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Human rights violations during eu border surveillance and return operations: frontex's shared responsibility or complicity?

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HUMAN RIGHTS VIOLATIONS DURING EU BORDER SURVEILLANCE AND RETURN OPERATIONS: FRONTEX'S SHARED RESPONSIBILITY OR COMPLICITY?¹

“There is still a *dangerous mindset*
which views Frontex's activities
as being no more than those of member States,
with responsibilities lying with individual
member States and not with the Agency.”
Parliamentary Assembly of Council of Europe²

1. INTRODUCTION

Since October 2005, the capital of Poland has been hosting one of the European Union (EU) Justice and Home Affairs (JHA) regulatory agencies – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereafter Frontex or the Agency). Established by the Council Regulation 2007/2004 (hereafter the Founding Regulation or Regulation), Frontex's overarching objective is to improve “the integrated management of the external borders” of the EU member states (Art. 1(1)).³ The tasks of this Warsaw-based Agency belong to two principal categories, namely operational cooperation and coordination on one hand, while on the other capacity building measures such as risk analysis, training, and research and development (Art. 2). The focus of this paper will be on the first category, in particular on the deployment of human and technical resources to member states in need of assistance at external borders (Joint Operations) and the organisation of joint removal flights (Joint Return Operations).

¹ The seminar *Human Rights Obligations of Non-State Actors* given by Professor Andrew Clapham (Graduate Institute of International and Development Studies, Geneva, spring semester 2012) was a source of inspiration for researching this topic. The initial version of this article was written in the framework of that seminar.

² Parliamentary Assembly of the Council of Europe (PACE), *Frontex: Human Rights Responsibilities*, Resolution 1932 (2013), 25 April 2013.

³ *Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Official Journal of the European Union L 349/1, 26 October 2004. Throughout the paper, articles in brackets, unless another instrument is listed therein, refer to the Regulation, as amended in 2007 and 2011. The consolidated version put together by Professor Steve Peers can be found at the Statewatch website, <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>.

Frontex should be considered a powerful actor. It manages a pool of almost 2,500 border guards from member states and a pool of technical equipment that, as of 2014, included 43 fixed-wing aircraft, 53 helicopters, 93 patrol cars, and more than 280 vessels and boats.⁴ The Agency can itself acquire equipment and operational services as well (Art. 7(1)). For instance, in May 2014 it contracted 35 aerial surveillance high-tech flights with Diamond Executive Aviation Company at the cost of 270,000 euro.⁵ Frontex's budget has increased more than 20-fold since its inception, from 6 million euro in 2005 to 114 million euro in 2015.⁶ To compare with other JHA agencies, in 2015 Europol (the European Police Office) was accorded 94 million euro, while EASO (European Asylum Support Office) 15 million euro.⁷ Over the past 10 years, the number of Frontex's staff has risen from 43 to 316.⁸ Frontex is endowed with broad operational capacities. The Regulation entrusts the Agency with a co-leading role in joint operations – it evaluates, approves, and coordinates proposals for joint operations. The Agency may also initiate and carry out operations itself (Art. 3(1)). In terms of external policy, the Agency has signed a cooperation agreement with Europol, and can also sign such agreements with international organisations. In addition, it has established at least 17 working arrangements with third countries, including Russia, Belarus, and Turkey, and has been negotiating with seven other countries, including Libya and Egypt. It may also deploy liaison officers in third countries (Art. 13–14).⁹ The Agency's operational capacities were additionally strengthened by the establishment of European Border Sur-

⁴ Frontex, *Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool*, 2014. See also Ch. Jones, *Border Guards, Planes, "thermal Vision Vans" and Heartbeat Detectors: Who Is Equipping Frontex?*, Statewatch 2014.

⁵ The flights took place along the Bulgarian-Turkish border during 40 days, using a high performance electro-optical/ infra-red camera together with real time video transmission to a remote command vehicle, Frontex, *Pilot Project on Purchase of Aerial Surveillance Service for Frontex Joint Operations*, 2014; Statewatch, *Frontex Presses on with Aerial Surveillance Projects*, 2014. Previously, in May 2013, the Agency signed an 118,000 euro contract with Scotty Group Company for the two-week use of optionally-piloted surveillance aircraft, which could also be operated by remote control without a pilot on board. However this trial project did not take place due to lack of a flight license from Greece, see Nikolaj Nielsen, "EU Looks to 'Hybrid Drones' for Legal Shortcut on Migration," *EU Observer*, October 14, 2013, <https://euobserver.com/priv-immigration/121735>; Jones, *Border Guards, Planes, "thermal Vision Vans" and Heartbeat Detectors: Who Is Equipping Frontex?*.

⁶ Consultancy within Engineering, Environmental Science and Economics (COWI), *Frontex: External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 2009, p. 24–25; Frontex, *Budget 2015*, 2015.

⁷ Europol (European Police Office), *Final Budget and Staff Establishment Plan 2015*, 2014; EASO (European Asylum Support Office), *Statement of Revenues and Expenditures of the European Asylum Support Office (EASO): Financial Year 2015*, 2015.

⁸ Consultancy within Engineering, Environmental Science and Economics (COWI), *Frontex: External Evaluation*, p. 24–25; Frontex, *Programme of Work 2015*, 2014, pp. 6–7.

⁹ Frontex, "Third Countries," accessed 2 March 2015, <http://frontex.europa.eu/partners/third-countries>. These two tasks will not be further discussed, for an analysis of them elsewhere, see for M. Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'*; "Merkourios" 28, 2012, p. 20–35; V. Mitsilegas, *Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance*, [in:] *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy*, ed. A. Baldaccini, E. Guild, H. Toner, Essays in European Law, Hart, Oxford 2007, 374–375; C. Rodier, *L'action de Frontex: Quelle Transparence Pour Quelle Légalité?*, [in:] *La Légalité de La Lutte Contre L'immigration Irrégulière Par l'Union Européenne*, ed. L. Dubin, Collection Droit Administratif – Administrative Law 12, Bruylant, Bruxelles 2012, p. 168.

veillance System (Eurosur) in December 2013, which is an information-exchange system enabling near real-time sharing of border-related data between member states and Frontex.¹⁰ Vested with these wide-ranging capacities, Frontex can be described as the cornerstone of the European concept of Integrated Border Management (IBM).¹¹

Notwithstanding its incontestable operational role, capacities, and resources, Frontex persistently presents itself as a mere coordinator or facilitator of member states' measures, and denies exercising any executive powers. It therefore rejects responsibility for possible human rights violations. To be precise, the Agency maintains that any potential wrongful conduct would trigger the responsibility of states hosting or participating in an operation.¹² Consequently, it refuses to set up a complaint mechanism for people claiming that their rights have been encroached upon during Frontex's operations. There appears, therefore, to be a mismatch between Frontex's mandated and factual capacities and its discourse. Frontex's rhetoric and insistence on its mere coordination role allow the Agency to evade accountability by shielding itself behind the responsibility of states. In the context of operational activities, where mandates and actions of several involved actors are intertwined, this can lead to the dilution of responsibility for alleged human rights breaches.¹³

The aim of this paper is to challenge the assumption that Frontex cannot be held accountable for human rights violations potentially committed in the course of its operations. As stressed by the International Law Association "accountability is linked to the authority and power of an [organisation]. Power entails accountability, which is the duty to account for its exercise."¹⁴ Against this background, it could hardly be denied that Frontex may be able to be held to account. The calls for strengthening the Agency's accountability have been repetitively voiced by the European Ombudsman, the Parliamentary Assembly of the Council of Europe (PACE), civil society, and academia.¹⁵

¹⁰ Frontex, "Eurosur," accessed 2 March 2015, <http://frontex.europa.eu/intelligence/eurosur>.

¹¹ H. Jorjy, *Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a Decisive Step Forward?*, CEPS CHALLENGE Programme (Changing Landscape of European Liberty and Security), 2007, p. 18. In fact, the main components of the IBM concept included coordination and coherence; inter-agency cooperation; and international cooperation, see UNISYS, *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union*, Study requested by the Directorate General Home Affairs of the European Commission, 2014, p. 13.

¹² See, for instance, one of most recent interviews given by then Frontex Director in December 2013 (unofficial translation), N. Frenzen, *Interview with Frontex Director Laitinen*, "Migrants at Sea", 2014.

¹³ Ska Keller et al., *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", March 2011, p. 8; S. Carrera, L. den Hertog, J. Parkin, *The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?*, "European Journal of Migration and Law" 15, No 4, 2013, pp. 341–342; A. Baldaccini, *Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea*, [in:] *Extraterritorial Immigration Control: Legal Challenges*, ed. B. Ryan, V. Mitsilegas, vol. 21, Immigration and Asylum Law and Policy in Europe, Martinus Nijhoff, Leiden 2010, pp. 229–230; FIDH, Migreurop, and EMHRN, *Frontex between Greece and Turkey: At the Border of Denial*, 2014, p. 25.

¹⁴ International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 5.

¹⁵ European Ombudsman, *Special Report of the European Ombudsman in Own-Initiative Inquiry OI/5/2012/BEH-MHZ Concerning Frontex*, November 12, 2013, para. 29, 36, and 37; Parliamentary Assembly of the Council of Europe (PACE), *The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants*, Resolution 1821 (2011), 21 June 2011, para. 10; Amnesty International (European Institutions

This paper attempts to provide a theoretical analysis and legal arguments that should underlie and foster advocacy in favour of Frontex's accountability. The assessment will draw parallels with international organisations and will rely on the *Draft Articles on Responsibility of International Organizations* (hereafter the DARIO or the Draft Articles), as adopted by the International Law Commission (ILC) on the second reading in 2011.¹⁶

The ensuing analysis will be broken down into three steps. First (section 2), the arguments will be presented to consider Frontex – an entity akin to international organisation, capable of bearing rights and obligations under European law. Further (section 3), relying on the DARIO we will discuss circumstances where Frontex may incur responsibility for wrongful acts committed during Joint Operations and Joint Return Operations. The analysis will apply the concepts of shared responsibility and responsibility for complicity. Finally (section 4), redress avenues for potential victims will be discussed, along with Frontex's non-judicial accountability mechanisms. The paper will conclude with recommendations to bridge the accountability gap that currently characterises Frontex's operations (section 5).

2. FRONTEX AS AN ENTITY AKIN TO INTERNATIONAL ORGANISATION FOR RESPONSIBILITY PURPOSES

The principles enshrined in the Draft Articles will guide the assessment of whether Frontex can be held responsible for potential human rights breaches. A preliminary explanation is thus warranted as to whether it is justified at all to consider the DARIO in relation to the Agency. The Draft Articles apply to international organisations, of which they give a broad description, namely:

“International organisation” means an organisation established by a treaty or other instrument governed by international law, and possessing its own international legal personality. (DARIO, Art. 2(a))

This section will display arguments why Frontex should be considered an entity akin to an international organisation (IO) for its responsibility purposes. Although the Agency may not easily fit into the traditional understanding of an IO, we may nevertheless consider some of the DARIO's rules by analogy, in particular because the analysis, with some minor exceptions, will rely only on Part Two of the DARIO (conditions for responsibility to arise), rather than the content (Part Three) and implementation (Part Four) of the responsibility. In fact, the ILC itself stressed that “[the] fact that an international organisation does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the

Office) and European Council on Refugees and Exiles (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; Baldaccini, *Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea*; Rodier, *L'action de Frontex: Quelle Transparence Pour Quelle Légalité?*

¹⁶ This paper is not the first endeavour to apply the DARIO to Frontex's operations, see A. Shabbir, *The Accountability of FRONTEX for Human Rights Violations at Europe's Borders*, 2012. However, while Shabbir concludes that Frontex may have effective control over host state's agents, this article argues that Frontex may have effective control over guest officers deployed to a mission.

present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organisation.”¹⁷

While there is no formal definition of an IO, institutional law scholars tend to identify some common features that IOs share. Indeed, IOs are established under international law on the basis of a treaty or other instrument governed by international law. They are also set up by states or already existing IOs and should have at least one organ separate from its members or creators.¹⁸ Although Frontex emanates directly from the EU, it generally shares the respective four characteristics of IOs.

First, in terms of the relevant body of law, its nature allows IOs to be distinguished from non-governmental organisations (NGOs), which are regulated by domestic law.¹⁹ Frontex was established by the Frontex Regulation (EU secondary legislation) and is governed by European public law. Despite its peculiar nature, EU law could not obviously be assimilated with domestic law. Further, the Frontex Regulation should be considered a constituent instrument. In fact, not all organisations are established on the basis of a treaty, which is an agreement between states or other organisations. In fact, several IOs have been set up by the legal act of an already existing organisation, such as the UN Industrial Development Organisation (UNIDO) and the UN Children’s Fund (UNICEF), both created by the UN General Assembly by means of a resolution.²⁰ In a similar way, Frontex has been set up by one of the EU institutions – the European Commission (hereafter the Commission) – and the EU member states implementing the Schengen *acquis* are *ipso facto* its members.²¹ Does the Agency have an organ separate from its creator or members? In other words, how much autonomy does it enjoy towards the Commission and its member states?

Arguably, Frontex has a large degree of administrative, financial and legal autonomy. In fact, it has been endowed with specific powers and organs, as well as an autonomous budget and legal personality. The establishment of EU agencies is generally considered a transfer of authority from the Commission. Yet the operational powers entrusted to Frontex were previously held by national authorities rather than by the Commission.²² Further, Frontex’s governing structures are dominated by the member states, which gives it a considerable degree of administrative autonomy from the Commission.

¹⁷ International Law Commission, *Report on the Work of Its Sixty-Third Session (26 April to 3 June and 4 July to 12 August 2011)*, UN General Assembly, A/66/10, 2011, p. 74, para. 2.

¹⁸ Ch.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd revised ed, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge 2005, pp. 9–13; J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed, Cambridge University Press, Cambridge 2009, pp. 6–12.

¹⁹ Klabbers, *An Introduction to International Institutional Law*, p. 7.

²⁰ *Ibid.*, p. 9–10.

²¹ Thus all the EU member states except from the UK, Ireland, and Denmark (but the UK and Ireland do participate in Frontex operations) and Schengen Associate Countries (Iceland, Liechtenstein, Norway, and Switzerland), Frontex, *Beyond the Frontiers: Frontex: The First Five Years*, 2010, p. 15.

²² Thus it is argued that establishing Frontex represented a vertical transfer of powers from the member states, rather than horizontal one from the Commission, see R. Dehousse, *Delegation of Powers in the European Union: The Need for a Multi-Principals Model*, “West European Politics” 31, no. 4, 2008, p. 792–793; Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’*, p. 24. Precisely, Frontex was preceded by the intergovernmental network SCIFA+/PCU, see S. Wolff, A. Schout, *Frontex as Agency: More of the Same?*, “Perspectives on European Politics and Society” 14, no. 3, 2013, p. 305–324.

Its main policy-making organ – the Management Board – is composed of one representative of each member state and two representatives of the Commission (Art. 21). Undoubtedly, with two seats out of twenty-nine on the Management Board, the Commission's influence over the Agency's strategic objectives is quite limited.²³ The Board steers the Agency by formulating the long-term strategy in the Multi-Annual Plan and oversees its functioning by adopting the *General Report* for the past year, as well as the *Programme of Work* and budget for the coming year (Art. 20 and 29). Frontex is represented and managed by the Executive Director, who is “completely independent in the performance of his duties” (Art. 25).²⁴ The Commission's role in the process of selecting the head of the Agency is quite limited. The Commission only proposes candidates based on a list prepared following the publication of the post. It is the Management Board who appoints the Director by a two-thirds majority (Art. 26).²⁵ He is then accountable to the Management Board and may be dismissed by the Board's decision of a two-thirds majority (Art. 25 and 26).²⁶ Finally, Frontex has an autonomous budget, which means that it is financially independent with respect to the implementation of the entire budget, which mainly consists of a subsidy from the general EU budget.²⁷ It is striking to see what the Commission itself says about its links with Frontex. In an interview held in 2013, Stefano Manservigi, the then Director of the Commission's Directorate General (DG) Home Affairs, highlighted that “agencies like Frontex are autonomous, with no formal dependency of the Council or Commission.”²⁸

Most importantly, Frontex enjoys legal autonomy. The Frontex Regulation explicitly confers legal personality to the Agency (Art. 15(1)), which allows it to fulfil its tasks independently from the Commission and the member states. The Regulation also provides that “[in] each of the Member States, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under their laws. It may, in particular, acquire or dispose of movable and immovable property and may be party to legal proceedings” (Art. 15(2)). Besides this explicit recognition in the Frontex Regulation, Frontex's legal personality can also be inferred from its specific attributes and powers, in line with the functionalist approach to legal personality. In its landmark *Reparations for Injuries* advisory opinion, the International Court of Justice concluded that the UN indeed en-

²³ N. Perkowski, *A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex*, Refugee Studies Centre WORKING PAPER SERIES NO. 81, 2012, p. 18.

²⁴ The Executive Director is in charge of the operational functioning of the Agency, he prepares a draft Programme of Work, the budget, and the General Report, he also implements the budget (art. 25 and 29).

²⁵ R. Mungianu, *Frontex: Towards a Common Policy on External Border Control*, “European Journal of Migration and Law” 15, No 4, 2013, p. 374.

²⁶ For an analysis of autonomy and accountability of executive directors of EU agencies towards the management boards, see E.M. Busuioc, M. Groenleer, *Wielders of Supranational Power? The Administrative Behaviour of the Heads of European Union Agencies*, [in:] *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, ed. E.M. Busuioc, M. Groenleer, J. Trondal, European Policy Research Unit Series, Manchester University Press, Manchester 2012, p. 128–151.

²⁷ Apart from the EU contribution, Frontex's revenue comes also from the contributions from the Schengen states, fees for services provided and voluntary contributions from the EU states (Art. 29), Consultancy within Engineering, Environmental Science and Economics (COWI), *Frontex: External Evaluation*, p. 21.

²⁸ This is the author's own translation, the interview was held in French, see “Des agences comme Frontex sont autonomes, sans aucun lien formel de dépendance avec le Conseil ni la Commission. Ce sont des entités se situant dans une « zone grise »”, L. Borgomano, C. Vallet, *Commission Européenne: L'approche Globale: Entretien Avec Stefano Manservigi*, “Migrations Magazine” 9, 2013.

joyed legal personality because, among other things, it met the objectives requiring independent action and was endowed with permanent organs that had decision-making powers.²⁹ Arguably, on the basis of *Reparations* criteria, Frontex has legal personality. The Agency is vested with proper functions, such as initiating and carrying out Joint Operations and Joint Return Operations, establishing and deploying the European Border Guard Teams, and conducting risk analysis. It pursues objectives in the area of the border control and surveillance, which require independent action. For instance, it has the capacity to conclude cooperation agreements with Europol, IOs, and law enforcement authorities of third countries, deploy its liaison officers to third countries, and buy and lease technical equipment. Frontex also possesses permanent organs (the Management Board), its own staff (317 in 2014), an autonomous budget (114 million Euro in 2015), and technical equipment. It also enjoys immunity and privileges in the EU member states. It is thus submitted that Frontex is endowed with legal personality under EU law and towards the member states.³⁰

The Agency's legal personality is directly relevant to a discussion on its accountability, as shown by the draft article 2(a) of the DARIO quoted above. In fact, legal personality is a precondition of responsibility under international law. Being an international legal person implies that an entity is capable of bearing rights and obligations distinct from that of its members or creators. Therefore, only an organisation that is endowed with international legal personality may violate international obligations and thus be held responsible for it.³¹ By analogy to mainstream IOs created under international law and endowed with international legal personality, Frontex enjoys legal personality under EU law and on the national level of the member states. Thus, the relevant rules set out in the DARIO can arguably be applied by analogy to consider the Agency accountable under EU law.³²

²⁹ International Court of Justice (ICJ), *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Reports 174, 11 April 1949, pp. 178–179. See by analogy discussion of the NATO legal personality according to the functionalist theory, N. Tsagourias, *The Responsibility of International Organisations for Military Missions*, [in:] *International Military Missions and International Law*, ed. M. Odello, R. Piotrowicz, International Humanitarian Law Series, vol. 31, Martinus Nijhoff, Leiden 2011, pp. 257–260; M. Zwanenburg, *Accountability of Peace Support Operations*, “International Humanitarian Law Series”, vol. 9, Martinus Nijhoff, Leiden 2005, pp. 64–68.

³⁰ On Frontex's legal personality under EU law, see Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’*, pp. 25–27; M. Boumghar, *La Licéité Internationale Des Opérations Menées Par Frontex*, [in:] *La Légalité de La Lutte Contre L’immigration Irrégulière Par l’Union Européenne*, ed. L. Dubin, Collection Droit Administratif – Administrative Law 12, Bruylant, Bruxelles 2012, p. 124. For a broader discussion on IO's legal personality at a domestic level, see T. Gazzini, *Personality of International Organizations*, [in:] *Research Handbook on the Law of International Organizations*, ed. J. Klabbers, Å. Wallendahl, *Research Handbooks in International Law*, Edward Elgar, Cheltenham 2011, pp. 44–46.

³¹ Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 78; Zwanenburg, *Accountability of Peace Support Operations*, p. 53, 70, 126.

³² To recapitulate, it is submitted here that Frontex enjoys a sufficient degree of autonomy to be held accountable on its own. In particular, its legal personality calls for its own responsibility to be analysed rather than that of the Commission. Some scholars argue that Frontex's conduct would engage the responsibility of the EU directly, see for instance Boumghar, *La Licéité Internationale Des Opérations Menées Par Frontex*. However, according to others, “the question of whether Frontex is itself an international organisation, distinct from the European Union and with its own ‘legal personality’ capable of giving rise to responsibility in the first place, is not settled,” A.T. Gallagher, F. David, *The International Law of Migrant*

Since Frontex has legal personality under EU law, it may be held responsible for breaches of EU law obligations. So what are the Agency's EU human rights obligations? According to the International Court of Justice, IOs' international obligations stem from three main sources – general international law, constituent instruments and international agreements to which they are parties.³³ The analogous sources of Frontex's human rights obligations can be found in EU law. First, Frontex is bound by the general principles of EU law. By virtue of Article 6(3) of the Treaty of the European Union (TEU), the general principles of EU law are based on fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR). Thus, even prior to the accession of the EU to the ECHR, as required by Article 6(2) of the TEU, the rights enshrined in the ECHR are binding upon the Agency. Besides the general principles, the Charter of Fundamental Rights of the European Union (hereafter the EU Charter) constitutes a source of the Agency's human rights obligations. Turning to Frontex's constituent instrument, the Regulation stipulates that "[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" (Art. 1(2)).

We may assume that human rights that are at risk of being violated during Frontex operations include, at the very least, the right to life and to asylum, as well as protection from *refoulement*, ill-treatment, arbitrary detention, and collective expulsions. These human rights norms are enshrined in instruments binding upon Frontex, as discussed above. The right to life is protected by Articles 2 of the ECHR and the EU Charter, the right not to be subject to torture, inhuman and degrading treatment is set out in Article 3 of the ECHR and Article 4 of the EU Charter, while Article 5 of the ECHR and Article 6 of the EU Charter prohibit arbitrary detention. Further, Article 18 of the EU Charter guarantees the right to asylum. In terms of the principle of *non-refoulement*, Article 19 of the EU Charter, reflecting the case of the European Court of Human Rights (ECtHR), provides that "[no] one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." While the ECHR does not explicitly provide for the obligation of *non-refoulement*, the ECtHR implied it from the prohibition of ill-treatment under Article 3 of the ECHR.³⁴ Finally, Article 19 of the EU Charter also prohibits collective expulsions. This prohibition is set out in Protocol 4 to the ECHR, to which the EU will not accede. However, collective expulsion is at variance

Smuggling, Cambridge University Press, New York 2014, p. 347. Arguably, the conclusion that it would be the EU whose responsibility may be triggered would not deprive the present analysis of its *raison d'être*. In fact, the underlying objective of the paper is to challenge the assumption, persistently repeated by Frontex, that it is solely the responsibility of member states that would be engaged during the operations. In practice, if the Commission (the EU) would indeed be held accountable for violations during Frontex's operations, it would certainly exercise more oversight over the Agency's activities. Thus, in either scenario Frontex's impunity would be curtailed.

³³ International Court of Justice (ICJ), *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 1980, pp. 89–90, para. 37.

³⁴ European Court of Human Rights (ECtHR), *Soering v. the UK*, 14038/88, 7 July 1989; European Court of Human Rights (ECtHR), *Cruz Varas and Others v. Sweden*, 15576/89, 20 March 1991; European Court of Human Rights (ECtHR), *Chahal v. the United Kingdom*, 22414/93, 15 November 1996.

with procedural safeguards flowing from the right to effective remedy under Article 2(3) of the ECHR, such as an individualised decision on return.

3. FRONTEX'S RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS

Frontex persistently stresses that any responsibility for possible human rights violations lies with member states. This rhetoric is based on an alleged lack of executive powers and the mere coordination role of the Agency. Among several statements to that effect, Frontex's Director at the time highlighted before the European Parliament's Committee on Civil Liberties, Justice and Home Affairs in October 2010 that "[as] regards fundamental rights, Frontex is not responsible for decisions in that area. They are the responsibility of the Member States."³⁵ Frontex clarified that the Agency's staff, when deployed to operations, serve merely to coordinate, facilitate, and monitor operations.³⁶ The question of whether Frontex agents are endowed with executive powers is therefore directly relevant to the Agency's responsibility for alleged human rights breaches. The Agency's responsibility might be engaged if its agents would exercise executive powers that have a direct impact on the decision to return or detain intercepted migrants. Such activities include pursuing or stopping anyone trying to cross the border, patrolling the area between border crossing points, screening anyone crossing the border, asking for travel documents, interviewing people about their identity (screening) and itinerary (debriefing), deciding on entry or exit, and accompanying inadmissible persons to detention centres or for removal.³⁷ In fact, the primary way through which an IO's responsibility may be engaged is through its agents' acts:³⁸

The conduct of an [...] agent of an international organization in the performance of functions of that [...] agent shall be considered an act of that organization under international law, whatever position the [...] agent holds in respect of the organization. (DARIO, Art. 6(1))

³⁵ I. Laitinen, the Interparliamentary Committee Meeting "Democratic Accountability in the area of Freedom, Security and Justice: Evaluating Europol, Eurojust, Frontex and Schengen," organised by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 4–5 October 2010, quoted in Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, p. 22.

³⁶ E. Moncure (Frontex Communication Officer), *Interview with Izabella Majcher*, 23 September 2013. Frontex's staff (317 in 2014) consist of recruited personnel and the Seconded National Experts (SNEs). The SNEs are seconded to Frontex by the member states for a period up to two years, during which they remain hired and paid by their home employer. However, they will neither seek nor take instructions from any government, authority or person outside the Agency. In addition, they will carry out their duties and conduct themselves solely with the interests of Frontex in mind, Frontex, *Management Board Decision No 22/2009 Laying down Rules on the Secondment of Nationals Experts to the Agency*, 25 June 2009, Art. 7. The SNEs will not be confused with Seconded Guest Officers (SGOs), discussed under section 3(1)(1) below.

³⁷ For an extensive list of executive powers exercised by border guards, see UNISYS, *Study on Confering Executive Powers on Border Officers Operating at the External Borders of the EU*, 2006, pp. 35–45.

³⁸ See Guild, Carrera, den Hertog, and Parkin, "[the] activities of Agencies' servants may indeed constitute the most tangible direct contact between those agencies and individuals," E. Guild et al., *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", Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2011, pp. 85–86.

“agent of an international organization” means an 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. (DARIO, Art. 2(d))

In general, many scholars tend to share Frontex’s stance that its staff are indeed not endowed with executive powers.³⁹ However, it cannot be excluded that, on the ground, Frontex agents’ *de facto* activities might exceed their formal mandate and come within the ambit of executive powers. In fact, some allegations were previously made about the Agency’s staff involvement in screenings interviews aimed at establishing the nationality of apprehended migrants. In the framework of the Pilot Project Attica implemented in Greece, at the end of 2009 a local legal representative from the Aegean Island of Samos reportedly denounced the Agency’s officials for their failure to coordinate with him before identifying the country of origin of more than 80 immigration detainees and sending them to Athens with a view to removal.⁴⁰ Although such acts would exceed Frontex’s *de jure* competencies, they might nevertheless trigger the Agency’s responsibility. In fact, *ultra vires* acts may be attributable to the Agency:

The conduct of an [...] agent of an international organization shall be considered an act of that organization under international law if the [...] agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that [...] agent or contravenes instructions. (DARIO, Art. 8)

Besides potential instances of such a direct involvement, Frontex’s responsibility during its operational activities would hardly be engaged through the acts of its agents. However, there are also other ways by which Frontex’s responsibility may be triggered. We will explore them in turn. The following analysis does not intend to rid states of their responsibility for potential human rights violations committed in the course of Frontex’s operations. Rather, it demonstrates that the attribution of a breach to a state does not rule out Frontex’s responsibility being engaged along that of the state. Keeping in mind Frontex’s human rights obligations outlined in section 2 above, we will discuss circumstances in which Frontex might incur shared responsibility for acts committed during Joint Operations (3.1) and derived responsibility for complicity in relation to acts committed during Joint Return Operations (3.2).

3.1. SHARED RESPONSIBILITY IN JOINT OPERATIONS

In a scenario where a host state would be held responsible for failing to respect relevant human rights in the course of a Joint Operation (JO), the potential responsibility of Frontex is nevertheless not precluded. The Agency may be held co-responsible. The concept of shared responsibility recognises that more than one entity may be re-

³⁹ See, for instance, J.J. Rijpma, *Hybrid Agencification in the Area of Freedom, Security and Justice and Its Inherent Tensions: The Case of Frontex*, [in:] *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making*, ed. E.M. Busuioc, M. Groenleer, J. Trondal, European Policy Research Unit Series, Manchester University Press, Manchester 2012, p. 84–102.

⁴⁰ A. Fotiadis, *MIGRATION: Fortress Europe Starts With Greece*, “Inter Press Service” (IPS), 31 January 2010, <http://www.ipsnews.net/2010/01/migration-fortress-europe-starts-with-greece/>. These allegations were also referred to in Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, p. 12; Amnesty International (European Institutions Office) and European Council on Refugees and Exiles (ECRE), *Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 2007/2004*, pp. 11–12.

sponsible for the same wrongful act. Both the *Articles on Responsibility of States for Internationally Wrongful Acts* and the DARIO acknowledge that there may be circumstances where a plurality of entities, such as a state and an IO, are jointly responsible for the same wrongful act.⁴¹ Most commonly, shared responsibility would result from the attribution of conduct to more than one entity.⁴²

In order to establish that Frontex may be held co-responsible for alleged breaches of human rights committed in the course of JOs, we will apply the rules set out in the Draft Articles:

Every internationally wrongful act of an international organization entails the international responsibility of that organization. (DARIO, Art. 3)

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization. (DARIO, Art. 4)

In line with the Draft Articles, the Agency will incur responsibility if it commits a “wrongful act.” There are two constitutive elements of a wrongful act: a breach of an obligation binding upon the organisation and the attribution of that breach to the organisation. Relying on these principles, we will first inquire whether violations of Frontex’s human rights obligations may occur in the course of JOs (3.1.1). Next, against the background of the concept of double attribution, we will discuss whether such violations could be attributed to Frontex, alongside a state (3.1.2).

3.1.1. HUMAN RIGHTS VIOLATIONS IN THE COURSE OF JOINT OPERATIONS

Ever since Frontex’s inception, the organisation of Joint Operations has been its primary activity. JOs refer to border control and surveillance missions carried out jointly by member states and Frontex at the EU external sea, land, or air borders. The objective of the operations is to prevent unauthorised border crossing as well as to detect and apprehend people who have entered in an irregular manner.⁴³ Frontex undertakes

⁴¹ Modelled upon the corresponding Article 47 of the *Articles on Responsibility of States for Internationally Wrongful Act*, Art. 48(1) of the DARIO titled “Responsibility of an international organization and one or more States or international organizations” reads “Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.”

⁴² The Special Rapporteur pointed also to other cases leading to joint responsibility, such as the EU mixed agreements, G. Gaja, Special Rapporteur, *Second Report on Responsibility of International Organizations*, International Law Commission, Fifty-Fifth Session, A/CN.4/541, 2004, para. 8. On the concept of shared responsibility, see A. Nollkaemper, D. Jacobs, *Shared Responsibility in International Law: A Concept Paper*, ASIL Research Paper No 2011-07 (SHARES Series), 2011.

⁴³ The term “Joint Operations” used throughout the paper embraces various kinds of border control and surveillance missions, such as joint operations, pilot projects, and rapid interventions. Sea border operations, by far the most frequent, expensive and controversial ones, are additionally regulated by the *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Official Journal of the European Union L 189/93, 27 June 2014. This Regulation has attracted broad criticism, see for instance, S. Peers, *New EU Rules on Maritime Surveillance: Will They Stop the Deaths and Push-Backs in the Mediterranean?*, Statewatch, February 2014; Frontexit, *Regu-*

a broad range of activities and tasks in relation to JOs. The Agency evaluates, approves, and coordinates states' proposals for JOs. It may also itself initiate and carry out operations. Most importantly, Frontex deploys border guards to JOs (Art. 3). To this end it set up and manages the European Border Guard Teams (EBGTs) – a pool of border guards drawn from member states, who can be called on for the deployment to JOs. Member states contribute to the pool based on more than a dozen profiles developed by the Agency, such as debriefing experts, screening experts, border surveillance officers, or mobile operational unit officers.⁴⁴ Once deployment is decided, states make the border guards registered in the EBGT pool available to deployment at the request of Frontex, “unless they are faced with an exception situation substantially affecting the discharge of national tasks” (Art. 3b). At the end of 2013, almost 2,500 border guards were registered in the EBGTs.⁴⁵ In addition, Frontex itself contributes to the EBGTs with Seconded Guest Officers (SGOs) (Art. 3b). SGOs are border guards seconded by the member states to Frontex, and subsequently deployed by Frontex as members of the EBGTs. This mechanism offers considerable flexibility to the Agency. In fact, during the six-month secondment period, it is Frontex who decides where the SGOs will be deployed and for how long. At the end of 2013, the Agency disposed of 50 SGOs.⁴⁶ Besides border guards, Frontex also deploys technical equipment to JOs (Art. 7). By analogy to the EBGTs, it established a Technical Equipment Pool (TEP) consisting of equipment provided by states for deployment. At the end of 2013, the TEP contained 43 fixed-wing aircraft, 53 helicopters, 93 patrol cars, 285 vessels and boats, 93 patrol cars, 39 thermovision vehicles and mobile radar units, 291 pieces of border checks and surveillance equipment (such as heartbeat and carbon dioxide detectors, night vision goggles, and thermal cameras), and 32 dogs.⁴⁷ In 2015, Frontex spent 42.8 million euro on JOs (31.1 million euro on sea borders, 9.2 million euro on land borders, 2.5 million euros on air borders operations), compared to 32.6 million euro in 2014 and 40.5 million euro in 2013. These expenditures made up 37.5%, 33%, and 43%, respectively, of the Agency's total annual budget for the past three years.⁴⁸ In 2013, 20 JOs were carried out, of which 9 were on sea borders, 7 on land borders, and 4 on air borders.⁴⁹

With their underlying objective to curb irregular migration and prevent arrivals, interception operations may interfere with human rights of non-citizens. The lack of transparency surrounding JOs, combined with their potential extraterritorial scope, may strengthen that risk.⁵⁰ In line with the Draft Articles, in order for a breach to engage the responsibility of the Agency, the violated norm must be binding on it:

lation on the Maritime Surveillance by Frontex: Lives in Danger at the External Borders of Europe, Press Release, 14 April 2014.

⁴⁴ Frontex, *Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool*, p. 8.

⁴⁵ *Ibid.*, p. 9.

⁴⁶ *Ibid.*, p. 11. In contrast, with respect to border guards registered directly in the EBGTs, the Agency shall make the request for the deployment at least 45 days in advance, while member states decide on the duration of their deployment, see Frontex Regulation, art. 3b.

⁴⁷ *Ibid.*, pp. 12–13.

⁴⁸ Frontex, *General Report 2013*, 2014, pp. 62–63; Frontex, *Programme of Work 2015*, pp. 6–8.

⁴⁹ Frontex, *General Report 2013*, pp. 57–59.

⁵⁰ For contributions addressing the extra-territorial scope of Frontex operations, see Baldaccini, *Extra-territorial Border Controls in the EU: The Role of Frontex in Operations at Sea*; A. Fischer-Lescano, T. Löhr,

There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation [...]. (DARIO, Art. 10(1))

Several norms that are binding upon the Agency are at risk of being violated in the course of JOs. First and foremost, there is a risk that JOs would encroach upon the right to asylum, the principle of *non-refoulement* as well as the prohibition on ill-treatment and collective expulsions. It cannot be excluded that the interception of migrants in the course of JOs will result in diverting them back to third countries without an individualised assessment of their needs for international protection. The landmark case of *Hirsi v Italy* before the ECtHR is telling in this respect. The Court found Italy in breach of the ECHR because it intercepted a group of more than 20 Somalian and Eritrean migrants on the high seas and returned them to Libya without any individual examination.⁵¹ In line with the judgment, such a push-back operation may constitute a double violation of the prohibition of ill-treatment (via the principle of *non-refoulement*): by exposing migrants to the risk of inhuman and degrading treatment in the destination country and the subsequent expulsion by that country to their countries of origin. In addition, the transfer of migrants without an examination of each applicant's individual situation amounts to collective expulsion. The potential human rights implications of interceptions was also made clear in the *Sharifi v Italy and Greece* case.⁵² The case concerned more than 30 migrants from Afghanistan, Sudan, and Eritrea, who arrived to Italy from Greece in an undocumented way. Intercepted in Italian ports, they were immediately deported back to Greece, without being offered access to asylum procedures. The Strasbourg Court found that these measures amounted to collective expulsion and a breach of the right to effective remedy. Italy also violated the prohibition on ill-treatment, by exposing migrants to the risk of arbitrary repatriation from Greece to their countries of origin. It cannot be ruled out that similar violations may occur during Frontex-led operations. This risk does not appear to be purely hypothetical. In fact, Human Rights Watch raised allegations that some of the Italian push-back measures challenged in the *Hirsi* case took place in the course of Frontex's JO Nautilus.⁵³ In addition, Pro Asyl documented several push-backs conducted by Greece along its land and sea border with Turkey. Almost all of these measures arguably took place within the operational area of JO Poseidon Land and Sea.⁵⁴

Another set of human rights that may be breached in the context of JOs relates to the deprivation of liberty. It may turn out that the authorities of the host state will place in-

T. Tohidipur, *Border Controls at Sea: Requirements Under International Human Rights and Refugee Law*, "International Journal of Refugee Law" 21, No 2, 2009, p. 256–296; V. Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, "International Journal of Refugee Law" 23, No 2, 2011, p. 174–220; E. Papastavridis, 'Fortress Europe' and FRONTEX: *Within or Without International Law?*, "Nordic Journal of International Law" 79, No 1, 2010, p. 75–111.

⁵¹ European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, 27765/09, GC, 23 February 2012.

⁵² European Court of Human Rights (ECtHR), *Sharifi and Others v. Italy and Greece*, 16643/09, 21 October 2014.

⁵³ 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*, 2009, pp. 37 and 98.

⁵⁴ PRO ASYL, *PUSHED BACK: Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek-Turkish Land Border*, 2013, p. 5.

tercepted or apprehended individuals in detention. According to the well-established case law of the ECtHR, immigration detention in disrespect of procedural guarantees, such as the right to information about the reasons for detention, judicial review, and compensation for unlawful detention is at odds with the right to liberty. Detaining non-citizens in substandard conditions may also amount to ill-treatment.⁵⁵ Among many Strasbourg judgments to that effect, is it worth recalling the *M.S.S* case brought against Belgium and Greece.⁵⁶ The ECtHR found there that conditions in some immigration detention facilities in Greece amounted to inhuman or degrading treatment. In this respect, Human Rights Watch observed that during Frontex's RABIT mission in Greece, the deployed border guards assisted Greek authorities in apprehending and then transferring immigrants to detention centres where conditions were allegedly the same as those condemned by the Strasbourg Court in the *M.S.S* case.⁵⁷

3.1.2. ATTRIBUTION OF A CONDUCT

It is submitted that the possible violations of human rights discussed above, which are binding upon the Agency, might in certain circumstances be imputable not only to the host state, but also to Frontex. The arguments presented here will rely on the “effective control” that Frontex may have in practice over the EBGs:

The conduct of an organ of a State [...] that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct. (DARIO, Art. 7)

Draft Article 7 addresses international and multinational peace missions, to which states provide their military contingents. The troops placed at the disposal of the UN or regional organisations, like NATO, remain state organs, and so effective control over their conduct is a factor determining which entity, organisation or lending state, would be held accountable if they breach applicable international obligations.⁵⁸ Arguably, the rule of attribution enshrined in draft Article 7 could be applied to JO by analogy. The deployment by Frontex of the EBGs for a particular mission means, in practice, that the Agency places them at the disposal of the host state. Thus, effective control over the EBGs would determine whether their conduct would be attributable to the host state or Frontex.⁵⁹

In the framework of the UN peace missions, the effective control is generally understood as the authority to issue instructions. This criterion therefore aims to identify the source of orders leading to a given conduct. Such control over the national contingents'

⁵⁵ See for instance, European Court of Human Rights (ECtHR), *Abdolkhani and Karimnia v. Turkey*, 30471/08, 22 September 2009; European Court of Human Rights (ECtHR), *Ammur v. France*, 19776/92, 25 June 1996; European Court of Human Rights (ECtHR), *Khudyakova v. Russia*, 13476/04, 8 January 2009; European Court of Human Rights (ECtHR), *S.D. v. Greece*, 53541/07, 11 June 2009; European Court of Human Rights (ECtHR), *Soldatenko v. Ukraine*, 2440/07, 23 October 2008.

⁵⁶ European Court of Human Rights (ECtHR), *M.S.S v. Belgium and Greece*, 30696/09, GC, 21 January 2011.

⁵⁷ Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, 2.

⁵⁸ International Law Commission, *Report on the Work of Its Sixty-Third Session*, p. 87, para. 1.

⁵⁹ For the sake of clarity, the analysis will leave aside any potential responsibility of the state contributing to the EBGs.

actions is usually inferred from the formal command and control structure. Based on a contribution agreement, the placement of the troops at the UN's disposal refers to the transfer of operational command or control over the contingents, which enables the UN Commander to assign missions or tasks to national forces, deploy units, and reassign forces. Thus, by virtue of formal arrangements between the UN and troop-contributing states, the national contingents are brought into the UN's chain of command, which constitutes a formal test of attribution.⁶⁰ Similarly, the deployment of the EBGs is based on an operational plan that is an agreement between the Agency and the host state. The operational plan details the relevant organisational aspects of the operation, including the command and control structure. Although the operational plans are confidential, we may assume that they explicitly provide the host state with command and control over the EBGs. This conclusion also flows from the relevant provisions in the Frontex Regulation, by virtue of which, during the deployment, the host state will issue instructions to the EBGs (Art. 3(c)(1)). It also provides that the deployed guest border guards from the EBGs pool may only perform their functions under instructions from host border guards. The presence of host border guards is required in situations where they use force, weapons, ammunition, and equipment (Art. 10(3) and 10(6)).⁶¹ Thus, formally, the EBGs are under the command of the host state and their conduct appears to be imputable to that state. It is this formal set-up that allows Frontex to reject any allegations about its (co-)responsibility for potential human rights breaches committed during JOs. For instance the Director of the Operations Division stressed that “[while] we are involved in the coordination, the host member state keeps the command-and-control of the operation. For whatever is done in performing the operational activities, the authorities of the [host member state] will be in charge.”⁶²

However, besides the formal command and control framework, effective control is also based on factual elements. The factual criterion acknowledges that, despite a formally agreed chain of command, another entity may in practice issue instructions to the troops. According to the ILC, attribution of conduct to either the receiving or contributing entity is based on “the factual control that is exercised over the specific conduct” taken by the troops and that account needs to be taken of the “full factual circumstances and particular context.” The ILC also agreed with the UN Secretary-General that, where actions are taken outside formal arrangements, “responsibility would be determined in each and every case according to the degree of effective control exer-

⁶⁰ Tsagourias, *The Responsibility of International Organisations for Military Missions*, pp. 247–248; Zwanenburg, *Accountability of Peace Support Operations*, p. 100; U. Häussler, *Human Rights Accountability of International Organisations in the Lead of International Peace Missions*, [in:] *Accountability for Human Rights Violations by International Organisations*, ed. J. Wouters et al., International Law Series 7, Intersentia, Antwerp 2010, pp. 232–251.

⁶¹ Article 10b of the Frontex Regulation provides that the host state assumes civil liability in accordance with its national law for damage caused by guest officers. This provision deals only with distribution of responsibility rather than attribution of wrongful acts which is the subject of our discussion here.

⁶² K. Roesler (Director of Operations Division), *Interview with Chris Deliso (Balkananalysis.com) ‘Safeguarding Europe’s Southern Borders’*, 23 September 2011, <http://www.balkananalysis.com/greece/2011/09/23/safeguarding-europe%E2%80%99s-southern-borders-interview-with-klaus-roesler-director-of-operations-division-frontex/>.

cised by either party in the conduct.”⁶³ The concept of dual attribution stems from the importance accorded to the factual element in the criterion of effective control. It acknowledges that, while the formal chain of command entails attribution of conduct to the receiving entity, the sending entity may actually exercise some elements of factual control. In such circumstances, the wrongful act should be imputable to both actors.⁶⁴ The possibility of dual or even multiple attributions has been explicitly acknowledged by the ILC. According to the ILC, “attribution of a certain conduct to an international organisation does not imply that the same conduct cannot be attributed to a State; nor does the attribution of conduct to a State rule out the attribution of the same conduct to an international organisation.”⁶⁵ In the context of peace missions, dual attribution has been advocated in order to prevent a situation where the sending state shields itself behind the receiving organisation. The analogous justification calls for considering this concept with respect to the host state – Frontex intertwined impact on JOs. The EBGs, while integrated into the formal command structure of the host state, arguably, in some situations may be under the factual control of Frontex. Thus, notwithstanding responsibility for potential wrongdoing incumbent on the host member state, there may be circumstances where the same act would also be imputable to the Agency.⁶⁶

First and foremost, the wording of the Frontex Regulation does not unequivocally preclude the possibility for Frontex to issue instructions to the EBGs. As noted above, the Regulation is clear that individual guest border guards carry out their func-

⁶³ International Law Commission, *Report on the Work of Its Sixty-Third Session*, pp. 87–88, para. 4, and p. 90, para. 9. The account on the factual control is also widely supported by the doctrine, see Häussler, *Human Rights Accountability of International Organisations in the Lead of International Peace Missions*, p. 248; A. Orakhelashvili, *Division of Reparation between Responsible Entities*, [in:] *The Law of International Responsibility*, ed. J. Crawford, A. Pellet, S. Olleson, Oxford Commentaries on International Law, Oxford University Press, Oxford 2010, p. 653; L.-A. Sicilianos, *L’(ir)responsabilité Des Forces Multinationales?*, [in:] *International Law and the Quest for Its Implementation = Le Droit International et La Quête de Sa Mise En Oeuvre: Liber Amicorum Vera Gowlland-Debbas*, ed. L. Boisson de Chazournes, M.G. Kohen, Brill, Leiden 2010, p. 108; Zwanenburg, *Accountability of Peace Support Operations*, pp. 72, 129.

⁶⁴ Among contributions that acknowledge the concept of dual attribution, see C.A. Bell, *Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision*, “Journal of International Law and Politics” 42, No 2, 2010, p. 501–548; Ch. Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, “Melbourne Journal of International Law” 10, No 1, 2009, p. 346–364; M.C. Lopez, *Towards Dual or Multiple Attribution The Strasbourg Court and the Liability of Contracting Parties’ Troops Contributed to the United Nations*, “International Organizations Law Review” 10, No 1, 2013, p. 193–222; A. Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, “Journal of International Criminal Justice” 9, No 5, 2011, p. 1143–1157.

⁶⁵ International Law Commission, *Report on the Work of Its Sixty-Third Session*, p. 83, para. 4. G. Gaja, the Special Rapporteur to the ILC, addressing the criterion of effective or factual control found that “in many cases its application will lead to the conclusion that conduct has to be attributed both to the lending State and to the receiving international organization,” G. Gaja, *Seventh Report on Responsibility of International Organizations*, International Law Commission, Sixty-first session, UN General Assembly, A/CN.4/610, 27 March 2009, para. 25.

⁶⁶ The possibility of a double attribution should be assessed in the specific circumstances of the case. According to a proposition by Nollkaemper, attribution could be visualised as a sliding scale, with exclusive attribution to the organisation or State at its far ends. In the middle of the continuum, in factual situations where both entities exercise effective control, double attribution of wrongdoing would be the proper solution, Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, p. 1157.

tions under instructions from their host state counterparts (Art. 10(3)). However, it is less straightforward with respect to instructions to the EBGs as a whole, which may comprise more operation-wide orders. It provides that the host state will issue instructions to the EBGs (Art. 3c(1)). It does not, however, say that *only* host state can instruct the EBGs. Such exclusive competency would be more easily deduced from the wording of the initial draft proposal of the Regulation, which was not retained, namely that “instructions to the teams shall be issued by the host Member State.”⁶⁷ The possibility that operational decisions are taken collectively by the host state and the Agency is supported by the prominent role accorded to the Frontex Coordinating Officer (FCO). The FCO is a Frontex staff member nominated to every JO where the EBGs are deployed (Art. 3b(5)). The Agency, via the FCO, may communicate its views on the instructions to the EBGs issued by the host state. If it does so, the state will take those views into consideration. Moreover, the host state will provide the FCO with all necessary assistance, including full access to the EBGs at all times throughout the deployment (Art. 3(c)(2)–(3)). These duties incumbent on the host state considerably limit its authority over the teams. Some scholars found that this entails that the EBGs are deployed “under the supervision” of the FCO.⁶⁸ In turn, Amnesty International stressed that “[the] power of [the FCO] to communicate views on instructions which are binding on the host State confounds responsibility. It should be clear in all instances who retains responsibility for the instructions given.”⁶⁹ In any case, Frontex itself admitted that the Regulation, following the 2011 amendment, provides the Agency with the ability to co-command JOs together with the host state.⁷⁰ It seems quite unlikely, therefore, that the FCO in any circumstances stops short of issuing instructions to the EBGs.

More generally, the Regulation endows the Agency with operational and decision-making powers relating to JOs. Frontex may itself initiate operations in which it is subsequently involved. It is a planner and monitor at the same time. In fact, the Agency drafts the operational plan and is tasked to ensure the operational implementation of all the organisational aspects provided therein (Art. 3(1) and 3a(3)). It deploys the EBGs and technical equipment. In particular, it decides on the length of deployment and the composition of teams, and can deploy its own SGOs to the mission.⁷¹ Against this background, the PACE called on Frontex to “[recognise] its responsibility as owner

⁶⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 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 (FRONTEX)*, COM (2010)61, 24 February 2010.

⁶⁸ Carrera, den Hertog, Parkin, *The Peculiar Nature of EU Home Affairs Agencies in Migration Control*, p. 340.

⁶⁹ Amnesty International (European Institutions Office) and European Council on Refugees and Exiles (ECRE), *Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 2007/2004* p. 6.

⁷⁰ Frontex, *Frontex's Reaction to HRW Report*, Frontex Press Release, 20 September 2011.

⁷¹ Carrera, den Hertog, and Parkin, *The Peculiar Nature of EU Home Affairs Agencies in Migration Control*, pp. 341–349; Baldaccini, *Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea*, pp. 234–235; Amnesty International (European Institutions Office) and European Council on Refugees and Exiles (ECRE), *Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 2007/2004*, pp. 13–14; Y. Pascouau, P. Schumacher, *Frontex and the Respect of Fundamental Rights: From Better Protection to Full Responsibility*, “European Policy Centre Policy Brief”, 3 June 2014.

or co-owner of the projects it co-ordinates and implements.”⁷² In practice, this set of competencies may result in at least an informal influence over the mission and a bargaining power towards the host member state. There therefore appears to be a substantial possibility that Frontex may exercise a degree of effective control over the EBGs.⁷³ In addition, there might be instances where guest border guards exercise executive powers without the authority of host state border guards. For instance, following his mission to Italy in 2012, the UN Special Rapporteur on the Human Rights of Migrants noted that Frontex guest officers deployed to the JO Hermes were conducting debriefing interviews with migrants in Italian detention centres without any supervision by the host state officers.⁷⁴ Although the Commission tended to clarify that apparently neither Frontex nor the guest officers were directly involved in national asylum and return procedures of the host member state, this incident shows that on the ground actions may well be taken without orders from host member state officers.⁷⁵

In the domestic jurisprudence, the notion of effective control has been extended beyond the authority to give orders. The *Nuhanovic* and *Mustafic* lawsuits before Dutch courts challenged acts of the Dutch battalion (Dutchbat) of the UN operation in Bosnia and Herzegovina (UNPROFOR). The cases concerned the eviction from the UN compound of four Bosnians, who were subsequently killed by Bosnian Serb forces. Their eviction was carried out by Dutchbat, but not provided for in any order. In landmark decisions, the Hague Court of Appeal found that the eviction was nevertheless attributable to the Netherlands, because the Dutch State had the capacity to prevent it. In particular, the Court held that the assessment of effective control, “does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such instruction, the UN or the State had the power to prevent the conduct concerned.”⁷⁶ Thus, in line with this interpretation, if an impugned act does

⁷² Parliamentary Assembly of the Council of Europe (PACE), *Frontex: Human Rights Responsibilities*, para. 8(2).

⁷³ Similar conclusions were formulated by Gallagher and David, “Frontex is in fact vested with authority to make decisions and take substantive initiative – potential indicia of the ‘effective control’ criteria required under the ILC Draft Articles [...]. It would not be difficult to argue that wrongful acts occurring in the course of taking such initiatives or implementing such decisions are indeed attributable to Frontex (or its parent organisation), as well as (separately and independently) to any Member States involved in the commission of the wrongful act [...]”, see Gallagher and David, *The International Law of Migrant Smuggling*, pp. 347–348.

⁷⁴ F. Crépeau, *Report by the Special Rapporteur on the Human Rights of Migrants*, François Crépeau, on His Mission to Italy (29 September–8 October 2012), Human Rights Council, Twenty-third session, UN General Assembly, A/HRC/23/46/Add.3, 30 April 2013, para. 41–42.

⁷⁵ European Commission, *Response by the European Union and Its Member States to the Report of the Special Rapporteur on the Human Rights of Migrants Entitled “Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants”*, 21 May 2013, pp. 16.

⁷⁶ Court of Appeal in the Hague, *Mehida Mustafic-Mujic, Damir Mustafic, and Alma Mustafic v. the Netherlands*, LJN: BR5386, 5 July 2011, para. 5(9); Court of Appeal in the Hague, *Hasan Nuhanovic v. the Netherlands*, LJN: BR5388, 5 July 2011, para. 5(9). It has to be noted that the ILC referred to these judgments providing for wider meaning of the concept effective control and did not criticise them, International Law Commission, *Report on the Work of Its Sixty-Third Session*, pp. 92–93, para. 14. For an analysis of these judgments, see B. Boutin, *Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peace-keeping*, “Leiden Journal of International Law” 25, No 2, 2012, p. 521–535; T. Dannenbaum, *Killings at Sre-*

not follow any particular instruction, the entity that is capable of lawfully preventing it can be considered having effective control over it. The Court may have followed the approach advocated in the doctrine, in particular the proposition by Dannenbaum that “effective control is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question.”⁷⁷ Arguably, Frontex is endowed with such legal power to prevent wrongdoing. In fact, the Frontex Regulation obliges the Agency’s Director to suspend or terminate all or part of a JO if he considers that violations of fundamental rights or international protection obligations are of a serious nature or are likely to persist (Art. 3(1a)). Despite the use of qualifying terms leaving the Agency a certain degree of discretion, it is undoubtedly an obligation. If the EBGs deployed to a JO would commit human rights violations but their wrongful acts would not follow a particular order of host state, Frontex may become an entity lawfully capable of preventing further violations. If it fails to at least suspend the operation, such a violation might be attributable to the Agency, alongside the host member state.

The “power to prevent” approach to effective control may be manifested also by other competencies, such as the control over the composition of contingents and their preparation for deployment. As observed by Dannenbaum, in the context of peace mission, wrongful acts committed in contravention of superior orders often result from inappropriate personnel placed at the organisation’s disposal or inadequate pre-deployment training of the troops. The ability to select members of the troops and train them empowers states to prevent acts in breach of lawful instructions, and thus affords them a degree of control over the conduct. In this respect, effective control on the part of the sending states may be understood as the power to ensure conduct in compliance with lawful orders.⁷⁸ It is submitted that Frontex has such competencies to ensure that the EBGs act according to the lawful orders of the host state officers. In fact, the Agency exercises considerable control over both the EBGs’ preparation for the mission and the composition of the deployed teams. Member states contribute to the pool of EBGs on the basis of several pre-defined profiles. It is the Agency who decides on the profiles and the overall number of border guards to be made available for the EBGs (Art. 3(1b)). To recall, there are almost 2,500 border guards in the pool, clustered in some 13 different border guard profiles, including debriefing experts, screening experts, and border surveillance officers.⁷⁹ In addition, Frontex provides border guards in the EBGs pool with advanced training relevant to their tasks and powers, and on EU and internatio-

brenica, Effective Control, and the Power to Prevent Unlawful Conduct, “International and Comparative Law Quarterly” 61, No 3, 2012, p. 713–728. Recently, the Dutch Supreme Court upheld these judgments, Supreme Court of the Netherlands, *Mehida Mustafic-Mujic, Damir Mustafic, and Alma Mustafic v. the Netherlands*, 12/03329, 6 September 2013; Supreme Court of the Netherlands, *Hasan Nuhanovic v. the Netherlands*, 12/03324, 6 September 2013.

⁷⁷ T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, “Harvard International Law Journal” 51, No 1, 2010, p. 113–192, p. 158. See also K.M. Larsen, *Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test*, “European Journal of International Law” 19, No 3, 2008, pp. 519–520; Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*.

⁷⁸ Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 2010, pp. 156–164.

⁷⁹ Frontex, *Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool*, pp. 8–9.

nal law, including fundamental rights and access to international protection (Art. 5).⁸⁰ Once deployment to JO has been decided, the Frontex Director determines the composition of the teams (Art. 3(1b)).⁸¹

In conclusion, there may be circumstances where Frontex may be held jointly responsible alongside a host member state for alleged human rights violations occurring during JOs. Applying the DARIO, it was demonstrated that the Agency may commit a “wrongful act” that triggers responsibility. Both constituent elements of a wrongful act can be pointed out. First, JOs may create conditions conducive to violations of human rights that are binding upon the Agency. In particular, the principle of *non-refoulement*, prohibition of ill-treatment and collective expulsion, as well as the right to asylum and liberty are at risk of being violated. Secondly, such potential human rights breaches might in some cases be attributed both to the host state and Frontex, relying on the concept of dual attribution.

3.2. COMPLICITY IN JOINT RETURN OPERATIONS

In the context of Joint Return Operations (JROs), the attribution of wrongful conduct to Frontex would be more difficult to prove. However, the Agency’s responsibility may still be engaged – it may be held responsible for complicity if it would assist a state in the commission of a wrongful conduct:

An international organization which aids or assists a State [...] in the commission of an internationally wrongful act by the State [...] is internationally responsible for doing so if: (a) the [...] organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization. (DARIO, Art. 14)

In circumstances addressed in draft Article 14, while the wrongdoing state bears the original responsibility for the wrongful act, the aiding or assisting organisation may incur derived responsibility for its causal contribution to the commission of the act in question. We will discuss two constituent conditions for responsibility for complicity in relation to Frontex’s involvement in JROs, namely the obligation breached by a state is also binding on Frontex (3.2.1) and the Agency assisted the state while knowing of the circumstances of the violation (3.2.2).

3.2.1. HUMAN RIGHTS VIOLATIONS IN THE COURSE OF JOINT RETURN OPERATIONS

While JOs aim to prevent people from entering the EU irregularly, JROs serve to deport undocumented non-citizens, usually by means of escorts. Coordination, organisation and co-financing of JROs are among Frontex’s main operational tasks (Art. 2(1)(f)), on which the Agency spends around 9 million euro annually.⁸² Frontex-led JROs build upon mechanisms that have already been regulated by EU law. Removal operations carried out by a single state are addressed by the Returns Directive. The Direc-

⁸⁰ On Frontex-organized training, see S. Horii, *It Is about More than Just Training: The Effect of Frontex Border Guard Training*, “Refugee Survey Quarterly” 31, No 4, 2012, p. 158–177.

⁸¹ The composition of the teams is laid down in the operational plan. Operational plan is drawn up by Frontex’s Director and then agreed on by the Director and the host state (Article 3a(1)).

⁸² Frontex, *Programme of Work 2014*, 2013, p. 7; Frontex, *Programme of Work 2015*, p. 8.

tive defines this operation as a physical transportation out of the member state.⁸³ Another piece of EU legislation – Council Decision 2004/573 – regulates joint removals by air.⁸⁴ Joint flights are carried out by two or more member states, intending to deport individuals to the same destination country. JROs aim to strengthen such cooperation. The Agency's involvement in return operations has increased significantly over the past few years. While in 2006 four JROs were organised to deport 74 individuals, in 2013 2,152 individuals were deported in 39 JROs. Since its inception, Frontex coordinated and co-organised more than 260 JROs, during which more than 13,500 individuals were deported. Currently there are around 40–45 JROs per year.⁸⁵

Forced removal operations, by their very nature, involve a degree of coercion and force. They therefore have the potential to encroach on fundamental rights of deportees. In particular, such fundamental rights as the right to life and protection from ill-treatment may be at risk. This risk is not a theoretical one. In fact, since 1991 at least fifteen removals carried out by member states ended up with the deportee's death.⁸⁶ In addition, several instances of ill-treatment inflicted during removals have been reported.⁸⁷ This prompted the PACE and the European Committee on the Prevention of Torture (CPT) to issue specific recommendations on this matter in the early 2000s. They urged states, for instance, not to use certain restraining techniques (including obstruction of the respiratory tract, gagging with adhesive tapes, and the administration of tranquillizers) and to ensure that the force applied is proportionate.⁸⁸ It is questionable whether these recommendations have been followed by states, since two of the deadly incidents still occurred in 2010.⁸⁹ The 2013 Frontex *Code of Conduct for*

⁸³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, Official Journal of the European Union L 348/98, 24 December 2008, Art. 3(5) and 8.

⁸⁴ Council Decision of 29 April 2004 on the Organisation of Joint Flights for Removals from the Territory of Two or More Member States, of Third-Country Nationals Who Are Subjects of Individual Removal Orders (2004/573/EC), Official Journal of the European Union L 261/28, 29 April 2004.

⁸⁵ Frontex, *Response to the European Ombudsman's Own-Initiative Inquiry 01/9/2014/MHZ Concerning the Means through Which Frontex Ensures Respect for Fundamental Rights in Joint Return Operations*, 29 January 2015, p. 2 and Annex II. In the past five years alone, Frontex organised more than 190 JROs with almost 10,000 individuals – Frontex, *Annual Report 2006, 2007*, p. 15; Frontex, *General Report 2009, 2010*, p. 18; Frontex, *General Report 2011, 2012*, p. 51; Frontex, *General Report 2013*, p. 18.

⁸⁶ Parliamentary Assembly of the Council of Europe (PACE), Committee on Migration, Refugees and Demography, *Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity*, Doc. 9196, September 2001; Institute of Race Relations, *Full List of Deaths during Deportations from Europe*, IRR News, 21 October 2010.

⁸⁷ Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns, *Outsourcing Abuse: The Use and Misuse of State-Sanctioned Force during the Detention and Removal of Asylum Seekers*, 2008; Amnesty International, *Cruel, Inhuman or Degrading Treatment During Forced Deportation*, 1994; Medical Foundation for the Care of Victims of Torture, *Harm on Removal: Excessive Force against Failed Asylum-Seekers*, 2004.

⁸⁸ Parliamentary Assembly of the Council of Europe (PACE), *Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity*, Recommendation 1547 (2002), 22 January 2002; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Deportation of Foreign Nationals by Air*, 13th General Report on the CPT's activities, CPT/Inf(2003)35, 10 September 2003.

⁸⁹ A. Morvern, *Brutal Deportations Must Stop: The Violent Death of Jimmy Mubenga Reveals That 'Fortress' Britain Controls Its Borders by Increasingly Inhuman Means*, "The Guardian", 15 October 2010, <http://>

Joint Return Operations Coordinated by Frontex also circumscribes the use of coercive measures, yet it cannot be excluded that serious violations of human rights occur in the course of JROs, just like they did during state-led removal flights. What is worrisome is that JROs are not systematically monitored. Under Article 8(6) of the Returns Directive states are obliged to provide for such monitoring during removals. Likewise, Frontex's *Fundamental Rights Strategy* sets out that states participating in JROs are required to ensure monitoring during operations. However, only around half of the JROs take place with monitors present on board.⁹⁰

In addition, the possibility that violations of human rights reported during state-led removals may also occur during JROs, there is a specific risk associated with JROs, namely collective expulsion. To recall, the ECtHR defines collective expulsion as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”⁹¹ In *Conka v. Belgium*, the Strasbourg Court stressed that, even when the above procedural pre-conditions are met – measures are taken based on a reasonable and objective examination of the individual circumstances of each case – the manner in which the return operation is carried out has a bearing on whether an expulsion can be considered collective. In concluding that the return of Slovakian nationals of Romany origin was indeed a collective expulsion, the Court focused on such factors as the large number of individuals of the same origin to be removed, the call for these individuals to attend the police station at the same time, and similarly worded, with a few references to personal circumstances of the applicants, removal orders.⁹² With their underlying objective to group together non-citizens of the same nationality and deport them together to the same destination country, JROs represent an obvious challenge to the prohibition on collective expulsion. During the operation, deportees are transported from participating member states to the organising state, where they embark an aircraft and travel together to the destination airport in a third country.⁹³ It cannot be ruled out that some migrants would be deported without being offered a prior examination of all the elements of their asylum claim or the possibility to appeal against a return order.

3.2.2. AID, ASSISTANCE AND KNOWLEDGE

Could Frontex be complicit with the alleged human rights breaches committed by states during JROs? By virtue of draft Article 14 of the DARIO, to incur responsibly for complicity for a violation committed by a state, the organisation must aid or assist the

www.theguardian.com/commentisfree/2010/oct/15/deportation-jimmy-mubenga-borders; Ariane Gigon, “Nigerian Dies Shortly before Deportation Flight,” *Swissinfo*, 18 March 2010, <http://www.swissinfo.ch/eng/nigerian-dies-shortly-before-deportation-flight/8511616>.

⁹⁰ European Commission, *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM (2014)199, Brussels, 28 March 2014, p. 6. The gaps with respect to independent monitoring of JROs belong to the main issues raised by the European Ombudsman in her own initiative, started in October 2014, see European Ombudsman, *Own-Initiative Inquiry OI/9/2014/MHZ Concerning the Means through Which Frontex Ensures Respect for Fundamental Rights in Joint Return Operations (JRO)*, 20 October 2014.

⁹¹ European Court of Human Rights (ECtHR), *Conka v. Belgium*, 51564/99, 5 February 2002, para. 59.

⁹² *Ibid.*, para. 59–63.

⁹³ Frontex, “Return,” accessed 14 November 2014, <http://frontex.europa.eu/operations/return>.

state in the commission of a wrongful act (material element) and do so with knowledge of the circumstances of the wrongful act (mental element). Arguably, Frontex's involvement in JROs may fulfil both conditions for complicity.

First and foremost, it needs to be proved that the organisation aided or assisted a state. Typically, this would involve logistic, technical, material or financial contributions.⁹⁴ As noted by the Special Rapporteur to the ILC, financial or other support to a state's project that would entail an infringement of human rights of certain affected individuals could trigger an organisation's responsibility.⁹⁵ Lanovoy observes that complicity may also arise out of less formal cooperation, including operational collaboration, common training, and the provision of technical equipment used to commit human rights violations by the receiving state.⁹⁶ Undoubtedly, Frontex's logistic, technical, and financial assistance is of unquestionable support for states participating in JROs. As stipulated in the Frontex Regulation, states will regularly inform Frontex about their needs for the assistance for a coordination of JROs. In turn, the Agency will provide them with necessary operational support, including technical equipment (Art. 9(1c)). Frontex also cooperates with the authorities of third countries (Art. 9(2)). In practice, lack of cooperation from the countries of destination frequently constitutes an obstacle to removal. The involvement of Frontex in negotiations with third countries may have a considerable impact, since it is able to exercise more pressure on reluctant third countries to accept the returnees than individual member states. Besides assisting states and coordinating return-related preparations, Frontex may also itself organise JROs. Since September 2010, the Agency has directly chartered aircrafts for removal flights.⁹⁷ In addition, the Agency also finances or co-finances the JROs (Art. 9(1)), including the cost of chartering the plane, the travel costs of escorts and returnees from participating states, and the costs of medical personnel, human rights monitor, and catering provided before departure.⁹⁸ In 2013, Frontex's budget for JROs exceeded 8 million euro, while in the past five years it spent more than 44 million euro on return-related activities.⁹⁹

As highlighted by the ILC, there has to be a causal relationship between the aid/assistance and the commission of unlawful act. The aid/assistance must facilitate or "contribute significantly" to the wrongful act. However, there is no need for the aid to be essential for the performance of the wrongful act, in the absence of which it would not have occurred. In this case, the complicit organisation would become co-responsible for the breach.¹⁰⁰ Arguably, all the various kinds of Frontex's assistance to states might facilitate possible human rights violations during JROs. If a deportee would be subject to ill-treatment during a JRO on a flight chartered by Frontex, with a restraint equip-

⁹⁴ International Law Commission, *Report on the Work of Its Fifty-Third Session (23 April to 1 June and 2 July to 10 August 2001)*, UN General Assembly, A/56/10, 2001, p. 66, para. 4; International Law Commission, *Report on the Work of Its Sixty-Third Session*, pp. 104–105, para. 6.

⁹⁵ G. Gaja, *Third Report on Responsibility of International Organizations*, "International Law Commission", Fifty-seventh session, UN General Assembly, A/CN.4/553, 13 May 2005, para. 28.

⁹⁶ V. Lanovoy, *Complicity in an Internationally Wrongful Act*, SHARES Research Paper No. 38, 2014, p. 9.

⁹⁷ Frontex, General Report 2010, p. 25.

⁹⁸ Frontex, "Return."

⁹⁹ Frontex, *General Report 2009*, p. 47; Frontex, *General Report 2010*, 2011, p. 44; Frontex, *General Report 2011*, p. 26; Frontex, *General Report 2012*, 2013, p. 32; Frontex, *General Report 2013*, p. 48.

¹⁰⁰ International Law Commission, *Report on the Work of Its Sixty-Third Session*, p. 104, para. 4; International Law Commission, *Report on the Work of Its Fifty-Third Session*, p. 66, para. 5, and p. 67, para. 10.

ment provided by the Agency, or by escorts financed by it, it could be assumed that Frontex's assistance facilitated the wrongful act. Frontex assistance may also contribute to the occurrence of collective expulsions. The financial, technical, and logistical aid operates like an incentive for states to participate in JROs rather than conduct removal flights on their own. The preparation of an operation is initiated by the organising state posting an "Offer of a Return Flight," via Frontex Joint Return Command Centre, to which interested states must respond within a specified period of time.¹⁰¹ It is not difficult to imagine a scenario where, upon such an "Offer of a Return Flight" to a particular country, states processing asylum applications or appeals against a return of a migrant from that country may be compelled to swiftly terminate the relevant proceedings, without proper examination of all the circumstances of his individual case, in order to benefit from the removal flight. To confirm this worrying conclusion, it is worth mentioning that, according to the Agency's previous Director, by chartering aircrafts for JROs, Frontex's role "will come as a relief to national governments who will no longer have to 'carry the burden' of negative public opinion, embarrassment and disapproval prompted by collective repatriation procedures."¹⁰²

Turning to the mental element of the complicity, as spelled out in draft Article 14(a) of the DARIO, the organisation must know the circumstances of the impugned act. If assisting organisation is unaware of the circumstances in which its aid is used by the receiving states, it bears no responsibility.¹⁰³ Despite the explicit wording of this provision, the ILC noted that the assisting entity should also intend to facilitate the commission of a wrongful act.¹⁰⁴ The requirement of intent, which is a higher standard than knowledge, hardly stems from the clear formulation of draft Article 14. Thus scholars generally share the view that the correct standard is the one of knowledge.¹⁰⁵ Presumably, the requirement of knowledge covers not only actual but also constructive knowledge. In other words, the requirement will be fulfilled where the organisation knew, or had reason to know, of the circumstances of the wrongful act.¹⁰⁶ It is submitted that the Agency meets the requirement of knowledge. In the course of all JROs, a Frontex project manager travels on the charter flight to the destination country. His tasks include ensuring that the return operation is carried out in accordance with the *Frontex Code of Conduct for Joint Return Operations*.¹⁰⁷ Thus, if a deportee would suf-

¹⁰¹ For a detailed account on how JROs are organised and carried out, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Government of the Netherlands on the Visit to the Netherlands Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 October 2013*, CPT/Inf (2015)14, February 2015.

¹⁰² Le Monde, *Frontex Launches First Expulsion Charter*, "VOX Europ", 4 October 2010, <http://www.vox-europ.eu/en/content/news-brief/352121-frontex-launches-first-expulsion-charter>.

¹⁰³ International Law Commission, International Law Commission, *Report on the Work of Its Sixty-Third Session*, 104, para. 3.

¹⁰⁴ International Law Commission, *Report on the Work of Its Sixty-Third Session*, p. 104, para. 4.

¹⁰⁵ B. Graefrath, *Complicity in the Law of International Responsibility*, "Revue Belge de Droit International" 29, no. 2, 1996, p. 375; Lanovoy, *Complicity in an Internationally Wrongful Act*, pp. 16–21; Orakhelashvili, *Division of Reparation between Responsible Entities*, pp. 650–651; A. Reinisch, *Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts*, "International Organizations Law Review" 7, no. 1, 2010, p. 72.

¹⁰⁶ Lanovoy, *Complicity in an Internationally Wrongful Act*, pp. 20–21.

¹⁰⁷ Frontex, "Return."

fer ill-treatment during the operation, the Agency cannot claim that it was unaware of the circumstances of the wrongful act. The requirement of knowledge would be more difficult to prove in the context of allegations of collective expulsion. In fact, the Agency does not have access to the merits of return decisions handed down by states (Art. 9(1)). However, against the risk of collective expulsions that JROs create, there should arguably be a mechanism to review the return decisions adopted with respect to individuals to be deported during a joint flight. Such a standard check could merely verify that at least basic safeguards against collective expulsion have been observed. One could well imagine that this role could be entrusted to Frontex's Fundamental Rights Officer.

To sum up, Frontex's involvement in JROs might give rise to responsibility for complicity on the part of the Agency. Several human rights obligations that are binding on Frontex may be violated in the course of JROs, including the right to life as well as the prohibition on ill-treatment and collective expulsion. By aiding and assisting the wrongdoing state, the Agency may be held complicit with these breaches.¹⁰⁸

4. ACCOUNTABILITY MECHANISMS

The final step of our analysis relates to the implementation of Frontex's responsibility. How to hold the Agency to account?¹⁰⁹ In practice, enforcing the accountability of IOs is a cumbersome task. This section will discuss two broad categories of IOs' accountability mechanisms, namely judicial redress (4.1) and non-judicial scrutiny (4.2).

4.1. JUDICIAL REDRESS

International institutional law scholars tend to list three judicial mechanisms capable of reviewing IO's actions, notably self-regulation, accession to treaty-based regimes, and

¹⁰⁸ Not only JROs, but also JOs can create conditions for the responsibility for complicity to arise. In its influential report, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, the Human Rights Watch makes a claim that, during a RABIT mission, the Agency was complicit with Greece because it facilitated the transfer of migrants to detention centres where conditions were similar to those that the ECtHR had found inhuman and degrading in the above discussed *M.S.S* case. In circumstances where the attribution of human rights violations during JOs to Frontex would not be feasible, the Agency may still be responsible for complicity, which is easier to prove. Its financial, technical, and operational assistance during JOs is of unquestionable support for states, and may be argued to facilitate the occurrence of human rights violations. In addition, since an FCO is deployed to every mission, the Agency could not claim not to be aware of the circumstances of a wrongful conduct. In a broader perspective, complicity of an IO in state's violations of migrants' rights was also alleged with respect to the involvement of the International Organization for Migration (IOM) in Australia's immigration detention, see Human Rights Watch, *The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns*, 2003.

¹⁰⁹ The fact that the Agency would be not the sole responsible is not an obstacle in this respect. In fact, in a case of shared responsibility, the responsibility of each entity may be invoked in relation to the impugned act, in line with Article 48(1) of the DARIO. However, where the Agency would incur responsibility for complicity, responsibility of the aided state needs to be established at the first stage, see by analogy with state responsibility, International Law Commission, *Report on the Work of Its Fifty-Third Session*, p. 67, para. 11.

judicial control exercised by domestic tribunals.¹¹⁰ We will discuss these fora in relation to Frontex, accordingly the Court of Justice of the European Union (4.2.1), the European Court of Human Rights (4.2.2), and domestic courts of the member states (4.2.3).

4.1.1. COURT OF JUSTICE OF THE EUROPEAN UNION

With the entry of the Lisbon Treaty into force in December 2009, the jurisdiction of the Court of Justice of the European Union (CJEU) has been extended to acts of EU agencies. Among the procedures applicable since then to agencies, two are particularly relevant to Frontex's operational activities: the action for annulment (legality of acts) and the failure to act. In addition, the Frontex Regulation points to compensation for damages procedure.¹¹¹

The action for annulment refers to the judicial review of the legality of acts intended to produce "legal effects" towards third parties (Art. 263(1) of the Treaty on the Functioning of the European Union (TFEU)).¹¹² There are two main obstacles for individuals to rely on this remedy in relation to Frontex's operations. First, the Agency's measure, such as the operational plan, would need to be qualified as an act producing legal effects. In line with the Luxembourg Court's jurisprudence, this means that the measure must have legal effects that are binding on the applicant and bring about a change in his legal situation.¹¹³ Yet, the new defendants under this procedure, such as EU agencies, in general do not have the power to adopt legally binding decisions. Thus, if the Court pursues the traditional stance, agencies would hardly come under the scope of the review.¹¹⁴ Adopting a more flexible approach to measures taken by agencies would allow the operational plan to be considered as an act. In fact, further strengthening Frontex's operational competencies and the transfer of more extensive powers from national authorities to the Agency, the operational plan using mandatory language could be construed as an act producing legal effects. A second difficulty relates to the status of individuals as "non-privileged applicants." In order to be accorded standing, private applicants must be the addressees of the act, or prove that it is of "direct and individual concern" to them (Art. 263(4) of the TFEU). Direct concern is established when the

¹¹⁰ O. de Schutter, *Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility*, [in:] *Accountability for Human Rights Violations by International Organisations*, ed. J. Wouters et al., International Law Series 7, Intersentia, Antwerp 2010), p. 104.

¹¹¹ Guild et al., *Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies*, pp. 82–87; Keller et al., *Frontex Agency: Which Guarantees for Human Rights?*, p. 23; Carrera, den Hertog, Parkin, *The Peculiar Nature of EU Home Affairs Agencies in Migration Control*, pp. 352–353.

¹¹² Among the grounds on which such review may be sought (Art. 263(2) of the TFEU), the infringement of the Treaties or any rule of law relating to their application, which is construed to embrace violation of fundamental rights, would be most pertinent in the context of Frontex conduct, arguably this ground would also include a breach of the secondary legislation binding on Frontex, D. Chalmers, G. Davies, G. Monti, *European Union Law: Cases and Materials*, 2nd ed, Cambridge University Press, Cambridge 2010, p. 409; P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, 5th ed, Oxford University Press, Oxford 2011, p. 525.

¹¹³ Accordingly, "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article [263] for a declaration that it is void," Court of Justice of the European Union (CJEU), *IBM v. Commission*, Case 60/81, ECR 2639, 1981, para. 9.

¹¹⁴ Chalmers, Davies, Monti, *European Union Law: Cases and Materials*, p. 399.

measure directly affects the legal situation of the applicant and leaves no discretion to national authorities as to its implementation.¹¹⁵ To prove individual concern, the applicants need to show that they have attributes or characteristics distinguishing them from all other persons and mark them out in the same manner as the addressees of the measure.¹¹⁶ The operational plan would hardly meet the direct and individual concern criteria. However, several scholars advocate the involvement of the EU institutions in proceedings before the CJEU in order to sidestep the stringent admissibility criteria applicable to individuals (Art. 263(2) of the TFEU). As “privileged applicants”, the EU institutions do not have to meet the direct and individual concern test. In particular, the European Parliament (hereafter the Parliament) could act as applicant under the action for annulment, choosing the cases to bring before the Court. As proposed, the Parliament could develop its role as a “fundamental rights litigant,” relying on its general *locus standi* before the CJEU.¹¹⁷

In turn, the failure to act procedure (Art. 265(1) of the TFEU) offers individuals the possibility to challenge Frontex’s omissions. The procedure applies to circumstances where defendants have positive obligations under EU law to perform specific tasks. In particular, there must be a clear duty rather than a mere discretion to act.¹¹⁸ Like in the case of the action for annulment procedure, the measure, whose absence is challenged before the CJEU, should meet the criteria of an act producing a legal effect. Arguably, the failure by the Agency’s Director to abort a JO in spite of violations of human rights could be brought under the scope of this remedy (Art. 3(1a)). As discussed above, notwithstanding the qualifying terms, the Frontex Regulation provides for an obligation incumbent on the head of the Agency to terminate or suspend the mission if it violates fundamental rights. Presumably an act terminating an operation would have binding legal force and leave no discretion to the host state. The review of the legality alike, to bring a failure to act claim, the individual petitioners would need to prove that the measure that Frontex failed to adopt would have been of direct and individual concern to them (Art. 265(3) of the TFEU). Thus, the potential victims of human rights violations occurred during a JO that should have been aborted, may be able to meet these criteria more easily than their counterparts relying on the review of the legality procedure. The alternative solution, displayed above, would be to rely on the Parliament, which, like in the action for annulment procedure, is not subject to the stringent admissibility criteria.

¹¹⁵ Court of Justice of the European Union (CJEU), *National Front v. European Parliament*, C-468/01 P, ECR I-6289, 2004, para. 34.

¹¹⁶ Court of Justice of the European Union (CJEU), *Plaumann & Co v. Commission*, 25/62, ECR 95, 1963. For the discussion on the “individual concern” test, see Craig and De Búrca, *EU Law*, pp. 493–510; Chalmers, Davies, Monti, *European Union Law: Cases and Materials*, pp. 418–424. However, to challenge regulatory acts, individuals need only to meet the direct concern test (Art. 263(4) of the TFEU). Regulatory acts may be broadly construed as measures other than legislative acts, which are adopted under the EU legislative procedures (Art. 289(3) of the TFEU), *Ibid.*, p. 415. Relying on such approach, arguments could be made to interpret operational plan as regulatory act and thus to relieve the applicants from proving individual concern.

¹¹⁷ Guild et al., *Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies*, p. 84; L. Lazarus et al., *The Evolution of Fundamental Rights Charters and Case Law*, “Study requested by the European Parliament’s Committee on Constitutional Affairs”, 2011, pp. 81–83.

¹¹⁸ Chalmers, Davies, Monti, *European Union Law: Cases and Materials*, pp. 428–429.

Pursuant to the Frontex Regulation (Art. 19(3)), the Agency should assume its non-contractual responsibility before the CJEU for all disputes concerning damage caused by the Agency's staff. The compensation for damages appears to be a less cumbersome way to obtain redress than the two procedures mentioned above. Under this procedure, the Court decides on claims of damage caused by EU institutions or its servants in the performance of their duties (Art. 268 and 340 of the TFEU). The term "servants" also applies to Frontex staff. In fact, the Frontex Regulation itself provides for the jurisdiction of the CJEU in disputes relating to compensation for damage caused by Frontex servants, requiring the Agency to "make good" any damage (Art. 19). However, contrary to the regime of international responsibility (Art. 3 of the DARIO), under EU law not every wrongful act triggers responsibility. In particular, the impugned conduct must meet two requirements. The first condition is unproblematic in the context of our discussion, since it requires that the rule allegedly infringed confer rights on individuals. By virtue of the second requirement, the breach should be sufficiently serious.¹¹⁹ This relates to the manifest and grave character of the breach and recognises the margin of appreciation enjoyed by the author. Accordingly, the broader is Frontex's staff discretionary power, the higher threshold is required to consider his breaches sufficiently serious.¹²⁰ However, in the hypothetical scenario of a failure on the part of the FCO to ensure sufficient guarantees for upholding the *non-refoulement* principle during a JO, due to the fundamental character of this principle, his margin of discretion would be quite limited. Thus, such a failure might more easily amount to a manifest and grave breach of the FCO's duties giving rise to claims for damages.

4.1.2. EUROPEAN COURT OF HUMAN RIGHTS

The TEU, in its Article 6(2), provides that the EU will accede to the ECHR. The accession will provide for external scrutiny of the EU's compliance with the human rights obligations under the ECHR.¹²¹ Acts, measures, and omissions of the EU's institutions, bodies, and agencies will be amenable to review by the ECtHR, as stipulated in the 2013 *Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter Draft Accession Agreement).¹²² Thus, non-citizens whose rights, enshrined in the ECHR, would be encroached upon in the course of Frontex's operations, will be able to seek redress before the Strasbourg Court. It needs to be highlighted that the EU, as a contracting party

¹¹⁹ Court of Justice of the European Union (CJEU), *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities*, 352/98 P, ECR I-5291, 2000, para. 42.

¹²⁰ J.-M. Thouvenin, *Responsibility in the Context of the European Union Legal Order*, [in:] *The Law of International Responsibility*, ed. J. Crawford, A. Pellet, S. Olleson, Oxford Commentaries on International Law, Oxford University Press, Oxford 2010, pp. 868–871.

¹²¹ For a discussion on the broader implications of accession see A. Clapham, *The European Union before the European Court of Human Rights*, [in:] *International Organizations and International Dispute Settlement: Trends and Prospects*, ed. L.B. de Chazournes, C.P.R. Romano, R. Mackenzie, Transnational Publ, Ardsley NY 2002, p. 73–88; J.P. Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, "Common Market Law Review" 48, No 3, 2011, p. 995–1023.

¹²² Council of Europe, *Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 47+1(2013) 008 rev 2, June 10, 2013, Art. 1(3).

to the ECHR, will be a respondent in the proceedings before the ECtHR.¹²³ Of particular relevance to our analysis is the co-respondent mechanism set out in Article 3 of the Draft Accession Agreement. Under this mechanism, appeals could be directed against both the EU and one or more of its member states. The mechanism would also allow the EU to be involved as a co-respondent in cases where member state's acts are challenged before the ECtHR, if the compatibility of a provision of EU law with the ECHR is at stake. In cases relying on the co-respondent mechanism, where a violation is found, both the EU and the relevant member states would be held jointly responsible for the breach.¹²⁴ However, in December 2014, the CJEU issued a negative opinion on the Draft Accession Agreement. The Court found that the autonomy of EU law and the Court's primacy in the interpretation of EU law would be undermined. At the same token, it rejected the co-respondent mechanism due to a perceived conflict with the rules on the division of powers between the EU and its member states.¹²⁵ Following the CJEU's opinion, the enforcement of Frontex's responsibility by the ECtHR seems unlikely in the near future.

4.1.3. DOMESTIC COURTS OF MEMBER STATES

Traditionally, national courts refuse to adjudicate complaints against IOs because of the immunity of jurisdiction they enjoy in their member states. The underlying rationale for granting immunities to IOs is to ensure their independence from states and their effective functioning.¹²⁶ Frontex is not different in this respect. By virtue of the *Protocol on the privileges and immunities of the European Communities*, the Agency enjoys such privileges and immunities in the EU states that are necessary for the performance of its tasks (Art. 18). There is little doubt that the IO's immunity from legal process may encroach upon the right of access to a court, as set out in Article 6 of the ECHR and Article 47 of the EU Charter. In this respect, in the *Waite and Kennedy* and the *Beer and Regan* cases the ECtHR ruled that granting the jurisdictional immunity to organisation

¹²³ In particular, the EU will be represented by the Commission, see European Parliament, *Institutional Aspects of Accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Resolution P7_TA(2010)0184, Brussels, 19 May 2010, para. 9; X. Groussot, T. Lock, L. Pech, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14 October 2011*, Foundation Robert Schuman, European Issues, No. 218, 2011, p. 14.

¹²⁴ M. den Heijer, A. Nollkaemper, *A New Framework for Allocating International Responsibility: The EU Accession to the European Convention on Human Rights*, SHARES Briefing Paper, 2014, pp. 7–8, 10–17; T. Lock, *Shared Responsibility after EU Accession to the ECHR Revisited*, SHARES Blog, 14 April 2013. The proceedings before the CJEU, notably the action for annulment, will be considered as “domestic” remedies to be exhausted before filing a claim before the ECtHR, Groussot, Lock, Pech, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14 October 2011*, p. 14.

¹²⁵ Court of Justice of the European Union (CJEU), *Opinion 2/13*, 18 December 2014, para. 215–235. For the commentaries on the Court's opinion, see Tobias Lock, *Oops! We Did It Again – the CJEU's Opinion on EU Accession to the ECHR*, Verfassungsblog, 18 December 2014; A. Popov, *L'avis 2/13 de La CJUE Complicque L'adhésion de l'Union Européenne À La CEDH*, La Revue des droits de l'homme, February 2015.

¹²⁶ Klabbbers, *An Introduction to International Institutional Law*, pp. 131–152; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 315–328; A. Reinisch, *International Organizations Before National Courts*, “Cambridge Studies in International and Comparative Law” 10, Cambridge Univ. Press, Cambridge 2000, pp. 127–168.

would be permissible under the ECHR, as long as the applicants have access to reasonable alternative remedies, including internal review mechanisms.¹²⁷ The Court's reasoning implies that, in the absence of an adequate alternative review mechanism available to the petitioner, domestic courts should waive the immunities. At present, there are hardly any accessible alternative appeal mechanisms available to individuals affected by Frontex's operations. Redress before the CJEU is difficult to obtain due to legal impediments to individuals, while the Court's recent negative opinion on the accession to the ECHR precludes the ECtHR's scrutiny of Frontex's conduct in the near future. As will be discussed below, the Agency rejected the recommendation made by the European Ombudsman to set up a quasi-judicial internal claims mechanism. It is therefore submitted that if an individual files a complaint against Frontex before a court in one of the EU member states, the Agency's immunity may need to be waived. Otherwise the claimant's right of access to justice risks being violated.¹²⁸

4.2. NON-JUDICIAL SCRUTINY

Legal remedies against IO's acts are difficult to implement and enforce in practice. Thus, the non-judicial scrutiny of IOs has been perceived as a way to fill in the accountability gap. The literature dedicated to the accountability of IOs defines it as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."¹²⁹ Non-judicial accountability mechanisms aimed at monitoring the actions of IOs are clustered in three groups: administrative, social, and democratic/ political.¹³⁰

Administrative accountability refers to supervision by quasi-legal and quasi-independent institutions.¹³¹ The position of the Fundamental Rights Officer (FRO), cre-

¹²⁷ European Court of Human Rights (ECtHR), *Beer and Regan v. Germany*, 28934/95, 18 February 1999, para. 58; European Court of Human Rights (ECtHR), *Waite and Kennedy v. Germany*, 26083/94, 18 February 1999, para. 68. For commentaries on these cases, among abundant literature, see for instance, C. Rynjaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, "International Organizations Law Review" 7, No 1, 2010, pp. 132–144; J. Wouters, P. Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials*, [in:] *Challenging Acts of International Organizations before National Courts*, ed. A. Reinisch, Oxford University Press, Oxford 2010, pp. 96–101; A. Reinisch, U.A. Weber, *In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, "International Organizations Law Review" 1, No. 1, 2004, p. 59–110.

¹²⁸ See Carrera, De Somer&Petkova arguing that "[...] reinforced role of Frontex has therefore consolidated the grounds for the potential liability (and responsibility) of the Agency before competent national tribunals," S. Carrera, M. de Somer, B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS, 2012, p. 4.

¹²⁹ M. Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, "European Governance Papers" (EUROGOV) No C-06-0, 2006, p. 9. This definition embraces also judicial accountability mechanisms that are discussed in the preceding sub-section.

¹³⁰ S.P. Riekmann, *Security, Freedom and Accountability: Europol and Frontex*, [in:] *Security versus Justice?: Police and Judicial Cooperation in the European Union*, ed. E. Guild, F. Geyer, Ashgate, Aldershot–Burlington 2008, p. 23; J. Pollak, P. Slominski, *Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders*, "West European Politics" 32, No 5, 2009, p. 917.

¹³¹ P. Riekmann, *Security, Freedom and Accountability: Europol and Frontex*, p. 23.

ated in September 2012, undoubtedly fostered administrative scrutiny over the Agency's actions. Designated by the Management Board and appointed by the Director, the FRO reports directly to the Director, the Board, and the Consultative Forum (see below), and "as such, contributes to the mechanism for monitoring fundamental rights" (Art. 26a(3)). While the Regulation provides that the FRO must be independent in the performance of his duties, the job description clarifies that he must "act independently in Frontex's interest." The FRO's duties that are relevant to our discussion here include contributing to monitoring the mechanism of fundamental rights by regular reporting and monitoring Frontex's activities and setting up and maintaining a record of possible fundamental rights incidents that may occur during Frontex's operations.¹³² As laudable as FRO's monitoring and reporting functions may be, regrettably the position has not been endowed with the capacity to receive complaints from individuals.

In the framework of the 2012–2013 European Ombudsman's own-initiative inquiry into Frontex's implementation of its fundamental rights and obligations, the lack of an internal complaint mechanism has been repetitively criticised by the Ombudsman and other bodies, including the PACE and civil society organisations.¹³³ The FRO seemed to be the natural candidate for receiving complaints. In his April 2013 draft recommendation to Frontex, the Ombudsman recommended "taking any possible action to enable the FRO to consider dealing with complaints on infringements of fundamental rights in all Frontex activities submitted by persons individually affected by the infringements and also in the public interest."¹³⁴ This was the only recommendation that Frontex explicitly rejected.¹³⁵ In November 2013, requesting assistance from the Parliament, the Ombudsman formulated the following recommendation to Frontex: "Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled joint operations. The mechanism should receive complaints from anyone who claim to be individually affected, or who complain in the public interest. This role could be entrusted to the FRO, who should be resourced accordingly."¹³⁶ To date, the Agency has ignored the Ombudsman's recommendation.

In turn, social accountability is understood as the scrutiny by civil society organisations and, more generally, access to information and transparency of the IOs.¹³⁷ Over the past years the secrecy and lack of transparency surrounding the Agency's actions

¹³² Frontex, *Opinion from Frontex on the European Ombudsman's Own-Initiative Inquiry into the Implementation by Frontex of Its Fundamental Rights Obligations*, 17 May 2012. In September 2012, Ms Inmaculada Arnaez Fernandez was appointed the first FRO.

¹³³ Parliamentary Assembly of the Council of Europe (PACE), *Frontex: Human Rights Responsibilities*, para. 9(5). Among several contributions to the Ombudsman's inquiry expressing concern about the lack of a complaints-handling mechanism, see e.g. Caritas Europa, Amnesty International, Meijers Committee, and Jesuit Refugee Service. The full list of contributions is provided on the webpage of the inquiry, <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark>.

¹³⁴ European Ombudsman, *Letter from the European Ombudsman to the Frontex Concerning His Draft Recommendation – OI/5/2012/BEH-MHZ*, 9 April 2013.

¹³⁵ Frontex, *Frontex Answer on Draft Recommendations of the European Ombudsman in His Own-Initiative Inquiry OI/5/2012/BEH-MHZ Concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*, 25 June 2013.

¹³⁶ European Ombudsman, *Special Report of the European Ombudsman in Own-Initiative Inquiry OI/5/2012/BEH-MHZ Concerning Frontex*.

¹³⁷ P. Riekmann, *Security, Freedom and Accountability: Europol and Frontex*, p. 23; Pollak and Slominski, *Experimentalist but Not Accountable Governance?*, p. 917.

came under criticism. For instance, in its Resolution *Frontex: human rights responsibilities*, the PACE described the lack of transparency and public communication regarding the nature of the operations as “structural problems that have human rights implications.”¹³⁸ The establishment of the Consultative Forum on Fundamental Rights (CF) in October 2012 appears to have enhanced Frontex’s social accountability. The CF’s function is to advise and assist the Frontex Director and the Management Board “in fundamental rights matters” (Art. 26a(2)). Six members of the Forum, belonging to EU and UN Agencies and Intergovernmental Organisations, are mandatory and permanent.¹³⁹ Different status within the CF is accorded to (up to nine) civil society organisations. Selected by a decision of the Management Board, as proposed by the Director, they are invited to participate in the Forum for a specific period of time (Art. 26a(2)).¹⁴⁰ The establishment of the Forum is welcome, although its role is quite limited in practice. The CF may adopt opinions, at the initiative of the Board or the Director, or recommendations, at the initiative of its members. Both opinions and recommendations are adopted by consensus of the CF’s members. Only exceptionally, when no consensus can be reached, is voting envisaged. Opinions and recommendations may only be addressed and transmitted to the Board and Director. Thus, the Forum is prevented from issuing opinions and recommendations to member states or EU bodies, and from directly addressing the media. Moreover, the CF itself stressed that it works on selected areas of the Agency’s activities and does not have the resources to systematically screen all of Frontex’s activities, thus “the oversight by the European Parliament, national parliaments, civil society and, where necessary, the judiciary [...] remains important.”¹⁴¹

Such an oversight by the Parliament and national parliaments refers to democratic or political accountability.¹⁴² The Parliament’s control mainly relies on its budgetary powers. As a budgetary authority, it decides, together with the Council, on the amount of money that agencies, including Frontex, can spend from the general budget of the EU.¹⁴³ To this end, it receives from the Commission a draft estimated budget alongside a draft *Programme of Work*, adopted by the Management Board (Art. 29(5)–(6)). Besides this, its role is quite restrained. As opposed to the Commission, it does not re-

¹³⁸ Parliamentary Assembly of the Council of Europe (PACE), *Frontex: Human Rights Responsibilities*, para. 8(1).

¹³⁹ The mandatory members are either specified in the Frontex Regulation (EASO, Fundamental Rights Agency (FRA), and UN High Commissioner for Refugees (UNHCR)), or in the MB Decision 12/2012 (Council of Europe (CoE), International Organisation for Migration (IOM), and Organisation for the Security and Co-operation in Europe (OSCE)), Frontex, *Management Board Decision No 12/2012 on the Composition of Frontex Consultative Forum*, 23 May 2012, Art. 2.

¹⁴⁰ Ibid., Art. 3. In 2013, NGOs participating in the Forum, included Amnesty International European Institutions Office (AI EIO), Caritas Europa (CE), Churches’ Commission for Migrants in Europe (CCME), European Council on Refugees and Exiles (ECRE), International Commission of Jurists (ICJ), International Catholic Migration Commission (ICMC), Jesuit Refugee Service Europe (JRS), Platform for International Cooperation on Undocumented Migrants (PICUM), and Red Cross EU Office, see Frontex Consultative Forum on Fundamental Rights, *Annual Report 2013*, 2014, p. 6.

¹⁴¹ Frontex Consultative Forum on Fundamental Rights, *Annual Report 2013*, pp. 12, 14.

¹⁴² P. Riekmann, *Security, Freedom and Accountability: Europol and Frontex*, p. 23; Pollak and Slominski, *Experimentalist but Not Accountable Governance?*, p. 917.

¹⁴³ A. Wills, M. Vermeulen, *Parliamentary Oversight of Security and Intelligence Agencies in the European Union*, “Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs” (LIBE), 2011, pp. 104–106.

ceive the Agency's risk analysis, nor does it have a role in the appointment of the Frontex Director. The Parliament does not have the power to summon the Director; it may merely "invite" him to report on the performance of his tasks (Art. 25(2)). The Agency's refusal to attend a public hearing on the "Tragedies of Migrants at Sea" in July 2007 demonstrated that the head of Frontex did not consider this an obligation.¹⁴⁴ The PACE therefore recommended enhancing the Parliament's scrutiny of Frontex by ensuring that the FRO and the CF report directly to the Parliament on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns. The PACE also recommended that the Parliament be consulted prior to the conclusion of any agreements between Frontex and third countries.¹⁴⁵

5. CONCLUSION

This paper aimed at challenging the assumption that responsibility for potential human rights violations during Frontex's operational activities rests solely upon the states. It was argued that the relevant principles set out in the DARIO could be applied to Frontex by analogy. The analysis of the Agency's powers reveals that, in certain circumstances, an impugned act may be attributed both to a wrongdoing state and to Frontex, in line with the concept of dual attribution. Shared responsibility that would arise in such circumstances reflects the features of Frontex-led operations, where the tasks and competencies of several actors are intertwined. Frontex may also incur responsibility for complicity, if it assists a state in violation of human rights obligations. However, current avenues for potential victims to obtain redress – before the CJEU or domestic courts – are cumbersome. This situation will be remedied once the EU accedes to the ECHR, though the CJEU's recent opinion on the accession will slow down the process. At the same token, Frontex's non-judicial accountability mechanisms – democratic, administrative, and social scrutiny – although welcome, stop short of being independent and effective. In particular, Frontex has refused to set up an internal complaint mechanism for people alleging violations of their rights.

Over the past 10 years, Frontex's human, financial, and technical resources, along with its operational capacities and powers, have seen a steady increase. This process is likely to continue, especially in the current context of the break down in the rule of law in countries at the EU periphery in the South and Eastern Mediterranean region, leading to large-scale flows of migrants, asylum-seekers, and refugees. In its 2014 *Programme of Work*, the Agency shares its intention to "increase the intensity of operational activities."¹⁴⁶ In a more long-term perspective, the Commission's long-cherished idea of setting up a European System of Border Guards (ESBG) endowed with executive powers, may see the light of day. The recent feasibility study requested by the Commission notes that the creation of the SGO mechanism and the deployment of the

¹⁴⁴ Ibid., p. 102.

¹⁴⁵ Parliamentary Assembly of the Council of Europe (PACE), *Frontex: Human Rights Responsibilities*, para. 9(2).

¹⁴⁶ Frontex, *Programme of Work 2014*, p. 56; Jones, *Border Guards, Planes, "thermal Vision Vans" and Heartbeat Detectors: Who Is Equipping Frontex?*.

EBGTs can be considered as initial steps towards the possible creation of the ESBG.¹⁴⁷ Against this background, the Agency's mantra that it merely coordinates, while states bear responsibility for any potential human rights violations, is less and less tenable. The Agency should recognise that it is capable of being held to account. In line with the European Ombudsman's recommendations, internal complaint mechanisms for people subject to the Agency's operations should be established. In addition, judicial redress should be fostered, in particular with the involvement of the Parliament in proceedings before the CJEU.

¹⁴⁷ UNISYS, *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union*, p. 21.