

THE NEW FRONTEX REGULATION AND THE AGENCY'S EXTENDED POWERS:

POSSIBLE PERSPECTIVES FOR STRATEGIC LITIGATION

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The Member states and the Eu responsibility for illicit acts committed by Frontex:

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Today I will speak about which actors participating in Frontex operations could be considered responsible. We could consider four type of responsibilities:

- The EU;
- The EU States;
- The individuals;
- Third States;

I will focus about member state' responsibilities under two aspects: the one in front of the European Convention of human rights and the other under European Union liability law. Responsibility of State in front of the ECHR (The EU: Frontex is an EU body and can lead to the EU responsibility. The EU has to respect human rights that are part of international customary law, but EU did not access itself to the ECHR or other human rights treaties)

Following the thesis of *Melanie Flink*, we can distinguish between:

- The Host State: the state where a joint operation takes place;
- The Participating State: another member state that gives additional operational resources (human or technical)

Another important distinction is based on:

- Direct responsibility, for example the case of excessive use of force at a border control, or the disembarking of migrants in a third country that can not be considered as a safe place.
- Indirect responsibility that can occur in case of assistance given by one State to another in violation of human rights – or in failure to protect people from a human rights violation

Direct responsibility

Violations occur through individuals so a fundamental question is to which state should we attribute the behaviors of individuals? There are different members that we can distinguished in the Frontex operations

These individuals could be part of the following teams:

- Statutory staff of Frontex (new regulation) would also cooperate on the ground
- National members provided to Frontex

- National members deployed by Members State

- Local staff of the host state

Also, could be considered responsible Frontex' members that are not part of these teams but that are deployed during operation? The answer can be found in the law of international responsibility:

- Articles on State Responsibility (ASR)
- Articles on the Responsibility of International Organisations (ARIO)
- Article 4: the conduct of State organ is considered an act of that State
- Article 5: the conduct of private parties empowered by the law of a state 'to exercise elements of the

governmental authority' – again is considered as an act of the State.

- Article 6: the conduct of a foreign State' organs that are empowered to exercise governmental authority of another State - may be considered as an act of the receiving state under conditions of this article.

Until now we spoke about responsibility under a state, but under the international organizations we have

- Article 6 ARIO: act of an organ or agent of an international organization shall be considered an act of that international organization under international law.

So, under the ECHR we can follow these structures. The Regulations itself speaks about responsibility at the article 42 of 2016 Regulation/85 when this author, *Melanie Flink* says that this New Regulation does not displace the general regime that I just told you about from the article of State responsibility, of attribution according to the author – just a rule of allocation of responsibility between States (and between state and international organization).

1. Without prejudice to Article 94, where members of the teams are operating in a host Member State, that Member State shall be liable in accordance with its national law for any damage caused by them during their operations.

2. Where such damage is caused by gross negligence or wilful misconduct of the team members seconded or deployed by the Member States, the host Member State may approach the home Member State in order to have any sums it has paid to the victims or persons entitled on their behalf reimbursed by the home Member State.

Likewise, if the damage is caused by gross negligence or wilful misconduct by the statutory staff of the Agency, the host Member State may approach the Agency in order to have any sums it has paid to the victims or persons entitled on their behalf reimbursed by the Agency. This is without prejudice to any action before the Court of Justice against the Agency in accordance with Article 96a.

The Starting point is the conduct of personnel deployed during operations is attributable to the State or to Frontex, depending who has sent them. But during their deployment, officers are subject to a specific command regime: authority is not only exercised by their respective 'home' entities but also by the host state and by Frontex itself. So, for example if Belgium send some boarder guards it's not Belgium that actually commands these guards on the ground but rather from the member state and Frontex itself, so

that's why we have to look at article 6 and the article of responsibility that I mentioned before, so when an organ of a foreign state exercised government and authority of another state

Conditions of article 6:

1. Be an Organ of a participating state
2. exercise governmental authority in the host state
3. organ needs to be at the disposal of the host state – being at the disposal includes the fact to be under the exclusive authority

So, if you look at the conditions, in the first one: What happens if it's an organ sent by Frontex? ASR applies by analogy according to *Melanie Fink*; we can apply the same principles of responsibility of international organizations. Importantly, in the drafting process the view was never expressed that the transfer of organs by international organisations to states required a different approach to the transfer of organs from one state to another. The decision to leave the former question open was based on the rare occurrence and complexity of the situation, rather than a rejection of the rule underlying Article 6 ASR. For the same reasons, closing that gap did not seem a priority during the drafting process of the ARIO. It may thus be assumed that Article 6 ASR applies by analogy to the transfer of organs by international organisations to states. (pp. 147 - 148)

For exclusive authority we have to look at the Regulation of 2016: articles 21.1 et 40.3 – and at the New Regulation: articles 44.1 et 83.3. The power to issue instructions to member teams, so to these four categories of people, during joint operations is into the hands of the host state. There are some Limits: for example, Frontex' views (21.2 et 44.2)

A Home state can only prohibit certain use of certain forces (40.6 et 83.6) and take disciplinary measures (21.5 et 44.5). Anyway, the power of host state is less comprehensive in practice than on the paper, but still is mainly the host state, with the exceptions, and that's when it's interesting to include the responsibility of other states, it's that decisions that concern team members that are deployed on large (often military) assets (like vessels or airplanes) require that the National Official of the respective participating state is consulted. Formally they have no explicit right to block decisions regarding this asset but in practice decisions are not taken until consensus is reached. The author speaks about direct responsibility in case of a *shared* control: not only host states are responsible but sometimes there is also responsibility of the participating state, if they send contributions.

Indirect Responsibility

Then, and that's interesting again in order to involve other states and maybe Frontex as well, there is an Indirect responsibility: the ECtHR says since a long time that the Convention contains a positive obligation: so basically its obligation is to protect individuals from violations committed from other private individuals or from violations of other states or international organizations.

There are two conditions through the case law of the Court to engage responsibility:

1. The authorities knew or should know that there was a risk of ill-treatment contrary to the Convention
2. To engage responsibility that they did not take any reasonable steps to prevent the violations that they should know about, to happen.

Regarding this, if we came back to indirect responsibility of host state or indirect responsibility of participating state:

-responsibility of the host state: regarding its leading role, if HR violations are committed on foreign vessels or airplane the host state could have an indirect responsible because it failed to prevent the violation situation where the implementation of a return decision issued by a participating state is taken in violation of *non-refoulement* principle.

- the participating state and the indirect responsibility: for the contribution to an operation by human or technical resources (ECtHR prohibit the fact to not prevent violations committed by others so a fortiori, state should not participate to violation of others). The knowledge criteria say that, if a host state's human rights record exposes systemic failures that would inevitably materialize during a Frontex operation, participating states must be assumed to know that their contributions would be used for human rights violations. There could be a responsibility in case of failure to intervene when HR violations occur (knowledge of the failure: state that contribute with large assets have a national official in the operation; otherwise, not national official but members teams can gain knowledge).

In both cases, the main issue is the problem of jurisdiction of European Convention of human rights, in order for a state to be responsible for violations it has to happen on its territory. This is the principle to bring the case in front of the ECtHR.

There are some cases of extraterritorial jurisdiction when a state exercise effective control over a territory (not the case here) or when a state exercise control or authority on an individual. Two situations: - physical power and control and - state exercise some of the public powers abroad that are normally exercised by the government of the territory in question (*al-skeini*). In case of Frontex operations It is indeed conceivable that in the context of a joint operation, participating states exercise authority and control over individuals, bringing them within their jurisdiction. Simply speaking, when they contribute a border guard to a joint operation, that border guard exercises border management functions in the territory and with the consent of the host state. They may thus be considered to participate in the exercise of public powers normally exercised by the host state alone. Whether this kind of participation in the exercise of public powers is really sufficient for the purposes of Article 1 ECHR is not entirely clear. But for the current purposes it is noteworthy that it may be. (P. 186 *Melanie Fink*)

Only participating state that contribute to large assets can be considered as exercising control.

Conduct of other members teams are only attributable to host state.

- Liability under EU law
- Frontex can also be liable, not contractually liable

Article 340 (2) TFUE: the EU is liable (on the non-contractual level) for damage caused by its institutions or agents but not for its agencies

Article 60.3 of the Regulation of 2016 (article 96 of the New Regulation). The Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers.

Article 60.4: CJUE is competent to deal with dispute in relation with this liability (256 (1) TFUE). For both the Eu case law says different conditions: you need to engage liability States

Condition of liability:

- Unlawful conduct
- Damage
- Causal relationship

The particularity is that an unlawful conduct is qualified: the rule violated must be intended to give right to individuals and the breach itself must be sufficiently serious. Fundamental rights are generally assumed to confer rights to individuals. Regarding the rights at stake usually (right to life, non-refoulement), we can argue that any breach is sufficiently serious.

Again, same question, which states are responsible?

Direct liability

Frontex: Yes, for its own coordinating personnel deployed during joints operations

What about local staff and team member?

Key principle in the Court case law: liability follows legal decisions making power - the actor, Frontex, that was empowered to determine the conduct at the origin of the violation in a legally binding manner will incur liability and this takes us to the responsibility of host state. We could speak about Frontex responsibility only if HR violation stems from operational plan, otherwise is often the host state that is responsible for the operations.

Local staff: host state

Team members: host state

Frontex staff? In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers.

Team members on large assets: joint liability

Indirect liability

Four conditions:

1. Obligation to supervise another authority in the application of EU law OR obligation to protect individuals' from violations committed by others
2. Associated obligation confer right to individuals
3. Breach of associated obligation is sufficiently serious
4. sufficient causal link between breach of associated obligation and damage

Associated responsibility of Frontex

The analysis revealed that Frontex incurs far-reaching associated obligations. In particular, it has to supervise the conduct of member state authorities during joint operations, which includes ensuring they comply with EU fundamental rights law. In addition, it incurs positive obligations under EU fundamental rights law to protect individuals from violations committed by others. All of these obligations can, as a general rule, be considered to confer rights on individuals, either alone or together with the primary fundamental rights obligation at stake. Thus, Frontex incurs liability for a breach of its supervisory or protective obligations if the breach can be considered sufficiently serious.

Associated responsibility of participating state

Yet, to the extent they have knowledge of and means to prevent fundamental rights violations, they are required, under EU fundamental rights law, to protect individuals from violations committed by others.

Two situations:

- On the one hand, this is where a state substantially contributes to an operation that blatantly involves serious fundamental rights infringements.
- On the other hand, a participating state may also incur associated liability if it contributes a large asset, learns of a fundamental rights violation, but then does not use all reasonable opportunities that accompany that sort of

Associated responsibility of host state

The state hosting a return operation brings back a person that received a return order from another state but doing so breaches the prohibition of *refoulement*.