

Frontex's Responsibility on Fundamental Rights Compliance in Third Countries

International Law and Global Governance

LLM Thesis

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Abstract

One major player in European Union (EU) external border management is the European Coast and Border Guard Agency called Frontex. To improve the EU's external border management, the Agency expanded its operational mandate with a standing corps and its international mandate with the ability to conduct operations outside EU borders. In line with the development of increasing powers and resources, the Agency has faced criticism regarding fundamental rights. Questions on its legal mandate considering fundamental rights compliance arise from the view of both international and EU law. Subsequently, the thesis explores whether the Agency can be held legally responsible for fundamental rights violations that may occur in the context of border control or return operations coordinated by the EU Agency. In the assessment on international responsibility for the ECHR, the Agency was not recognized as an International Organisation. The Articles on the Responsibility of International Organizations were found inapplicable. In the assessment of non-contractual liability law under EU law, the thesis concludes that, in theory, the Agency can be held liable next to the primary liable state.

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List of Abbreviations:

ARIO - Articles on the Responsibility of International Organizations

BJIL - Brooklyn Journal of International Law

BUILJ - Boston University International Law Journal

CJEU - Court of Justice of the European Union

EBCG - European Border and Coast Guard Agency

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

EU - European Union

EU Charter - Charter of Fundamental Rights of the European Union

GLJ - German Law Journal

ICJ - International Court of Justice

ICLR - International Community Law Review

ILP - International Legal Personality

IOs - International Organisations

JOs - Joint Operations

JROs - Joint Return Operations

LJIL - Leiden Journal of International Law

RABIT - Rapid Border Intervention Team

RBIs - Rapid Border Interventions

SJLS - Silesian Journal of Legal Studies

SSRN EJ - SSRN Electronical Journal

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

UJIEL - Utrecht Journal of International and European Law

YEL - Yearbook of European Law

Chapter 1: Introduction

1.1: The European Coast and Border Guard Agency: an emerging actor facing emerging challenges.

One of the major players in European Union (EU) external border management is the European Coast and Border Guard Agency, called Frontex (hereinafter: the Agency).¹ The Council Regulation 2007/2004 established the Agency for improvement of the integrated management at the external borders.² Since its establishment in 2004, several amendments to the founding regulation have taken place expanding the Agency's mandate. The Agency originally functioned to coordinate the operational cooperation between EU Member States.³ Through its reforms, with the final amendment established in Regulation 2019/1869,⁴ the Agency increased its tasks and its human, technical, and financial resources resulting in the Agency being the most important actor in the management of the external borders.⁵ The most striking reform is the aim to recruit a standing corps of up to 10.000 officers to be deployed at the external borders.⁶ The creation of a significant executive agency with operational capabilities has until now been exceptional to EU Agencies.⁷

Also exceptional is that the Agency's executive powers have reached beyond EU territory with the ability to establish relations between the EU and non-EU countries (hereinafter: third countries). In line with the view that cooperation with third countries has been crucial for operations on extraterritorial ground to be successful, the Agency is now

¹ With the denotation 'the Agency' the paper refers specifically to Frontex. The name European Border Coast Guard (EBCG) will be used when referring to the multilevel structure of agencies all relating to border and coast guarding. The EBCG was developed with Regulation 2016 and encompasses among others the Agency 'Frontex'.

² Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349 [hereinafter: Regulation 2007/2004].

³ Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 [hereinafter: Regulation 2019/1896].

⁵ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

⁶ Regulation 2019/1896, arts 54-59 Annex I.

⁷ Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

allowed to deploy operations on the territory of the third country.⁸ These operations are regulated through Status Agreements⁹ based on Article 218 of the Treaty on the Functioning of the European Union (TFEU).¹⁰ Previously, the engagement of the Agency outside EU territory was established through working arrangements conducted between the Agency and the respective authority of third countries.¹¹ This specifically allowed for the Agency to cooperate with third countries on the exchange of classified information. These arrangements suggested a low level of cooperation and were not considered treaties under international law.

In line with the development of increasing powers and resources, criticism to the Agency's operations have emerged regarding the respect of fundamental rights.¹² The Agency has come to the attention of several NGOs and international organisations for the violation of fundamental rights committed in the course of operations at the external borders.¹³ The fundamental rights that are found sensitive for violations during the Agency's operation include, among others:

- the right to asylum;¹⁴
- the prohibition of torture or inhuman or degrading treatment;¹⁵
- the prohibition of *refoulement*;¹⁶
- the prohibition of collective expulsion;¹⁷ and
- the prohibition of discrimination.¹⁸

⁸ Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'' (2012) 28(75) UJIEL 20.

⁹ Regulation 2019/1896, art 73(3).

¹⁰ Consolidated version of the Treaty on European Union [2002] OJ C115/13 [hereinafter TFEU], art 218.

¹¹ Regulation 2019/1896, art 73(4).

¹² Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

¹³ Border Violence Monitoring Network, 'Balkan Region July 2020' (Illegal push-backs and border violence reports, 15 August 2020) < https://www.borderviolence.eu/wp-content/uploads/2020_July_Report.pdf > accessed 30 May 2021; Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (21 September 2011) < <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> > accessed 30 May 2021; Elspeth Guild and others, 'Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office' (2011) < https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_02_study_fundamental_rights_en.pdf > accessed 30 May 2021.

¹⁴ Charter of Fundamental Rights of the European Union [2012] OJ C 326 [hereinafter: EU Charter], art 18.

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos 11 and 14) (ECHR) [hereinafter ECHR], art 2; EU Charter, art 4.

¹⁶ ECHR, art 3; EU Charter, art 19(2).

¹⁷ ECHR, art 4; Protocol No 4 EU Charter, art 19(1).

¹⁸ EU Charter, art 21.

Necessary respect for the right to international protection in the context of operations related to immigration control was clarified by the European Court of Human Rights judgment in *Hirsi and Others v Italy*.¹⁹ Italy was held responsible for its activities of interception and pushback of the applicants, as these activities were in violation of the right to guarantee and secure the rights of the Convention.²⁰ In this case, the Court established that Italy was exercising extraterritorial jurisdiction by exercising continuous *de jure* and *de facto* control over the applicants during the operation.²¹ In this case the host Member State, instead of the Agency, was found responsible. More frequently, Member States are found responsible for unlawful conduct during the Agency's operations. Additional references to the Agency during cases are often lacking. The concept of shared responsibility in the Regulation is based on the premise that the Agency does operate alongside the Member States.²² It necessarily follows that the Agency also needs to ensure that fundamental rights guarantees are in practice respected.²³ The question whether the Agency as an EU body can be held responsible arises.

In line with the Agency increasingly interaction in the international arena, EU Agencies in general have acquired more activities internationally. This phenomenon of evolving international dimensions of EU Agencies raises crucial questions from the view of both international and EU law.²⁴ Questions arise for the overall constitutional structure of the EU, indicating an imbalance between the executive branch on the one hand and the legislative and judicial branches on the other. In addition, from an international law perspective, it is essential to clarify the legal status of the Agencies as global actors.²⁵

The present thesis will study the extraterritorial powers of the Agency and the implications for its fundamental rights obligations. Where the responsibility for fundamental rights violations committed during border control operations has been established only for Member States, this thesis will explore whether similar legal actions can be taken against the Agency being an EU Agency. In addition, existing literature on the Agency and its responsibility for

¹⁹ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012).

²⁰ ECHR, art 1.

²¹ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012).

²² Regulation 2019/1896, art 7(1).

²³ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁴ Floris Coman-Kund 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²⁵ Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

fundamental rights' violations has focused on legal responsibility for violations within the EU.²⁶ The extraterritorial expansion of the Agency's executive practices by specifically Status Agreements has not been touched upon yet. The thesis will therefore focus on the responsibility that may arise for conduct outside the EU borders. While the working arrangements concluded with third countries are not legally binding under international law and cannot be considered to constitute an international agreement,²⁷ the thesis will exclude them from research. In addition, authors have mostly explored the attribution of responsibility under the Regulations previous to Regulation 2019/1896.²⁸ A gap in the literature can be found with regard to the current rules applicable to the Agency.

1.2: Research Questions and Operationalisation

The purpose of the present study is to ascertain whether and on what basis the Agency can bear responsibility for fundamental rights violations committed during border control operations in third countries. The following research question and sub-questions will structure the study.

Main research question: *To what extent can the Agency be held responsible for fundamental rights violations during operations conducted by the Agency in the context of the Status Agreements with third countries?*

Sub-questions:

1. Based on the new legal framework, what competencies does the Agency have regarding international cooperation through a Status Agreement? And what are the implications of such competencies?

²⁶ Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45; Eftymios Papastavridis 'The EU and the Obligation of *Non-Refoulement* at Sea', in S Trevisanut and F Ippolito (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press: Cambridge, 2016); Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455; Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁷ Andrea Ott and others, 'EU Agencies and their international mandate: a new category of global actors?' (2013) CLEER WP 2013/7 < <https://www.asser.nl/cleer/publications/cleer-papers/cleer-wp-20137-ott-vos-and-coman-kund/> > accessed 5 June 2021.

²⁸ Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45; Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

2. What fundamental rights obligations are present in the Agency's legal framework? And to what extent are fundamental rights sensitive to violations during operations conducted by the Agency?
3. How can the Agency be held responsible for potential fundamental rights violations during operations established by a Status Agreement, under international law and EU law?

In order to answer the research questions listed above, the study will proceed in the following way.

The second Chapter will present the legal framework which currently regulates the Agency, outlining its nature and role. As the main question relates to how the Agency's action affects the scope of fundamental rights, it is of essence to account for what the Agency is set to achieve, and on what legal grounds. Therefore, an overview of the legal basis and mandate of the Agency's cooperation with and within third countries will be offered. Specifically, the authority during operations through the decision-making processes and chains of command are examined. The overview will allow me to answer the first sub-question. In addition, the chapter will serve as the basis for chapter 4 where the regimes on responsibility and liability will be assessed in the context of the Agency's activities.

Subsequently, the third Chapter will outline the sources and scope of fundamental rights obligations and the extent to which these are referred to in the Agency's Regulation. The extraterritorial scope of fundamental rights will be assessed considering the operations conducted on territory outside the EU. Subsequently, as the main research question relates to the fundamental rights that may be violated in the context of the Agency's operations, the fundamental rights that are at stake during operations are presented. The second sub-question will be answered in this chapter.

In the fourth Chapter, the rules on responsibility under the ECHR and the rules on liability under EU law that may arise for potential violations of fundamental rights will be applied to the Agency's activities. For the fundamental rights under the ECHR the law of international responsibility by the ECtHR will be examined. For fundamental rights under EU law, the analysis will focus on EU public liability law as developed by the CJEU's case law. The findings of Chapter 2 on the Agency's mandate and Chapter 3 on potential fundamental rights violations during the Agency's operations are used to assess the rules of law. In this regard, the legal framework will allow us to identify to what extent the Agency can be held

responsible for potential violations of fundamental rights during its operations in third countries. This Chapter answers the third sub-question.

In the last Chapter the main research question will be answered with a synthesis of the elements presented in the previous chapters. The study will conclude with a reflection on the possible limitations of the analysis carried out.

1.3: Methodology

The thesis aims at setting down and analysing potentially relevant legal arguments that can clarify on what basis and to what extent the Agency may be allocated responsibility. The thesis will use a doctrinal legal approach in applying responsibility and liability law to the context of operations conducted by the Agency in third countries. The letter of the law includes the presentation of a descriptive and detailed analysis of the legal rules in relevant primary sources. While the doctrinal approach will allow the research to discuss the legal meaning of the rules focuses on traditional legal sources, it is sufficient to take a teleological approach for interpreting the primary sources by courts' jurisprudence. In addition, as provisions often cross-reference to other instruments, it is necessary to assess them within a broader legal framework. In addition, literature such as policy documents, EU publications, and legal articles have been assessed and have been helpful in explaining and interpreting the primary legal sources.

For the first sub-question, the Agency's legal framework will be presented by analysing the Agency's Regulations, in particular Regulation 2019/1896, the model Status Agreement, and the Status Agreements conducted with third countries. These sources are collected at the EUR-LEX website of the EU. In addition, literature review has been helpful to identify the external dimensions and implications of the Agency's tasks.

The second sub-question, focusing on fundamental rights sources in the Agency's legal framework, will be answered by literature review and an analysis of the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU Charter). In addition, reports on fundamental rights violations during the Agency's operations are collected. Reports about the Agency's operations are conducted mainly by independent sources such as The Border Violence Monitoring Network and the Human Rights Watch. To support arguments with examples, cases from the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) will be applied.

For the third sub-question, both the rules on responsibility under international law and the rules on liability set out under EU law will be analysed. A teleological approach will give

rise to interpreting the rather vague and synthetic texts of the primary sources. Case law of the CJEU and the ECtHR will help clarify the content of provisions and legal concepts. As for EU liability law, there is not much case law available regarding EU Agencies and explicitly dealing with fundamental rights. Hence, the interpretation of the law will be analysed based on black letter law. The thesis will assess EU case law that contains similar issues before fundamental rights law.

In order to answer the research question, the Chapter will tie the concepts of the research together in addressing whether the law applies to the Agency. While this approach may be formalistic and can lead to oversimplifying the legal doctrine, reports and case law will add a practical dimension to the analyses.

Chapter 2: The European Border and Coast Guard Agency

2.1: Development towards an integrated agency on EU border management

The competence of the EU to design and implement common policies on its external borders can be traced back to the EU's commitment to secure the free movement of goods, persons, services, and capital.²⁹ The goal of the EU to create an area without internal borders and coordinate action at external borders resulted in the creation of the Schengen Agreement in 1990.³⁰ The Schengen Agreement became part of the EU law acquis with the signing of the Treaty of Amsterdam in 1999 and led to the incorporation of intergovernmental cooperation into the EU framework.³¹ With the aim to create an area of freedom, security, and justice,³² several important measures have been adopted at the EU level, including the creation of the EU Agency 'Frontex' in 2004.³³ The Agency's legal basis for the establishment was based on Articles 77(2)(b) and (d) of the TFEU.³⁴ With the creation of the Agency, the common approach for border control on the EU's external borders, the Integrated Border Management system, was introduced.³⁵

With the aim to improve the integrated management of the external borders of the EU,³⁶ the Agency was originally set up by Regulation 2007/2004 with a mandate to coordinate the Member States' actions on the management of the external borders.³⁷ The tasks of the Agency comprised foremost the coordination of joint operations and pilot projects, the assistance of Member States with the training of their national border guards, and the provision of technical and operational assistance at the external borders in particular circumstances.³⁸ In 2007 a

²⁹ EU European Council, 'Tampere European Council 15 and 16 October 1999, Presidency Conclusions' (15 October – 16 October 1999) < https://www.europarl.europa.eu/summits/tam_en.htm# > accessed 6 June 2021.

³⁰ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Convention of 14 June 1985) [hereinafter: Schengen Agreement].

³¹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 49 [hereinafter TFEU].

³² TEU, art 3(2).

³³ Regulation 2007/2004.

³⁴ TFEU, arts 77(2)(b) and 77(2)(d).

³⁵ Commission (EC), 'Towards Integrated Management of the External Borders of the Member States of the European Union' (Communication) COM (2002) 233 final, 7 May 2002 [hereinafter: IBM].

³⁶ Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, art 1.

³⁷ Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1; Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

³⁸ European Council on Refugees and Exiles, 'ECRE Comments on the commission proposal for a regulation on the European Border and Coast Guard' (Communication) COM (2018) 631 final, 12 September 2018.

revision in the founding regulation set up a Rapid Border Intervention Team (RABIT) mechanism.³⁹ The Agency's mandate expanded its initial mandate for the first time with the result that it could now provide operational assistance for a limited period of time to a Member State in an urgent situation.⁴⁰

Subsequently, with the 2011 amendment of the regulation, the Agency was entrusted with the composition and deployment of European Border Guard Teams encompassing border guards seconded by the Member States.⁴¹ The teams were made available to be deployed for rapid border intervention operations.⁴² Later in 2016, the original founding regulation was replaced by the European Border and Coast Guard Regulation.⁴³

In the midst of the migratory 'crisis', structural deficiencies regarding the management of the external borders were exposed. The purpose of the new Regulation 2016/1624 was to expand the Agency's resources and to become more efficient in tackling the unprecedented arrival of migrants to the EU.⁴⁴ Frontex transformed into the European Border and Coast Guard (EBCG) Agency comprising both Frontex and the Member States' national border and coast guard institutions.⁴⁵ The role of the Agency changed as the operation of information systems was strengthened and the tasks and powers on border management, including both operational and monitoring tasks, were enhanced. With the greater role the Agency enjoyed, a provision was added in the regulation which recognized the shared responsibility between the EU and the Member States.⁴⁶

Currently, the Agency works under Regulation 2019/1896 [hereinafter: the Regulation], which is the latest revision.⁴⁷ Within this revision, the Agency expanded its human

³⁹ Council Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199 [hereinafter: Regulation 863/2007].

⁴⁰ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

⁴¹ Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending 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 [2011] OJ L304 [hereinafter: Regulation 1168/2011]

⁴² Regulation 1168/2011, art 3(b).

⁴³ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251 [hereinafter: Regulation 2016/1624].

⁴⁴ Regulation 2016/1624, art 1.

⁴⁵ Regulation 2016/1624, art 3.

⁴⁶ Regulation 2016/1624, art 5.

⁴⁷ Regulation 2019/1896.

and technical resources even more and increased its operational capacity with the mandate to set up a European Border and Coast Guard standing corps with up to 10.000 border guards.⁴⁸ In addition, the competencies of the Agency expanded with the possibility to deploy border guards of the standing corps to operations with and within third countries.⁴⁹ The growing importance of the Agency in the management of the EU's external borders is evident, yet the primary role of the Member States remains. The legal framework in which the Agency currently operates is further presented in the following paragraph.

2.2: Legal Framework

2.2.1: The Agency's operational mandate

The Agency's tasks are set out in Article 10 of the Regulation.⁵⁰ The main tasks include the provision of technical and operational assistance to the Member States and third countries;⁵¹ the deployment of the standing corps in the framework of border management teams;⁵² to set up a pool of forced-return monitors,⁵³ and; cooperate with third countries, including through the operational deployment of border management teams in third countries.⁵⁴ In addition, the Agency can coordinate Joint Operations (JO's),⁵⁵ organise Rapid Border Interventions (RBI's),⁵⁶ and coordinate or organise Joint Return Operations (JRO's).⁵⁷

An essential development to the Agency's operational mandate was the establishment of the 'Standing Corps of European Border Guards' (hereafter: standing corps).⁵⁸ The creation of a standing corps makes that the Agency is not solely dependent on the Member States' contribution of border guards anymore. Moreover, with the corps, the Agency aims to effectively address existing and future operational needs in the EU and third countries.⁵⁹ The standing corps consists of operational staff from the Agency and staff seconded from the

⁴⁸ Regulation 2019/1896, art 54.

⁴⁹ Regulation 2019/1896, art 73(3).

⁵⁰ Regulation 2019/1896, art 10.

⁵¹ Regulation 2019/1896, art 10(1)(i).

⁵² Regulation 2019/1896, art 10(1)(j).

⁵³ Regulation 2019/1896, art 10(1)(o).

⁵⁴ Regulation 2019/1896, art 10(1)(u).

⁵⁵ Regulation 2019/1896, art 36(2)(a).

⁵⁶ Regulation 2019/1896, art 36(2)(b).

⁵⁷ Regulation 2019/1896, art 50(1).

⁵⁸ European Council on Refugees and Exiles, 'An EU Agreement on Reform of Frontex' (*ECRE news*, 5 April 2019) < <https://www.ecre.org/an-eu-agreement-on-reform-of-frontex/> > accessed 1 June 2021.

⁵⁹ Regulation 2019/1896, (5).

Member States for a short or long-term duration.⁶⁰ The standing corps should have 10.000 operational staff members by the end of 2027.⁶¹ Four categories of staff are distinguished:

- 1) statutory staff employed by the Agency.
- 2) staff seconded from the Member States to the Agency for a long term as part of the standing corps.
- 3) staff from the Member States ready to be provided to the Agency for a short-term deployment as part of the standing corps.
- 4) the reserve for rapid reaction consisting of staff from the Member States ready to be deployed.⁶²

The standing corps are deployed by the Agency as ‘members of the team’ and include both border guards and technical crew members.⁶³ The Agency will deploy the standing corps as members of the teams during JO’s, RBI’s, and JRO’s.⁶⁴ It is important to note that the members of the teams are additional to the border guards from the host state⁶⁵ and to the border guards that are directly deployed by participating states to the host state.⁶⁶

The operational activities of the standing corps are laid down in the first section of the Regulation, and specifically, in Annex V.⁶⁷ The standing corps are authorised to use force and will directly be involved in operations through tasks such as verifying the identity and nationality of persons, authorising or refusing the entry upon border check, the issuing or refusing of visas, and the patrolling.⁶⁸ The standing corps, however, shall only perform tasks and exercise powers under the host Member State⁶⁹ or third country’s instructions.⁷⁰ The coercive powers are left to the authorities of the host state, yet the Agency can communicate its views to the host state on the instructions given to the team.⁷¹ The Regulation poses that the host Member State must take the suggestions into consideration and follow them to the extent

⁶⁰ Regulation 2019/1896, art 54(1).

⁶¹ Regulation 2019/1896, Annex 1.

⁶² Regulation 2019/1896, art 54(1).

⁶³ Regulation 2019/1896, art 54.

⁶⁴ Regulation 2019/1896, art 54(2).

⁶⁵ Regulation 2019/1896, art 2(20); The state in which an operation takes place, Member State or third country, is referred to as the ‘host state’.

⁶⁶ Regulation 2019/1896, art 2(22); The Member State which participates in the operation by providing technical equipment or staff is referred to as ‘participating Member State’.

⁶⁷ Regulation 2019/1896, Annex V.

⁶⁸ Regulation 2019/1896, art 55(5); Mariana Gkliati, ‘The new European Border and Coast Guard: Do increased powers come with enhanced accountability?’ (*EU Law Analysis*, 27 April 2019) < <http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html> > accessed 2 June 2021.

⁶⁹ Regulation 2019/1896, art 2(5)(7).

⁷⁰ Regulation 2019/1896, arts 43(1) and 82(2)(4).

⁷¹ Regulation 2019/1896, art 43(2).

possible.⁷² While the standing corps only executive power under the authority of the host state, the Agency still has a considered influence on the instructions to the members of the teams.

The intertwining of different actors with executive powers in the statutory staff makes it difficult to determine the chain of commands. It is important to note that, where the statutory staff employed by the Agency exercises executive powers, the Agency should be liable for any damage caused.⁷³ The exercise of executive powers by the staff seconded from the Member States (category 2, 3, and 4 of the standing corps) is subject to the disciplinary measures of their respective home Member State.⁷⁴

The core operational tasks of the Agency consist of activities at the external borders. The Agency's tasks during these operations are presented in the following paragraphs.

2.2.1.1: Joint Operations and Rapid Border Interventions

The purpose of JOs and RBIs is to detect and prevent irregular migration flows, illegal immigration, and present or future threats of cross-border crime.⁷⁵ The Agency may launch an operation, provide financial⁷⁶ and technical assistance and deploy the standing corps at the request of a Member State.⁷⁷ Moreover, the Agency shall coordinate activities at the external borders.⁷⁸ In the case of an RBI, the Agency may deploy an operation for a limited period and only when the Member State faces specific and disproportionate challenges.⁷⁹ The executive director is responsible for deciding to launch an RBI based on the risk analysis made by the Agency's experts.⁸⁰ While the Regulation sets the requirement for an RBI to only last for a limited period of time, it does not specifically mention a maximum time frame for such an operation. A limited time period should be appointed to the RBI operations as these are solely deployed in emergency situations.

Before executing such operations, an operational plan must be drawn by the executive director and the host state.⁸¹ The operational plan should include all aspects necessary for carrying out the operation, including 'general instructions on how to ensure the safeguarding

⁷² Regulation 2019/1896, (59).

⁷³ Regulation 2019/1896, (59).

⁷⁴ Regulation 2019/1896, art 43(5).

⁷⁵ Regulation 2019/1896, art 37(1)

⁷⁶ Regulation 2019/1896, art 36(3).

⁷⁷ Regulation 2019/1896, art 37(1).

⁷⁸ Regulation 2019/1896, art 36(2)(c).

⁷⁹ Regulation 2019/1896, art 37(2).

⁸⁰ Regulation 2019/1896, art 39(5).

⁸¹ Regulation 2019/1896, art 38(1).

of fundamental rights during the operational activity of the Agency.’⁸² However, a referral to the safeguarding of fundamental rights or other references to fundamental rights are not found in relation to the operational plans for RBIs.

For such operations, coordinating officers will foster cooperation and coordination among the host and participating states and will be assisted and advised by a fundamental rights officer.⁸³ Finally, the executive director may decide to suspend, terminate or not launch activities in the situation of violations of fundamental rights or international protection obligations.⁸⁴

2.2.1.2: Joint Return Operations

During JRO’s, the Agency reinforces and coordinates the activities of the Member State on the return of persons who have no right to stay.⁸⁵ While the sole responsibility for returns remains with the Member State, the Agency may provide technical, operational, and financial assistance to the Member State. These activities include collecting information, the acquisition of travel documents, and the organization and coordination of return operations.⁸⁶ Before the launch of the operation, a return plan must be drawn up by the executive director. Moreover, the JRO’s organized and coordinated by the Agency must be monitored by a forced-return monitor at all times.⁸⁷ The forced-return monitor is deployed from the pool of forced-return monitors consisting of statutory staff personnel from the Member States.⁸⁸ The forced-return monitor must submit reports on each forced return operation to the executive director, the fundamental rights officer, and to the competent national authorities of all the Member States involved.⁸⁹

Intriguing is that the Regulation on JO’s, RBI’s, and JRO’s lack provisions on how to respond to fundamental rights in the instance where obligations may occur. While the executive director must report on activities breaching fundamental rights, there are no specific tasks set out other than immediately the termination or suspension of an operation. In addition, the reporting of potential fundamental rights violations and the consideration of whether the violation of the fundamental right is serious enough to take action is left to the discretion of the executive director.

⁸² Regulation 2019/1896, arts 38(3) and 38(3)(1).

⁸³ Regulation 2019/1896, art 44(3).

⁸⁴ Regulation 2019/1896, art 46(4).

⁸⁵ Regulation 2019/1896, art 48.

⁸⁶ Regulation 2019/1896, art 48(a).

⁸⁷ Regulation 2019/1896, art 50(5).

⁸⁸ Regulation 2019/1896, art 51(5).

⁸⁹ Regulation 2019/1896, art 50(5).

2.2.2: Fundamental rights monitoring and accountability mechanisms

As a response to the concerns on fundamental rights violations during operations by several NGOs, the Agency adopted additional measures on fundamental rights monitoring, including a Consultative Forum on Fundamental Rights and the appointment of a Fundamental Rights Officer.⁹⁰ Furthermore, all the Agency's activities must be accompanied by a fundamental rights strategy and action plan, including an effective mechanism for monitoring respect for fundamental rights.⁹¹ Currently, four mechanisms are present that address fundamental rights violations: the Consultative Forum, the Fundamental Rights Officer, the Individual Complaints Mechanism, and a forced-return monitor.⁹²

First, the Consultative Forum is established as an advisory body and is composed of selected intergovernmental and non-governmental organisations. It includes the task of assisting the executive director and management board on developing and implementing the Frontex Fundamental Rights Strategy, Code of Conduct, and the common core curricula.⁹³ Regarding the selection of organisations to the Forum, no specific selection process is available. The Agency has before rejected organisations for the Forum on the ground that it did not have a similar operational focus.⁹⁴ This raises questions on the independent role of the Consultative Forum to the Agency in relation to the implementation of fundamental rights strategies.

Second, the Fundamental Rights Officer appointed is found to monitor the operations for its compliance with fundamental rights. The Officer assigns fundamental rights monitors, who are deployed independently and trained in fundamental rights,⁹⁵ to the operations. They visit operations and report to the Officer on any concern for fundamental rights violations.

⁹⁰ Elspeth Guild and others, 'Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office' (2011) < https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights/02_study_fundamental_rights_en.pdf > accessed 30 May 2021.

⁹¹ Regulation 2019/1896, art 80(1).

⁹² Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

⁹³ Regulation 2019/1896, art 108; Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

⁹⁴ Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

⁹⁵ Regulation 2019/1896, art 110.

Subsequently, the Officer shall advise the Agency on several aspects relating to fundamental rights compliance during the Agency's activities. This includes the task of advising the executive director on the suspension of operations.⁹⁶ With the latest Regulation the role of the Officer is strengthened as it now can provide advice on its own initiative.⁹⁷ This means that the Officer is an independent actor in relation to the Agency. Yet, the Officer is not found with decision-making powers.

Third, the Individual Complaints Mechanism is a mechanism where individuals can make complaints directly to the Agency. The fundamental rights officer manages the complaints and decides on their admissibility.⁹⁸ When found admissible, the complaint is forwarded to the executive director, who decides on measures and reports the outcomes to the fundamental rights officers.⁹⁹ If a member of the team is found to have violated fundamental rights, the Agency shall request the Member State to remove that member immediately from the Agency's activity or the standing corps.¹⁰⁰ These complaints can be submitted in writing or through an online form by the individual directly affected by a violation.¹⁰¹ The requirement that only individuals who are directly affected may submit a complaint is a limitation to the system as it excludes the group of people who may have indirectly experienced a violation. The claimants are found with a burden of proof since they have to show that they were directly affected.¹⁰² Moreover, while it is stipulated that there is an appropriate procedure for determining the admissibility of cases¹⁰³, the actual procedure is not incorporated in the Regulation or made available. This questions the independent role of the Officer.

Lastly, the mechanism for forced-return monitors entails the obligation to submit a report on each operation to the executive director, the fundamental rights officer, and the designated national mechanisms. The pool of forced-return monitors consists of selected bodies of the Member States who meet the profile criteria set by the Management Board. Yet, the deployment of a monitor is at the request of Member States.¹⁰⁴

⁹⁶ Regulation 2019/1896, art 109.

⁹⁷ Regulation 2019/1896, art 109(5).

⁹⁸ Regulation 2019/1896, art 111.

⁹⁹ Regulation 2019/1896, art 111(6).

¹⁰⁰ Regulation 2019/1896, art 111(8).

¹⁰¹ Regulation 2019/1896, art 111(10).

¹⁰² Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

¹⁰³ Regulation 2019/1896, art 111(5).

¹⁰⁴ Regulation 2019/1896, art 51.

Despite the quite extensive amount of mechanisms incorporated into the Agency, some issues on the monitoring and accountability mechanisms are found remaining.

2.3: Framework on international cooperation

The general legal framework for cooperation with third countries was incorporated in Regulation 2007/2004.¹⁰⁵ Direct cooperation between the Agency and the competent authorities of third countries and international organisations was made available through working arrangements.¹⁰⁶ The working arrangements are limited to the management of operational cooperation and encompass mostly the participation of third countries in the Agency's activities.¹⁰⁷ It allows the third country to receive support from the Agency in technical assistance, training, and the exchange of information.¹⁰⁸ In its provisions, it is stated that they are not an international treaty, meaning that they are not legally binding under international law¹⁰⁹. In line with the thesis' focus on the newly established agreements, the working arrangements will not be included in the analyses that follow.

In line with the view that cooperation with third countries has been an essential element of the European integrated border management, the Agency enhanced its international cooperation with Regulation 2016/1624.¹¹⁰ The Agency can now deploy border management teams from the standing corps to the territory of third states as part of the coordination of an operation by establishing a Status Agreement.¹¹¹ The Status Agreement differs from working arrangements as the Agency has an executive cooperative role with the establishment of a Status Agreement. In addition, a provision about a non-binding character under international law lacks. The Status Agreement must be concluded between the EU and the specific third state concerned based on Article 218 TFEU.¹¹² All aspects necessary for the deployment of border management teams regarding the conduct of JOs, RBIs, and RJOs in the third country must be

¹⁰⁵ Regulation 2007/2004, art 14.

¹⁰⁶ Regulation 2019/1869, art 73(4). Until now these arrangements are concluded between the Agency and the competent authorities of 20 third states.

¹⁰⁷ Regulation 2007/2004, art 14(2).

¹⁰⁸ Regulation 2019/1896, art 73(4).

¹⁰⁹ Andrea Ott and others, 'EU Agencies and their international mandate: a new category of global actors?' (2013) CLEER WP 2013/7 < <https://www.asser.nl/cleer/publications/cleer-papers/cleer-wp-20137-ott-vos-and-coman-kund/> > accessed 5 June 2021.

¹¹⁰ Regulation 2016/1624, art 54(3).

¹¹¹ Regulation 2019/1896, art 73(3).

¹¹² Regulation 2019/1896, art 73(3); TFEU, art 218.

regulated through a Status Agreement.¹¹³ The European Commission has set up a model status agreement which will serve as a starting point for negotiations on all agreements.¹¹⁴

The model agreement primarily replicates relevant provisions from the Regulation including the procedures, civil and criminal liability, tasks, and powers of the actions of the border guards.¹¹⁵ Interestingly, the activities of team members in the Status Agreement are regulated under the same conditions as for operations with the Member States under the Agency's Regulation. The operations concluded will be led by the third country. The members of the teams deployed to third countries will have the authority to carry arms, use force and use national databases where necessary and will come under the command of the authorities of the third country.¹¹⁶ The phenomenon of the delegation of authority over military command to the third state authority seems unique under EU law. The granting of executive powers to the operational staff members may conflict with the primary legal provisions that the Member States regard as ultimately responsible for their own security and management of the external borders.¹¹⁷

A critical aspect of the Status Agreement is the possibility for members of the team deployed in the third country to enjoy immunity from jurisdiction by the third country.¹¹⁸ Instead of falling under the criminal jurisdiction of the third country, the team members seconded by a Member State fall under the jurisdiction of their host Member State.¹¹⁹ While the model status agreement mentions the jurisdictional rules for team members seconded by a Member State, it does not include any provision on the jurisdiction that prevails for the Agency's statutory staff. Here the question arises whether the statutory staff is exempt from jurisdiction at all or must adhere to the third country's jurisdiction. Additionally, while it has been stated that all members of the team should respect the laws of the third country,¹²⁰ the

¹¹³ Regulation 2019/1896, art 73(3).

¹¹⁴ Regulation 2019/1896, art 63(5).

¹¹⁵ Zoran Nechev and Others, 'Status Agreements: Frontex's Novel Cooperation with the Western Balkans' (2019) Policy Brief No 6/2019 < https://idscs.org.mk/wp-content/uploads/2019/11/A5_FrontexENG.pdf > accessed 2 June 2021.

¹¹⁶ Regulation 2019/1896, art 43(1); Commission (EC), 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard' (Communication) COM (2016) 0747 final, 22 November 2016 [hereinafter: Model Status Agreement], art 4(3).

¹¹⁷ David Rojo, 'Regulation 2019/1896 on the European Border and Coast Guard Agency (FRONTEX)' (*Caught You Red-Handed*, 14 November 2019) < <https://caughtredhanded.ideasoneurope.eu/2019/11/14/regulation-2019-1896-on-the-european-border-and-coast-guard-agency-frontex/> > accessed 9 June 2021.

¹¹⁸ Model Status Agreement, art 6(3).

¹¹⁹ Regulation 2019/1896, art 96; Model Status Agreement, art 6(7).

¹²⁰ Model Status Agreement, art 4(2).

enjoyment of immunity may result in a reluctance of border guards' engagement to the authorities of the third country.¹²¹

Like the conduct of operations in cooperation with a Member State, an additional operational plan needs to be concluded and agreed upon with the participating state.¹²² The operational plan for the Status Agreement includes all details of the operations, including the circumstances under which the Agency's personnel can use executive powers, provisions on fundamental rights and data protection, and details on the aims and objectives of the Agency's operations.¹²³ Before the enforcement of the Status Agreement, the European Parliament, the Council, and the Commission must be reported on the activities related to technical and operational assistance.¹²⁴ Moreover, again at the executive director's discretion, the Agency may suspend or terminate the action if the third country does not respect the provisions of the Status Agreement, the Operational Plan.¹²⁵ While the Status Agreement conducted with a third country will be made public, the Operational Plan must be requested and can be denied access. A concern may occur over the Agency's discretion concerning its activities.¹²⁶ The closed nature of the operational plans contrasts with the statement of the parliamentary rapporteur, Bettina Vollath, who states that "the Status Agreements are a formal measure to ensure transparency and democratic oversight of actions taken by the Agency in third countries".¹²⁷

The model agreement has yet served as the basis for three concluded status agreements. Two other agreements are still pending and may be concluded soon.

2.3.1: Concluded Status Agreements

¹²¹ Zoran Nechev and Others, 'Status Agreements: Frontex's Novel Cooperation with the Western Balkans' (2019) Policy Brief No 6/2019 < https://idscs.org.mk/wp-content/uploads/2019/11/A5_FrontexENG.pdf > accessed 2 June 2021.

¹²² Regulation 2019/1896, art 54(7).

¹²³ Statewatch, 'EU: Border externalisation: Agreements on Frontex operations in Serbia and Montenegro heading for parliamentary approval' (*Statewatch*, 11 March 2020) < <https://www.statewatch.org/news/2020/march/eu-border-externalisation-agreements-on-frontex-operations-in-serbia-and-montenegro-heading-for-parliamentary-approval/> > accessed 2 June 2021.

¹²⁴ Regulation 2019/1896, art 73(7).

¹²⁵ Model Status Agreement, arts 5(1) and 5(3).

¹²⁶ Statewatch, 'EU: Border externalisation: Agreements on Frontex operations in Serbia and Montenegro heading for parliamentary approval' (*Statewatch*, 11 March 2020) < <https://www.statewatch.org/news/2020/march/eu-border-externalisation-agreements-on-frontex-operations-in-serbia-and-montenegro-heading-for-parliamentary-approval/> > accessed 2 June 2021.

¹²⁷ Committee on Civil Liberties, Justice and Home Affairs, 'RECOMMENDATION on the draft Council decision on the conclusion of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia (15581/2018 – C9-0180/2019 – 2018/0409(NLE))' (29 January 2020) < https://www.europarl.europa.eu/doceo/document/A-9-2020-0019_EN.html > (Draft European Parliament Legislative Resolution).

Since the implementation of Regulation 2019/1869, Status Agreements have been conducted with three countries, including Albania¹²⁸, Serbia¹²⁹, and Montenegro¹³⁰. The Status Agreement with Albania entered into force on 1 May 2019, which led to the first launch of a coordinated JO on the territory of a third country. Since 15 July 2020, the Agency has launched its second operation in Montenegro.¹³¹ Status Agreements with North Macedonia and Bosnia and Herzegovina are still pending.¹³² Status Agreements have been conducted through negotiations with the particular third country. The included provisions that deviate from the model status agreement will be outlined.

Except for the Status Agreement with Albania, no definition of the executive powers of the members of the team deployed to the third country has been given. The definition by Albania states that “the powers necessary should be included in the operational plan”.¹³³ This remains a rather vague provision on what these powers specifically entail.

Furthermore, the Status Agreement concluded with Serbia includes an additional provision on weapons used by the team members deployed from the Agency. It states that “members of the team may use weapons only when it is necessary for self-defence to repel an immediate life-threatening attack against themselves or another person [...]”.¹³⁴ Contrary to the executive powers attributed to the statutory staff in the model agreement and the Regulation, Serbia’s agreement specifically states that the members of the team that are Agency’s staff do not have the authority to perform the tasks and exercise the executive powers required for border control and return operations.¹³⁵ This questions whether the statutory staff may be deployed at all to operations with Serbia and what tasks are assigned to statutory staff.

¹²⁸ Council Decision (EU) 2019/267 of 12 February 2019 on the conclusion of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania [2019] OJ L46 [hereinafter: Status Agreement with the Republic of Albania].

¹²⁹ Council Decision (EU) 2019/400 of 22 January 2019 on the on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia [2019] OJ L72 [hereinafter: Status Agreement with the Republic of Serbia].

¹³⁰ Council Decision (EU) 2020/729 of 26 May 2020 on the conclusion of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro [2020] OJ L173 [hereinafter: Status Agreement with Montenegro].

¹³¹ Statewatch, ‘Montenegro: Frontex launches second operation on non-EU territory’ (*Statewatch*, 23 July 2020) < <https://www.statewatch.org/news/2020/july/montenegro-frontex-launches-second-operation-on-non-eu-territory/> > accessed 2 June 2021.

¹³² Statewatch, ‘Montenegro: Frontex launches second operation on non-EU territory’ (*Statewatch*, 23 July 2020) < <https://www.statewatch.org/news/2020/july/montenegro-frontex-launches-second-operation-on-non-eu-territory/> > accessed 2 June 2021.

¹³³ Status Agreement with the Republic of Albania, art 2(12).

¹³⁴ Status Agreement with the Republic of Serbia, art 5(6).

¹³⁵ Status Agreement with the Republic of Serbia, art 5(9).

At last, the Status Agreement concluded with Montenegro includes an extra obligation for the members of the team. The members of the team that are witnesses of a criminal offense are obliged to provide evidence as witnesses in criminal proceedings.¹³⁶ This is explicitly not obliged in the provisions concluded by the other status agreements.¹³⁷

Despite the differences, all conducted agreements so far allow the Agency to carry out JOs, RBIs, and JROs on the borders of the EU and the third state.

2.4: Role of the Agency during an operation with and within a third country

The Agency's framework presented in the previous paragraphs shows the Agency's role during operations. The Agency's role during operations conducted with the Member States or conducted with third states seems to be similar. Next to a facilitating role, the analysis above shows that the Agency is specifically conferred a supervisory and intervention role during the execution of operations. The first role is explicitly found with the Agency's monitoring activities. The latter role comes into play when the host state does not take the necessary actions in regard to fundamental rights obligations.

While the Agency's operational mandate expanded with a standing corps including executive powers, the original role of the Agency has not been altered much. From the standing corps, only the statutory staff act can be attributed to the Agency. While the staff may be deployed to a third country and practice executive powers, the members of teams are put under the instructions of the third country. In addition, it is possible that the Status Agreement declares the statutory staff without executive powers during the operations in third countries. It can thus be concluded that the Agency does not directly enjoy executive powers from its standing corps, including its statutory staff. Yet, the statutory staff particularly can hold the Agency liable for any damage caused.

Nevertheless, the Agency has some influence on the instructions given to the members of the team. The Regulation sets out that the host Member State must take the Agency's suggestions into consideration and follow them as far as possible. While the Member State is not obliged to take action on the suggestions by the Agency, it may be difficult for the Member State not to comply. Taking into account the expert role of the Agency, together with the firm language in the provision, it seems that the Member State is expected to follow the instructions by the Agency. This suggests that the Agency has a deliberate influence on the instructions to

¹³⁶ Status Agreement with Montenegro, art 7(6).

¹³⁷ Status Agreement with the Republic of Serbia, art 7(5); Status Agreement with the Republic of Albania, art 6(5).

the members of the teams. Note that this may influence both statutory and seconded staff members.

Furthermore, the Agency may influence the course of action during an operation through its executive director. The executive director can be seen as a key player during operations as it is found with specific responsibilities in relation to fundamental rights. The executive director makes up, together with the participating states, the operational plan, which consists of all the important information for the conducted operation. Additionally, a key task of the executive director is to withdraw financial support or suspend or terminate the operation when fundamental rights violations are concerned. Moreover, the executive director must investigate the complaints of fundamental rights violations against staff members and can decide, together with the fundamental rights officer, to remove team members who violated fundamental rights. Despite the lack of specific guidelines to react to potential violations, the executive director can intervene in the operations. In addition, the executive director has a highly responsible role for the Agency's compliance with fundamental rights obligations.

In conclusion, in the absence of having authority over the executive powers, the Agency can sufficiently influence the course of action during operations conducted both in the Member States and third countries. Specifically with the duty to interfere.

Chapter 3: Fundamental Rights obligations

3.1: EU Fundamental Rights sources

The establishment of Frontex as an EU Agency came with binding fundamental rights¹³⁸ legislation. Following Regulation 2019/1896, the standards on protecting fundamental rights are set out in article 80 of the Regulation. The provision states that

“The Agency shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law [...] and obligations related to access to international protection, in particular the principle of *non-refoulement*.”¹³⁹

The legal framework on EU fundamental rights has been strengthened with the *Treaty on European Union* (TEU).¹⁴⁰ The TEU reflects respect “for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights”.¹⁴¹ Foremost, EU organisations are bound by the general principles of EU law. Furthermore, the TEU stipulates that the general principles of EU law are based on fundamental rights guaranteed by the *European Convention on Human Rights* (ECHR).¹⁴² The general principles included act as guidelines for the interpretation of EU law.¹⁴³ The ECHR is binding upon states that have signed and ratified them. The EU is not a party to the ECHR, which means that the provisions do not directly bind the EU and its institutions.

Until 2009, it was not even possible for the EU to become a party to the ECHR. However, since the enforcement of the Lisbon Treaty, such competence is provided. The EU’s

¹³⁸ The European Union Agency for Fundamental Rights has noted that ‘The term ‘fundamental rights’ is used in [...] EU to express the concept of ‘human rights’ within a specific EU internal context. Traditionally, the term ‘fundamental rights’ is used in a constitutional setting whereas the term ‘human rights’ is used in international law. The two terms refer to the similar substance as can be seen when comparing the content in the Charter [...] with that of the European Convention on Human Rights and the European Social Charter.’ < <https://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights> >.

¹³⁹ Regulation 2019/1896, art 80(1).

¹⁴⁰ Consolidated version of the Treaty on European Union [2002] OJ C115/13 [hereinafter: TEU].

¹⁴¹ TEU, art 2; Ottavio Marzocchi, ‘The protection of fundamental rights in the EU’ (*Fact sheets on the European Union*, December 2020) < <https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu> > accessed 2 June 2021.

¹⁴² TEU, art 6(3).

¹⁴³ Yashar Modaber, ‘Fundamental Rights Outside of the EU – Implications of Frontex Multi-actor Operations Beyond the External Borders’ (Graduate Thesis, Lund University 2019) < <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8991460&fileOId=8994251> >.

accession to the ECHR denotes the process whereby the EU is ought to join the community of states which are party to the ECHR. This accession by the EU makes that the EU is subject to the same rules on fundamental rights as the Member States.¹⁴⁴ Moreover, it makes it possible for individuals to resort to the ECtHR for acts of EU institutions. However, the draft Accession Agreement, which was presented in 2013, received objections from the CJEU resulting in a halt to the establishment of the Accession Agreement. Currently, the negotiations for drafting the Accession Agreement are scheduled to resume in June 2021.¹⁴⁵ Solutions will be considered to the CJEU's comments, leading to renegotiations of the draft agreement. Considering that the Accession Agreement has not been established yet, the EU and its institutions are not directly bound to the ECHR.¹⁴⁶ However, since the general principles of law bind the Agency, and the general principles of law are based on the fundamental rights in the ECHR,¹⁴⁷ the document can be found applicable to the Agency.¹⁴⁸

Another essential fundamental rights document is the *Charter of Fundamental Rights of the European Union* (EU Charter), which entered into force with the Treaty of Lisbon.¹⁴⁹ The EU Charter has the same legal value as EU treaties, obtaining a binding force.¹⁵⁰ With the enforcement of the EU Charter, a new institutional and legal framework was build including effective accountability mechanisms to address human rights violations.¹⁵¹ From the premise that any EU act must be interpreted in the light of the EU Charter, the Agency's establishment came with the duty to respect, observe and promote the application of the rights and freedoms listed in the EU Charter¹⁵². In the Regulation the EU Charter has specifically been referenced.¹⁵³ The EU Charter's binding legal status means that the Agency is subject to the

¹⁴⁴ Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing, 2014) ISBN 978-92-871-7705-6.

¹⁴⁵ Marie Lecerf, 'Completion of EU Accession to the European Convention on Human Rights (European Parliament, Legislative Train, 21 May 2021) < <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr> > accessed 2 June 2021.

¹⁴⁶ Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing, 2014) ISBN 978-92-871-7705-6.

¹⁴⁷ TEU, art 6(3).

¹⁴⁸ Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45.

¹⁴⁹ Charter of Fundamental Rights of the European Union [2012] OJ C 326 [hereinafter: EU Charter].

¹⁵⁰ TEU, art 6(1).

¹⁵¹ Elspeth Guild and others, 'Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office' (2011) < https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_02_study_fundamental_rights_en.pdf > accessed 30 May 2021.

¹⁵² Yashar Modaber, 'Fundamental Rights Outside of the EU – Implications of Frontex Multi-actor Operations Beyond the External Borders' (Graduate Thesis, Lund University 2019) < <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8991460&fileId=8994251> >.

¹⁵³ Regulation 2019/1896, art 80(1).

Charter and can be held accountable before the CJEU for actions within the scope of EU law¹⁵⁴. The actions referred to include the official functions conferred to the Agency and included in the Regulation 2019/1896.¹⁵⁵

Together the ECHR and the EU Charter are relevant fundamental rights regimes in which the Agency operates.¹⁵⁶

3.1.1: Extraterritorial application

With the possibility of carrying out joint operations on the territory of neighbouring third states, the extraterritorial application of the relevant legal fundamental rights documents is questioned. A limitation can be noted in applying the ECHR or the EU Charter on the extraterritorial ground as third states are not directly bound by EU law or the Agency's Regulation.¹⁵⁷ In addition, third countries may not be a party to the fundamental rights documents, which give implications when the Agency conducts Status Agreements with that particular third country. The Agency then can theoretically deploy its officers in a state that does not have the same fundamental rights obligations.¹⁵⁸ Jurisdiction is a necessary condition for establishing responsibility for acts or omissions imputable to the Agency. In the following, the extraterritorial application of the ECHR and the EU Charter will be examined.

The scope of EU legislation under the ECHR is set by Article 1, which states that “the contracting parties shall secure everyone within their jurisdiction the rights and freedoms [...]”.¹⁵⁹ The scope of applicability of the ECHR in this article is set by jurisdiction instead of territory. The concept of jurisdiction represents a normative relationship between a subject and its authority.¹⁶⁰ In the case, *Al-Skeini and others v. the United Kingdom*, the exercise of jurisdiction found a necessary condition for responsibility to arise for acts or omissions that

¹⁵⁴ Guild E, Carrera S, den Hertog L and Parkin J, ‘Implementation of the EU Charter of Fundamental Rights and its impact on EU home affairs agencies: Frontex, Europol, and the European Asylum Support Office’ (2011) <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf> accessed 30 May 2021.

¹⁵⁵ The actions that are conferred to the Agency are presented in Chapter 2 of this thesis.

¹⁵⁶ Yashar Modaber, ‘Fundamental Rights Outside of the EU – Implications of Frontex Multi-actor Operations Beyond the External Borders’ (Graduate Thesis, Lund University 2019) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8991460&fileId=8994251>>.

¹⁵⁷ Melanie Fink, *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

¹⁵⁸ Yashar Modaber, ‘Fundamental Rights Outside of the EU – Implications of Frontex Multi-actor Operations Beyond the External Borders’ (Graduate Thesis, Lund University 2019) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8991460&fileId=8994251>>.

¹⁵⁹ ECHR, art 1.

¹⁶⁰ Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25(4) LJIL 857.

lead to a breach of the rights and freedoms outlined in the ECHR.¹⁶¹ A non-geographical approach is further recognized in the judgment in *Issa and Others v Turkey*. In this case, the Court recalled that the concept of jurisdiction under the ECHR is not limited to the territory of a state party. It states that “the Convention could not be interpreted to allow a Contracting State to perpetrate violations on the territory of another state, which it could not perpetrate on its own territory”.¹⁶² While state parties' jurisdiction was primarily territorial bound, the scope has evolved with the evolution of the interpretation of the notion of jurisdiction provided by the ECtHR.

In the context of the Agency's operations, *Hirsi Jamaa and Others v. Italy* show that during the conduct of an operation the host state authorities, in this case, Italy, had jurisdiction over the applicants for Article 1 of the ECHR. The alleged violations happened when the Italians transferred the applicants onto military ships returning them to Libya. The Court's judgment stated that the applicants fell within the jurisdiction of Italy, considering that the vessel sailing on the high seas was exclusively subject to Italy.¹⁶³ Based on this case, the ECtHR clarified that the jurisdiction of a state reaches beyond territorial jurisdiction. Furthermore, the ECtHR assessed the existence of jurisdiction through the degree of factual power, authority, or control over territory or people.¹⁶⁴ Nevertheless, the concept of jurisdiction in case law differs from each other as it is either determined by the state party's effective exercise of control¹⁶⁵ or normative control.¹⁶⁶

In conclusion, the scope of the ECtHR recognizes an extraterritorial application with the requirement that a jurisdictional relationship between the state party and the individuals is present.

Likewise, the EU Charter does not explicitly set a territorial scope of application. Instead, the EU Charter includes a provision stating that the meaning and scope of the EU Charter rights

¹⁶¹ *Al-Skeini and others v. the United Kingdom* App no 55721/07 (ECtHR 7 July 2011), ‘The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention’.

¹⁶² *Issa and Others v Turkey* App. No. 31821/96 (ECtHR 16 November 2004).

¹⁶³ ECHR, art 32; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012).

¹⁶⁴ Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25(4) LJIL 857.

¹⁶⁵ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012), ‘Whenever the State, through its agents operating outside its territory, exercised control and authority over an individual, and thus its jurisdiction, the State was under an obligation to secure the rights under the Convention to that individual’.

¹⁶⁶ *Al-Skeini and others v. the United Kingdom* App no 55721/07 (ECtHR 7 July 2011), ‘when a State bound by the Convention exercised public powers on the territory of another State’.

shall be the same as laid down in the ECHR.¹⁶⁷ This provision was meant to prevent inconsistencies between the two documents.¹⁶⁸ In this regard, the scope set by the ECHR also applies to the EU Charter. While this approach would prevent frictions regarding the levels of protection under both documents, critique has formed stating that the regimes may be too inhomogeneous to have a common requirement¹⁶⁹.

A different approach to its scope is found in the formulation of Article 51(1), stating that “the institutions, bodies, offices, and agencies of the EU are bound by the EU Charter only when implementing EU law”.¹⁷⁰ Under this conception, the EU Charter’s rights and principles are considered to apply whenever an EU institution or Member State exercises its powers, even if that is beyond the confines of the EU.¹⁷¹ In *Ledra Advertising v. Commission and ECB*, the CJEU concluded that the acts adopted outside the EU legal order still led to the applicability of EU law, including the EU charter.¹⁷² In addition, in *Bank Saderat Iran v Council* the CJEU states that the EU Charter applies to any entity located inside and outside the EU, whose legal interests have been affected by EU law.¹⁷³ This implies that the CJEU considers the application of the EU Charter not by territory but by the action in the capacity of an EU institution. Thus, the scope of application encompasses all actions of EU institutions and bodies, wherever they are performed inside or outside the EU’s borders.¹⁷⁴

The exclusion of a territorial scope in the Conventions creates a relatively broad geographic scope.¹⁷⁵ While the scope of applying both fundamental rights documents does not necessarily give rise to its extraterritorial application, case law shows that extraterritorial application is recognized. The approaches incorporated in the legal documents appear suitable in light of developments in the law. Considering the trend where EU institutions develop more

¹⁶⁷ EU Charter, art 52(3).

¹⁶⁸ Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, explanation on art 52; Sandra Hummelbrunner, ‘Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad? Reflections in light of the *Front Polisario* saga’ (2019) CLEER Papers 2019/2 < https://www.asser.nl/media/679407/cleer_19-02_web.pdf > accessed 2 June 2021.

¹⁶⁹ Sandra Hummelbrunner, ‘Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad? Reflections in light of the *Front Polisario* saga’ (2019) CLEER Papers 2019/2 < https://www.asser.nl/media/679407/cleer_19-02_web.pdf > accessed 2 June 2021.

¹⁷⁰ EU Charter, art 51.

¹⁷¹ Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25(4) LJIL 857.

¹⁷² Case C-8/15 *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701.

¹⁷³ Case T-494/10 *Bank Saderat Iran v Council of the European Union* [2013] ECLI:EU:T:2013:59.

¹⁷⁴ Sandra Hummelbrunner, ‘Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad? Reflections in light of the *Front Polisario* saga’ (2019) CLEER Papers 2019/2 < https://www.asser.nl/media/679407/cleer_19-02_web.pdf > accessed 2 June 2021.

¹⁷⁵ Cedric Ryngaert, ‘EU trade agreements and human rights: from extraterritorial to territorial obligations’ (2018) 20(3-4) ICLR 374.

on the international plane, the non-territorial approaches can narrow the accountability gap arising from institutions' extraterritorial actions or effects.

3.2: Risk to Fundamental Rights violations

While fundamental rights provisions and mechanisms have been included in the Regulation, fundamental rights may be infringed during JOs, RBIs, and JROs. Fundamental rights that are at risk of being violated in the course of operations include, among others, the right to asylum,¹⁷⁶ the prohibition of torture or inhuman or degrading treatment or punishment,¹⁷⁷ the prohibition of *refoulement*,¹⁷⁸ the prohibition of collective expulsions,¹⁷⁹ the right to private and family life,¹⁸⁰ and the prohibition of arbitrary detention.¹⁸¹ These fundamental rights norms are enshrined in both the ECHR and the EU Charter.¹⁸²

Operations on the territory of third countries through the establishment of a Status Agreement are only recently launched with the result that there are no reports about these operations published yet. The thesis will present potential fundamental rights violations based on reports covering former executed operations. Since the operations in and outside the EU are regulated similarly, it can be expected that the violations of former operations may occur in future operations.

3.2.1: Pushbacks

The Human Rights Watch¹⁸³ and the Border Violence Monitoring Network¹⁸⁴ have reported on violations of fundamental rights during operations led by the Agency. Activities that aim to prevent migrants from entering the EU are often found to be conducted irrespective of the

¹⁷⁶ EU Charter, art 18.

¹⁷⁷ ECHR, art 2; EU Charter, art 4.

¹⁷⁸ ECHR, art 3; EU Charter, art 19(2).

¹⁷⁹ ECHR, art 4; Protocol No 4 EU Charter, art 19(1).

¹⁸⁰ ECHR, art 8; EU Charter, art 7.

¹⁸¹ ECHR, art 5

¹⁸² Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45.

¹⁸³ Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (21 September 2011) < <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> > accessed 30 May 2021.

¹⁸⁴ The Border Violence Network is a watchdog platform of NGO's working in Greece, Turkey and Western Balkans; Border Violence Monitoring Network, 'Balkan Region April 2021' (Illegal push-backs and border violence reports, 14 May 2021) < <https://www.borderviolence.eu/balkan-region-report-april-2020/> > accessed 3 June 2021.

reason why an individual is seeking access to the EU.¹⁸⁵ During these activities called pushbacks, asylum seekers, refugees, and irregular migrants, are intercepted and turned back to the neighbouring country or their origin countries. Reports have consistently outlined the pushback of irregular migrants where the right to claim asylum is not adequately assured.¹⁸⁶ In addition, continuous accusations of violence to migrants during pushbacks have been made.¹⁸⁷

Several fundamental rights are found to be violated during pushback operations. First, the principle of *non-refoulement*, constituted in article 19(2) of the EU Charter,¹⁸⁸ may be breached when potential asylum seekers are sent back without an adequate individual examination. Second, the prohibition of ill-treatment may be violated when migrants are exposed to the risk of inhuman and degrading treatment in the destination country or during the Agency's activity of returning.¹⁸⁹ Third, the prohibition of collective expulsion is breached when the transfer of migrants is done without examining each applicant's situation.¹⁹⁰

An example of a pushback is presented in *Hirsi Jamaa and Others v Italy* before the ECtHR, where the Court concluded that Italy violated its duty to fundamental rights.¹⁹¹ Italy intercepted more than 20 Somalian and Eritrean migrants on the high seas and returned them to Libya without any individual examination.¹⁹² The Court found that Italy did not comply with the prohibition of collective expulsion as the transfer had been carried out without examining each applicants' individual situation.¹⁹³ In addition, Italy violated Article 3 of the ECHR, the prohibition of torture, as the applicants had been exposed to the risk of ill-treatment in Libya.

¹⁸⁵ Ska Keller and others, 'Frontex Agency: Which guarantees for human rights? A study conducted by Migreurop (www.migreurop.org) on the European External Borders Agency in view of the revision of its mandate' (25 May 2011) < <https://www.frontexit.org/en/docs/6-frontex-which-guarantees-for-human-rights/file> >.

¹⁸⁶ Human Rights Watch, 'Greece: Violent Pushbacks at Turkey Border' (*Human Rights Watch*, 18 December 2018) < <https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border> > accessed 3 June 2021; Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

¹⁸⁷ Border Violence Monitoring Network, 'Balkan Region July 2020' (Illegal push-backs and border violence reports, 15 August 2020) < https://www.borderviolence.eu/wp-content/uploads/2020_July_Report.pdf > Accessed 30 May 2021; Border Violence Monitoring Network, 'Balkan Region April 2021' (Illegal push-backs and border violence reports, 14 May 2021) < <https://www.borderviolence.eu/balkan-region-report-april-2020/> > accessed 3 June 2021.

¹⁸⁸ EU Charter, art 19(2).

¹⁸⁹ EU Charter, art 19.

¹⁹⁰ Protocol No 4 EU Charter, art 19(1); Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45.

¹⁹¹ EU Charter, art 1.

¹⁹² *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012).

¹⁹³ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR 23 February 2012).

Moreover, recently the Border Violence Monitoring Network reported on the Agency's involvement in pushback operations with Croatia. This report states that people are denied access to asylum procedures and pushed back to Bosnia and Herzegovina. The Slovenian Administrative Court of Slovenia had concluded that the Republic of Slovenia violated the Applicants' right to asylum, the prohibition of collective expulsion, and the prohibition of torture.¹⁹⁴

In its latest report of 2021, the Border Violence Monitoring Network reported pushback activities on the Albanian border. While the report states that it is difficult to document the Agency's role due to the officer's mobile tasks, several testimonies reported on the presence of the Agency.¹⁹⁵ On 21 May 2019, the Agency conducted its first operation outside the EU borders with the Republic of Albania¹⁹⁶. While it cannot be affirmed, these fundamental rights violations may be linked to that operation. Indeed, it may be assumed that the fundamental rights at risk presented in the reports and cases will continue to be a risk in operations conducted through Status Agreements.

3.2.2: Procedural guarantees

Moreover, in the context of operations, intercepted or apprehended individuals can be put in detention where authorities need to respect procedural guarantees. Fundamental rights that are sensitive in this regard include the right to protect private and family life,¹⁹⁷ the prohibition of torture or inhuman or degrading treatment or punishment,¹⁹⁸ and the prohibition of arbitrary detention.¹⁹⁹

Accusations on the Agency's violation of these rights are presented in the Human Rights Watch report 'The EU's Dirty Hands'.²⁰⁰ During the RABIT operation at the border between Greece and Turkey, the Agency had taken migrants to detention centres and police stations, which did not meet the minimal requirements on fundamental rights. The report stated

¹⁹⁴ Border Violence Monitoring Network, 'Balkan Region July 2020' (Illegal push-backs and border violence reports, 15 August 2020) < https://www.borderviolence.eu/wp-content/uploads/2020_July_Report.pdf > accessed 30 May 2021.

¹⁹⁵ Border Violence Monitoring Network, 'Balkan Region April 2021' (Illegal push-backs and border violence reports, 14 May 2021) < <https://www.borderviolence.eu/balkan-region-report-april-2020/> > accessed 3 June 2021.

¹⁹⁶ Frontex, 'Frontex Launches First Operation in Western Balkans' (*Frontex*, 21 Mei 2019) < <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM> > accessed 3 June 2021.

¹⁹⁷ ECHR, art 8; EU Charter, art 7.

¹⁹⁸ ECHR, art 2; EU Charter, art 4.

¹⁹⁹ ECHR, art 5

²⁰⁰ Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (21 September 2011) < <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> > accessed 30 May 2021.

that the Agency did not meet its “obligations to respect the absolute prohibition on exposing individuals to inhuman and degrading treatment [...]”.²⁰¹ In March 2020, another RABIT operation was conducted, raising further questions regarding the fundamental rights situation at the border between Greece and Turkey.²⁰² The possibility of fundamental rights violations occurring can be assumed very high considering the previous deployed RABIT operations. Unclear is whether the fundamental rights issues were taken into account before the launching of a new operation.

3.3: Agency’s scrutiny

Significant tensions have risen between the Agency’s mandate on border management and their obligations to comply with fundamental rights.²⁰³ Despite developments in their Regulation on protecting fundamental rights during operations, tensions have remained.²⁰⁴

It is disputable that while the Agency must terminate or suspend at the executive director’s discretion an operation where it is aware of fundamental rights violations that occur or may occur, only once the Agency suspended an operation.²⁰⁵ In January 2021, the Agency suspended the operational activities in Hungary after the ruling of the CJEU that the practices at the border were in violation of fundamental rights.²⁰⁶ Considering that the Agency only suspended its activities after the CJEU concluded violations, the mechanism to prevent fundamental rights violations might not be sufficient. In addition, the amount of extensive reports organisations presented in the context of the Agency’s operations are not reflected in

²⁰¹ Human Rights Watch, ‘The EU’s Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece’ (21 September 2011) < <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> > accessed 30 May 2021.

²⁰² Lena Karamanidou and others, ‘Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex’ (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

²⁰³ Ska Keller and others, ‘Frontex Agency: Which guarantees for human rights? A study conducted by Migreurop (www.migreurop.org) on the European External Borders Agency in view of the revision of its mandate’ (25 May 2011) < <https://www.frontexit.org/en/docs/6-frontex-which-guarantees-for-human-rights-file> >.

²⁰⁴ Lena Karamanidou and others, ‘Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex’ (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

²⁰⁵ Meijers Committee, ‘Frontex and Pushbacks: Obligations and Accountability (CM2105)’ (22 April 2021) < <https://euruleoflaw.eu/cm2105-frontex-and-pushbacks/> > accessed 3 June 2021.

²⁰⁶ Case C-808/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:1029.

the limited amount of reports that have been filed through the monitoring and reporting mechanisms of the Agency.²⁰⁷ The effectiveness of the mechanisms is questioned.

Further, the limitation on access to information about the Agency's actions surrounding JOs and JROs has not contributed positively to the Agency's transparency. The Agency has more often refused to release documents based on the rights of protection of information. In particular cases, the CJEU has declined access to such information for security reasons.²⁰⁸ Moreover, the operational plans of the conducted operations are only accessible on request. The CJEU concluded that the Agency enjoys "discretion in using the exception of the protection of European public security to justify non-disclosure of information related to its operations".²⁰⁹ This makes it more complicated to assess and address fundamental rights concerns regarding the Agency.

The shortcomings recognized in the Agency's framework may negatively contribute to the sensitivity of fundamental rights violations during its operations.²¹⁰

²⁰⁷ Meijers Committee, 'Frontex and Pushbacks: Obligations and Accountability (CM2105)' (22 April 2021) <<https://euruleoflaw.eu/cm2105-frontex-and-pushbacks/>> accessed 3 June 2021.

²⁰⁸ Case T-31/18 *Izusquiza and Semsrott v. Frontex* [2019] OJ C 112, ECLI:EU:T:2019:815, the General Court dismissed "the action for annulment of a decision of Frontex concerning the refusal to access information related to naval operations in the Mediterranean brought by EU citizens".

²⁰⁹ Case T-31/18 *Izusquiza and Semsrott v. Frontex* [2019] OJ C 112, ECLI:EU:T:2019:815.

²¹⁰ European Council on Refugees and Exiles, 'ECRE Comments on the commission proposal for a regulation on the European Border and Coast Guard' (Communication) COM (2018) 631 final, 12 September 2018; Lena Karamanidou and others, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (2020) Respond Working Paper Series 2020/59 < <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex> > accessed 31 May 2021.

Chapter 4: Responsibility for possible Fundamental Rights violations

4.1: Responsibility under the ECHR

To determine responsibility under ECHR law, the law of international responsibility will be as applied by the ECtHR. The law on international responsibility determines the responsibility of states and international organisations (IO's) for internationally wrongful acts. State responsibility is regulated through the 'Articles on Responsibility of States for Internationally Wrongful Acts (also named 'Articles on State Responsibility')'.²¹¹ Accordingly, responsibility regarding IOs is set out in the 'Articles on the Responsibility of International Organizations' (ARIO).

For responsibility to arise, conduct must be qualified as an internationally wrongful act. The International Law Commission defines this as "conduct consisting of an action or omission attributable to a state or international organisation and constitutes a breach of an international obligation".²¹² The fundamental rights presented in the previous Chapter are embedded in the ECHR and are qualified as international wrongful acts. Any court or tribunal having jurisdiction on the matter may find that the state or an IO has breached its international legal obligations.

In the following, the thesis will set out whether the ARIO applies to the Agency.²¹³

4.1.1: ARIO

The Articles within the ARIO apply to IO's that are "established by a treaty or other instrument governed by international law and possessing its own international legal personality".²¹⁴ According to the ICJ, an organisation must possess this requirement of International Legal Personality (ILP) to incur international responsibility.²¹⁵ When an IO incurs ILP, it can bear rights and obligations as a distinct entity of its members or creators.²¹⁶ In general, EU Agencies

²¹¹ ARIO, art 2(a).

²¹² ILC, 'Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations [ARIO]' (26 April – 3 June and 4 July – 12 August 2001) (UN Doc A/66/10) [hereinafter: ARIO], art 4.

²¹³ In literature the ARIO is more often applied to the Agency's operations, see Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45; Anjum Shabbir, 'The Accountability of FRONTEX for Human Rights Violations at Europe's Borders' [2012] SSRN EJ < <https://ssrn.com/abstract=2280707> > accessed 2 June 2021, the authors consider the ARIO rules by analogy, as they do state that the Agency does not fit into the traditional understanding of an IO.

²¹⁴ ARIO, art 2(a).

²¹⁵ ILC, 'First Report on Responsibility of International Organizations' (5 May-6 June and 7 July-8 August 2003) UN Doc. A/CN.4/532. < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/300/28/PDF/N0330028.pdf?OpenElement> > accessed 29 May 2021.

²¹⁶ Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45.

are established with the provision of legal personality, meaning they have rights and duties under EU law, including the legal capacity to act within the Member States' legal systems.²¹⁷ Similarly, the Agency is endorsed with legal personality under EU law²¹⁸ and can therefore be held liable under EU law when it breaches rights and duties independently from the EU and the Member State.²¹⁹ While the Agency incurs domestic legal personality, its legal status for extraterritorial actions beyond EU territory remains challenging to appoint. The EU Agencies' evolving international dimension questions the legal nature of their activities on the international plane and their legal status as global actors.²²⁰

Since the Agency is increasingly interacting internationally with third countries and can deploy its staff to operations outside the EU, the thesis presupposes that the Agency certainly has an international dimension. In addition, the Agency bears international obligations given the explicit mentioning of the EU Charter and international law in the Regulation²²¹. In line, the Common Approach on EU Agencies acknowledges that EU Agencies can pursue international cooperation.²²²

While the concept of ILP remains vague for international organisations, the thesis will consider the often used approach by the ICJ in its advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations* (hereinafter: *Reparations for Injuries*).²²³ For the ARIIO to be found applicable to the Agency, the Agency must be acknowledged possessing ILP. The following paragraph will set out the assessment of the legal status of the Agency.

4.1.2: International Legal Personality

Based on the ICJ's opinion, two elements are required for an organisation to incur ILP. First, the organization must be a permanent association of states where its legal powers and purpose

²¹⁷ Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²¹⁸ Regulation 2019/1896, art 93(2) states "[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".

²¹⁹ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²²⁰ William Worster, 'Relative International Legal Personality of Non-State Actors (2016) 42(1) BJIL 207.

²²¹ Regulation 2019/1896, art 80(1).

²²² Council of the European Union, 'Evaluation of European Union Agencies – Endorsement of the Joint Statement and Common Approach' (2012) Doc 11450/12, 18 June 2012 < <https://data.consilium.europa.eu/doc/document/ST-11450-2012-INIT/en/pdf> > accessed 6 June 2021, para 25.

²²³ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 < <https://www.icj-cij.org/en/case/4/advisory-opinions> > [178]–[179].

are clearly distinguished from its Member States.²²⁴ Second, the organization must enjoy independent functions exercisable on the international plane.²²⁵

The first element may be applicable to the Agency considering the ICJ's approach in the advisory opinion on the *Reparations for Injuries*.²²⁶ In the advisory opinion the UN was found to enjoy ILP as it met the requirement of independent action. Conform the case, the UN is established with permanent organs which have special tasks and decision-making powers.²²⁷ Comparing this with the establishment of the Agency, a similar structure is recognized. The Agency's establishment came with a significant degree of administrative, financial, and legal autonomy. The enjoyment of legal autonomy allows the Agency to fulfil tasks independently from the European Commission.²²⁸ Furthermore, the Agency is set with permanent organs, including the Management Board, which establishes the budget and controls the Agency's functions.²²⁹ Since the establishment of its standing corps, the Agency has organs with executive powers.²³⁰ Consequently, the Agency is found to meet the first element required to be considered an IO.

The second element requires the Agency to have an independent international function. Fink²³¹ finds that the Agency's ILP can be detected where the Agency has concluded agreements with other IO's. The Agency's international cooperation mandate constituted international cooperation with international organisations and the authorities of third countries.²³² Formalized through agreements, a legal nature between the Agency and other IO's is found.²³³ However, Fink²³⁴ acknowledges only a restricted ILP as the Status Agreements, are concluded between the EU and the Member States. It is questioned whether the Agency

²²⁴ Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²²⁵ James Fry, 'Rights, Functions, and International Legal Personality of International Organizations' (2018) 36(2) BUIJ 221.

²²⁶ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 < <https://www.icj-cij.org/en/case/4/advisory-opinions> > [178]–[179].

²²⁷ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 < <https://www.icj-cij.org/en/case/4/advisory-opinions> > [178]–[179].

²²⁸ Regulation 2019/1896, art 15(1).

²²⁹ Izabella Majcher 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex Shared Responsibility or Complicity' (2015) 7 SJLS 45.

²³⁰ See Chapter 2.2.1 on the Agency's standing corps and its operational mandate.

²³¹ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²³² Regulation 2019/1896, art 71-77.

²³³ Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²³⁴ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

can be found autonomous from the EU and its Member States. In a similar vein, Coman-Kund²³⁵ stresses that the EU Agency Europol cannot be found with ILP as it does not function in detachment from the EU and its Member States.²³⁶ EU Agencies are part of the EU and therefore cannot be found as separate IO's.²³⁷ The working paper of Ott and others²³⁸ shows that external actions by the majority of the EU Agencies are not bound by international agreements however consist of administrative or technical cooperation, which is treated as a binding commitment. Hence, the EU Agencies do not fall under international law, showing properties of administrative law beyond the national and European system.

As a result, the Agency does not fulfil the requirements set by the ICJ. It can be concluded that EU Agencies and thus the Agency does not incur ILP.²³⁹ As the EU Agencies' action on the international plane is ultimately performed on behalf of the EU, the EU would rather possess ILP.²⁴⁰ As the rules on responsibility for IOs set out in the ARIO cannot be applied to the Agency, the Agency cannot be found responsible for its extraterritorial activities under International law.

While the analysis is based on the requirements set by the ICJ, ambiguity regarding the determination of IPL prevails in literature. The lack of clarity on the legal position of EU Agencies comes with uncertainty regarding the extent to which international agreements can be concluded under international law.²⁴¹ Where EU Agencies are bound to act on a technical level, performing administrative actions on the international plane, it is difficult for them to acquire their own legal status on the international level.²⁴²

²³⁵ Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²³⁶ The comparison of Frontex to Europol in the context of international legal personality is relevant considering the similar enjoyment of powers in the area of external relations.

²³⁷ Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

²³⁸ Andrea Ott and others, 'EU Agencies and their international mandate: a new category of global actors?' (2013) CLEER WP 2013/7 < <https://www.asser.nl/cleer/publications/cleer-papers/cleer-wp-20137-ott-vos-and-coman-kund/> > accessed 5 June 2021.

²³⁹ For a similar position, see Violata Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff: Leiden, Boston, 2016), 398.

²⁴⁰ TFEU, arts 216-218 deals with the external action and international agreements, it confirms the international legal personality of the EU; Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁴¹ Niels Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law' (2016) 35(1) YEL 471.

²⁴² Floris Coman-Kund. 'EU Agencies as Global Actors: a Legal Assessment of Europol's International Dimension' (2014) Maastricht Faculty of Law Working Paper No. 2014/6 < <https://doi.org/10.2139/ssrn.2506568> > accessed 30 May 2021.

4.2: Liability under EU law

The allocation of liability for breaches of fundamental rights enshrined in the EU Charter will be assessed through EU public liability law. The Agency can be brought before the CJEU to account for its conformity with EU law.²⁴³ Two principal direct remedies are available to individuals against acts conducted by EU Agencies. The first is the action for annulment that enables the CJEU to review the legality of the acts adopted by the Agency.²⁴⁴ If successful, the annulment of the contested act is the result. The second remedy is the action for damages, whose primary function is to compensate for the damage suffered by the violation.²⁴⁵ With the view that the Agency's activities during operations consist of factual conduct, the paper will focus on the second remedy. In light of the protection of fundamental rights, the action for damages may serve as a substantive remedy under EU law. While remedy is often provided after the harmful conduct, liability law also aims to prevent future harmful behaviour through discouragement.²⁴⁶

The rules on liability will be assessed through contemporary case law. It must be noted that the EU action for damages has not sufficiently served to ensure fundamental rights accountability yet. The thesis will critically assess whether the rules on liability apply to the Agency and in the context of its operations.²⁴⁷

4.2.1: Non-contractual liability

Before applying the rules on liability to the Agency, it must be established if the Agency's conduct engages liability. The general principles of rights on non-contractual liability common to the legal system of the EU, EU agencies, and the Member States are set out in Article 340 TFEU and states that "[...] the Union shall [...] make good any damage caused by its institutions or by its servants in the performance of their duties".²⁴⁸ From this provision, it seems that non-contractual liability rather lies with the EU than the EU agencies as it specifically appoints the

²⁴³ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁴⁴ TFEU, art 263.

²⁴⁵ TFEU, art 340.

²⁴⁶ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁴⁷ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455, sets out general rules on allocation of liability from the CJEU case law that govern situations of violations of EU law with the most common multi-actor situations.

²⁴⁸ TFEU, art 340(2).

EU to make good any damage.²⁴⁹ Hence, case law shows that the Court exceeds the strict requirement as it sets two extra elements that may identify whether an EU body can incur non-contractual liability.²⁵⁰ First, the EU body must act on behalf of the European Community, and second, the Treaty authors must have intended Article 340 TFEU to refer to that EU body.²⁵¹

For the first requirement, case law shows that EU Agencies act on behalf of the EU despite being established with a separate legal personality from the EU. In *SGEEM and Etroy v. EIB*, the Court concluded that the EIB having a separate legal personality acts on behalf of the EU.²⁵² In this view, the assessment on ILP in Chapter 4.1.2 also concluded that although EU Agencies have national legal personality, they do not act independently from the EU.²⁵³ With the argument that the Agency performs on behalf of the EU, the first element required for non-contractual liability is met.

For the second element, the intention that Article 340 TFEU applies to the Agency must be found. The provision explicitly mentions that the action for damages must be brought either against the EU as a whole or against the European Central Bank.²⁵⁴ Additionally, the article refers to the ‘institutions’ defined in Article 13 TEU.²⁵⁵ Neither Article 340 TFEU and Article 13 TEU explicitly mention the Agency or the Agency’s situation.²⁵⁶ Hence, Article 340(2) TFEU refers to the engagement of personal liability to EU’s servants that hold themselves liable according to provisions established in their founding instrument of the institution.²⁵⁷ In this view, the Agency may be found liable under the same conditions as the EU considering its provisions on contractual liability in the founding Regulation. Article 19(3) in the Agency’s founding Regulation points out that “in the case of non-contractual liability, the Agency shall [...] make good any damage caused by its departments or by its staff in the performance of their duties [...]”.²⁵⁸ This provision is reiterated to the latest Regulation and explicitly mentions the

²⁴⁹ TEU, art 13, includes a limited list of EU institutions that are established with non-contractual liability; Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, New York 2016) ISBN-13: 9780198784487.

²⁵⁰ Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’ (2020) 21(3) GLJ 532.

²⁵¹ Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, New York 2016) ISBN-13: 9780198784487.

²⁵² Case C-370/89 *SGEEM and Etroy v. EIB* [1992] ECR I-6211.

²⁵³ Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, New York 2016) ISBN-13: 9780198784487.

²⁵⁴ TFEU, art 340.

²⁵⁵ TEU, art 13.

²⁵⁶ Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, New York 2016) ISBN-13: 9780198784487.

²⁵⁷ TFEU, art 340(2).

²⁵⁸ Regulation 2007/2004, art 19(3).

Agency's non-contractual liability.²⁵⁹ This gives the impression that Article 340 TFEU is intended to apply to the Agency. The Courts' view on the requirement of intention is shown in *SGEEM and Etroy v EIB* and holds that "it would be contrary to the intention of the authors of the Treaty if the Community could escape the consequences [when acting through a] Community body established by the Treaty and authorised to act in its name and on its behalf".²⁶⁰ Because of the Court's decision, non-contractual liability should not only apply to the institutions listed in Article 13 of the TEU. Instead, it should also cover Community bodies such as the EIB.²⁶¹

It can be concluded that both requirements are found applicable in the context of the Agency.²⁶² As the Agency may engage non-contractual liability, the following analysis will examine whether the Agency's conduct may give rise to the Agency's liability.

4.2.2: Action for damages

The procedure on action for damages will establish when the conditions for liability are met and can award compensation in case of a breach.²⁶³ While fundamental rights are underrepresented in the liability regime, the conditions that apply to any other breach of EU law will be considered in the analysis concerning the Agency. The CJEU is the only Court competent to hear disputes concerning the compensation for damage.²⁶⁴ Accordingly, the CJEU has set conditions for liability to arise, including 1) the rule infringed under EU law must be conceived as a right to an individual; 2) the breach must be found 'sufficiently serious'; 3) there must be a direct link between the breach committed and the resulting damage.²⁶⁵

First, the right that is found breached must hold the objective to serve the protection of individuals instead of the general public.²⁶⁶ The Agency's activities are found to infringe mostly fundamental rights, which are generally subject to serve the protection of individuals. In the EU Charter, the fundamental rights are condemned to place "the individual at the heart

²⁵⁹ Regulation 2019/1896, art 97(4).

²⁶⁰ Case C-370/89 *SGEEM and Etroy v. EIB* [1992] ECR I-6211.

²⁶¹ Case C-370/89 *SGEEM and Etroy v. EIB* [1992] ECR I-6211.

²⁶² This is in line with the arguments presented by Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, New York 2016) ISBN-13: 9780198784487.

²⁶³ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) *GLJ* 532.

²⁶⁴ TFEU, art 268.

²⁶⁵ E Lewis and others, 'Non-Contractual Liability of the EU for Damage Sustained by Women Who Received PIP Breast Implants' (*Amsterdam International Law Clinic*, 2013) < [Non-Contractual Liability of the EU for Damage Sustained by ...aailc.uva.nl > assets > reports > pip-report-15.08.pdf](https://www.aailc.uva.nl/assets/reports/pip-report-15.08.pdf) > Accessed 1 June 2021.

²⁶⁶ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

of its activities”.²⁶⁷ While the Court has not ruled upon many fundamental rights yet, the case of *Bergaderm and Groupil v Commission* shows that the definition of rights that serve the Court includes the rights enshrined in the EU Charter.²⁶⁸ Thus, the fundamental rights that have the potential to be invoked during the Agency's operations are classified as rights that can be brought to the CJEU to seek compensation for damages.

Second, the nature of the breach must qualify as ‘sufficiently serious’. The requirement of a sufficiently serious breach is considered vague since there is no single definition of the concept established in case law. On the one hand, case law shows that the Court concluded the breach of fundamental rights as sufficiently serious by nature since no discretion can be found in the area of fundamental rights.²⁶⁹ On the other hand, the CJEU sets that the qualification of a breach as sufficiently serious depends on the extent of discretion the EU Agency enjoys and the seriousness of the breach.²⁷⁰ Considering the Court’s judgment, the extent to which the Agency enjoys discretion reflects the seriousness of the breach. This requirement of discretion is set to secure the public authorities in fulfilling its functions in the general interest.²⁷¹ However, where public authorities enjoy great discretion, difficulties arise in recognizing unlawful conduct.²⁷² In order to find whether the Agency’s breach would qualify as sufficiently serious, the extent to which the Agency enjoys discretion must be assessed.

The Agency may infringe fundamental rights by breaching a negative obligation through its actions or by breaching a positive obligation through omission. Negative obligations, where the Agency needs to abstain from actions that violate a right, usually require little discretion.²⁷³ Positive obligations instead often grant a wider margin of discretion. Fundamental rights are in principle positive obligations, as it obliges the Agency to guarantee the protection of fundamental rights in the performance of its tasks²⁷⁴. The Agency’s discretion on positive obligations can be considered limited by the Regulations’ explicit establishment of

²⁶⁷ See introduction of the EU Charter.

²⁶⁸ Case C-352/98 *Bergaderm and Groupil v Commission* [2000] ECR I-5291; E Lewis and others, ‘Non-Contractual Liability of the EU for Damage Sustained by Women Who Received PIP Breast Implants’ (*Amsterdam International Law Clinic*, 2013) < [Non-Contractual Liability of the EU for Damage Sustained by ...ailec.uva.nl > assets > reports > pip-report-15.08.pdf](https://www.ailec.uva.nl/assets/reports/pip-report-15.08.pdf) > Accessed 1 June 2021.

²⁶⁹ Case T-48/05 *Franchet and Byk v Commission* [2008] ECLI:EU:T:2009:257.

²⁷⁰ Melanie Fink, *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁷¹ Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’ (2020) 21(3) GLJ 532.

²⁷² Melanie Fink, *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁷³ Melanie Fink, *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁷⁴ Regulation 2019/1896, art 80(1).

the Agency's general accountability towards the European Parliament and the Council.²⁷⁵ In addition, these positive obligations are extensively reiterated in the Regulation setting out particular provisions that must be followed. Yet, considering the implications on the Agency's monitoring and accountability regime presented previously in the thesis, discretion is not ruled out. Furthermore, some fundamental rights are found to be absolute rights, which enjoy little discretion.²⁷⁶ In the context of the Agency, the prohibition of torture and the prohibition of *refoulement* are found absolute. Based on the fact that the Agency's actions should be traced back in the Regulation and decision of the Court that argues that fundamental rights violations are automatically sufficiently serious, a breach of a fundamental right should be considered sufficiently serious. Subsequently, liability can be found to arise from Agency's conduct.²⁷⁷ Nevertheless, note that the Court's interpretations differ among cases as the determination of the level of discretion is subjective.²⁷⁸

Lastly, the actual damage and a causal link between the unlawful conduct and the victim's damage must be proven. Both material damage and non-material damage suffered from fundamental rights violations are applicable. The existence of the link requires the circumstances in which the result would not be achieved in the absence of unlawful conduct.²⁷⁹ This link must be determined on a case-to-case basis.

Knowing that liability can arise for violations of fundamental rights, the following will allocate liability during operations.

4.2.3: Allocation of liability

Allocating liability for fundamental rights violations during operations conducted by the Agency is complex as multiple actors are involved. However, the Regulation clearly states that the Agency should "make good any damage caused by its department or by its staff in the performance of their duties, including those related to the use of executive powers".²⁸⁰ In this regard, two situations in which violations may occur must be distinguished.

²⁷⁵ Regulation 2019/1896, art 6.

²⁷⁶ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁷⁷ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁷⁸ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁷⁹ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁸⁰ Regulation 2019/1896, art 97(4).

First is the situation where an Agency's staff member directly violates an individual's fundamental right. This is most likely to occur with the standing corps that have executive powers on the ground. While the provision on the duty to make good any damage does not define 'its staff', it is probable that 'its staff' includes all operational staff and not solely the statutory staff. In this regard, all staff from the standing corps deployed by the Agency as border guards that directly violate an individual's fundamental right may potentially engage the Agency's liability.²⁸¹

Second, an indirect link of the Agency to violations may occur when the Agency staff contributes to operations through the financing of operations, setting up the operational frameworks, providing assistance in training, providing resources, and guiding and supervising the states involved. The staff that contributes to such activities may potentially engage the Agency's indirect liability.

For both situations, the thesis will assess whether the conduct can be attributed to the Agency. Important to note that the situation may arise in which the Agency, a merely advisory body, may have *de facto* more power or means of influence than *de jure*.²⁸² This can occur, for instance, when the Agency advises the host state authority. This is formally non-binding however may shape the conduct executed during an operation. It may be difficult for the state to ignore the advice of the Agency, considering the expertise it holds. Assessing the factual control will enable more flexibility for determining the Agency's attribution of conduct.²⁸³

4.2.3.1: Direct liability of the Agency

Concerning the first situation presented before, the extent to which there is a direct link between the Agency and the allegedly unlawful conduct must be established. Following the extensive assessment of CJEU case law by Fink²⁸⁴, direct liability may be assessed through the degree of decision-making power. Decision-making power formally lies with the actor that enjoys the authority to determine the course of action. From the legal framework of the Agency, it has become clear that during operations conducted by the Agency, the host state has direct authority

²⁸¹ Regulation 2019/1896, art 55(7).

²⁸² Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁸³ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁸⁴ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455, Fink concluded this from the Court's case law regarding liability. In current case law however, cases of joint liability that involve EU agencies result in the liability of the national authority before determining the liability of an EU Agency.

over the team members.²⁸⁵ The Agency thus has no direct decision-making power over its staff deployed during an operation.

Hence, the Agency can be found with a limited degree of control over the conduct of its staff deployed in operations. For example, the Agency's influence in drawing up an operational plan renders the Agency some legal control.²⁸⁶ This plan, conducted together with the host state, legally binds all participating parties and determines all activities during the operation.²⁸⁷ In this regard, the Agency legally may contribute to potential breaches of fundamental rights.²⁸⁸ In practice, however, it is improbable that infringements will directly result from the provisions in the operational plan.

Another instrument through which the Agency may influence conduct is the Agency's authority to communicate its views on instructions to the host state. Although the host state is not obliged to specific instructions,²⁸⁹ the host state may be pressured to adhere to the Agency's instructions. From a *de facto* approach, it can be considered as decision-making power.

Both activities show that the Agency only enjoys limited decision-making power to issue instructions to the statutory staff. The limited decision-making power makes the Agency's liability for wrongful conduct more difficult.

4.2.3.2: Associated liability of the Agency

Liability for associated conduct comes with whether the Agency is liable in addition to the respective state for fundamental rights violations. Concerning associated liability, the obligation to supervise and to protect individuals from violations committed by others applies.²⁹⁰ The obligation to supervise requires to 'oversee the application of Union law'.²⁹¹ Moreover, the obligation to protect requires public authorities to protect individuals from abuses by other states by prohibiting *refoulement*.²⁹² Both obligations are reiterated in the

²⁸⁵ Regulation 2019/1896, art 43(1).

²⁸⁶ Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford university press, 2018) ISBN-13: 978-0198835455.

²⁸⁷ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁸⁸ Eftymios Papastavridis 'The EU and the Obligation of *Non-Refoulement* at Sea', in S Trevisanut and F Ippolito (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press: Cambridge, 2016).

²⁸⁹ Regulation 2019/1896, art 43(2).

²⁹⁰ TFEU, art 265(1).

²⁹¹ TEU, art 17(1)

²⁹² EU Charter, art 19(2).

Regulation and reflect the Agency's duty to oversee fundamental rights compliance.²⁹³ The duty specifically includes actions of supervision and prevention.²⁹⁴

The duty to actively ensure the protection of fundamental rights is set by the ECtHR and holds that the authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual".²⁹⁵ Differently, the CJEU analyses the foreseeability for the public authority of unlawful conduct. Here the authority should have taken all reasonable measures available to them to protect the individual's rights.²⁹⁶ In determining whether there is an existence of a breach of these obligations and whether the Agency may incur liability for it, the thesis will consider whether the Agency has knowledge of the risk of a violation or the violation of fundamental rights obligations and whether the Agency was able to prevent it in the specific situation.

During the Agency's operations, the Agency's staff are obliged to report on the entire operation. Several structures have been set up to monitor the implementation of the operations.²⁹⁷ Seen from the Agency's legal framework coordinating officers and forced-return officers are appointed to oversee the correct implementation of the operational plan.²⁹⁸ In case of noncompliance, the officer must report the executive director on the issue. The monitoring and reporting mechanisms incorporated in the Regulation show that the Agency has significant knowledge of violations or the risk of a potential violation during its operations.²⁹⁹

Subsequently, it must be assessed whether the Agency has taken all reasonable measures to protect the violation from happening. When a potential violation or actual violation of a fundamental right is recognized, the executive director has the task to decide on the withdrawal of financial support or suspension or termination of the operation.³⁰⁰ The assessment on the reasonableness of the Agency's action undertaken for protection depends on the specific actions in the specific situation and cannot be predicted. However, considering that fundamental rights violations have occurred during operations coordinated by the agency, and little to no information can be found on the withdrawal of financial support, the Agency's

²⁹³ Regulation 2019/1896, art 80.

²⁹⁴ See Chapter 2.2.2 for the specific duties in the Agency's Regulation on supervision and prevention of fundamental rights violations.

²⁹⁵ *Osman v. The United Kingdom* App. No. 23452/94 (ECtHR 28 October 1998).

²⁹⁶ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

²⁹⁷ See Chapter 2.2.2 on the Agency's fundamental rights monitoring and accountability mechanisms.

²⁹⁸ Regulation 2019/1896, art 22(1); see Chapter 2.2.2 on all monitoring activities during an operation.

²⁹⁹ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) GLJ 532.

³⁰⁰ Regulation 2019/1896, art 25(1).

response may be found insufficient to fundamental rights violations. In addition, the Agency only once decided to terminate an operation despite the extensive and continuing reports on fundamental rights violations.³⁰¹

In line with the analysis, it can be concluded that, in theory, the Agency can be held liable, in association to the host state, for its failure to take any measures within its reach when a fundamental right is breached during its operation.

³⁰¹ Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’ (2020) 21(3) GLJ 532.

Chapter 5: Conclusion

5.1: Main findings and implications

The main goal of the thesis was to find out whether the Agency can be held responsible for potential fundamental rights violations during operations within third countries.

Chapter 2 answered the first sub-question: *Based on the new legal framework, what competencies does the Agency have regarding international cooperation through a Status Agreement? And what are the implications of such competencies?* The Chapter identified the Agency's mandate, including the newly established standing corps with executive powers and the possibility to establish Status Agreements with third countries expanding their activities outside EU territory. It has become clear that the Agency does not just have an assisting role to the Member States in implementing EU legislation at the EU external borders. Instead, the Agency has become a central player on border management with its own operational staff.

Interestingly, while the Agency is found with border guards of their own, the statutory staff is still deployed under the authority of the host state. Whether the additional executive powers of the statutory corps will affect the attribution of activities to the Agency differently than with the actions of the standing corps is questionable. With the staff being brought under the authority of the host third country, the Agency is foremost left with the tasks of monitoring and interference. Extensive monitoring and accountability mechanisms are in place in order to ensure fundamental rights compliance during their operations. Depending on what the EU and the third country agree upon in the Status Agreement, most activities set out for operations within the territory of Member States also apply to operations on the third country's territory.

Chapter 3 answered the sub-question: *What fundamental rights obligations are present in the Agency's legal framework? And to what extent are fundamental rights sensitive to violations during operations conducted by the Agency?* From the Chapter it has become clear that both fundamental rights enshrined in the ECHR and EU Charter apply to the Agency extraterritorially. The extraterritoriality of both documents is not established through a geographical approach. Instead the scope of the ECHR is determined by jurisdiction and of the EU Charter when implementing EU law. This non-geographical approach on the scope of fundamental rights narrows the accountability gap arising from the evolvement of extraterritorial activities by EU Agencies. Furthermore, from reports on conducted operations, fundamental rights violations are recognized during operations by the Agency. These violations specifically occur during the standing corps' actions, which are in direct contact with migrants.

In Chapter 4, an answer has been given to the last sub-question: *How can the Agency be held responsible for potential fundamental rights violations during operations established by a Status Agreement, under international law and EU law?* A legal analysis on the law on international responsibility for breaches of the ECHR and public liability law for breaches of the EU Charter is presented. The rules on international responsibility set out in the ARIO apply to organisations considered International Organisations. The ICJ sets the requirement that an organisation must possess International Legal Personality to determine an International Organisation. While the Agency's activities have evolved on the international plane, it became clear that the Agency does not incur such personality as its activities are mainly performed on behalf of the EU. This means that the ARIO does not apply in the case of the Agency. While there are more EU Agencies with a solid international mandate, international law seems rigid in allocating responsibility to EU Agencies. It can be said that the evolving activities taking place on the international plane have consequences for the institutional balance established in the field of EU treaty-making as EU Agencies may not be held responsible for their international obligations.

Further, for the analysis on liability under EU law, an assessment is presented of the general principles on non-contractual liability. While it is difficult to fulfil the strict requirements set out in the TFEU, case law shows that the CJEU is lenient toward declaring EU institutions' admissibility. Under the procedure 'action for damages', a difference is made between the Agency's staff in direct contact with migrants, the standing corps, and the staff with indirect contact. It has been found that the activities conducted by the standing corps do not engage liability to the Agency as the Agency has only limited decision-making power. Hence, in association with the host state, liability is found with the conduct of the staff that has monitoring functions. Under the duty to actively protect individuals from violations, the Agency can be found liable when abstaining from taking all reasonable measures available for conduct that the Agency knew or should have known violated an individual's fundamental rights. The Chapter 's findings apply to both violations on the territory of the Member States and violations on the territory of third countries.

Based on the thesis, the main research question can be answered: *To what extent can the Agency be held responsible for fundamental rights violations during operations conducted by the Agency in context of the Status Agreements with third countries?* The study has explored the potential legal responsibility of the Agency on third countries' territory. The subsequent analysis has shown that the Agency can give rise to liability only in relation to EU public liability law and its duty to protect. The monitoring activities of the Agency make clear that the

Agency has an apparent oversight over the potential fundamental rights threats and must act where there is a violation or suspect of a potential violation. Thus, in the situation where the executive director does not take action, through the withdrawal of financial support or suspension or termination of the operation, as a potential threat for violation or an actual violation is real during an operation conducted in the third country, the Agency can, in theory, be held liable additionally to the primary liable state.

5.2: Limitations

A limitation to the study is the lack of factual knowledge and public information concerning the actual scope of the specific actions taken during operations. Operational plans on previous operations are not published, nor will the operational plans for operations in third countries be made public.

In addition, the action for damages has not functioned as an instrument of fundamental rights protection yet. Also, since case law on public liability regarding EU Agencies is limited, the Court had limitations in assessing the Agency's liability. It is unlikely that the Agency will be held liable for its inactions by CJEU. While the analysis on EU law is theoretically applied to the Agency's activities, it may not suffice in practice.

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