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Fundamental Rights Outside of the EU – Implications of Frontex Multi-actor Operations Beyond the External Borders

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Summary

The European Border and Coast Guard (EBCG), consisting of the EU agency of Frontex and the Union member states, has the mandate to perform missions relating to border management beyond the territory of said states. Its staff may act in the territory of third countries and on the high seas, which raises the question of what the implications are in respect to the obligations which the EU fundamental rights regime imposes on the public entities during their operations. The purpose of this thesis is therefore to evaluate the impact of the multi-actor operations pertaining to the territorial scope of fundamental human rights.

By examining the relevant legislation concerning border management, rights-sensitive situations pursuant to the operations the EBCG may engage in are identified, serving as a basis for outlining concrete fundamental human rights. The sources of the rights are interlinked through the EU legal order, where its Treaties and Charter of fundamental rights (the Charter) adhere to the European Convention on Human Rights (ECHR). Particular fundamental rights, principally at the least dually protected due to their codification at both the Union and international level, are subsequent to their deduction from the situations identified assessed in the light of both the overarching legal framework on fundamental rights, and secondary EU law.

The conclusion reached is that the territorial scope of the material rights in question is not confined to intra-Union events. Instead, it may reach to confer rights on individuals beyond the external borders of the member states. The conditions deciding on the scope differs depending on what instrument a contested right stems from. Pursuant to EU law, the fundamental rights regime tracks any action which are the result of duties deriving from the legal order itself. Therefore, spatial circumstances do not necessarily restrict individuals from enjoying the fundamental rights. The ECHR is interpreted as awarding individuals the genuine enjoyment of rights outside the contracting states' borders where they are subject to control of any of those states. The conventional human rights have, as opposed to those deriving from the Union's legal system, through the European Court of Human Rights (ECtHR) been expressly held to inhere an extraterritorial scope.

The lead interpreter of EU law, the Court of Justice of the European Union (CJEU), exerts great influence over the understanding of the EU legal system. Due to Treaty-provisions and rules in the Charter, the CJEU, in its interpretation of the material rights corresponding to Convention-rights, is bound by the same meaning and scope which the ECHR is found to have by its adjudicator. Thus, as the Charter may only provide for the higher protection of rights, the differentiation between EU fundamental rights and rights flowing from the ECHR is, for the sake of the extraterritorial scope of the former, peripheral. However, despite the link between them, the different

instruments do not necessarily bind the same actors; the Charter is binding on the EU, including its agencies, and the ECHR puts duties on third countries.

Sammanfattning

Den europeiska gräns- och kustbevakningen (EBCG), bestående av EU-byrån Frontex samt medlemsstaterna, har mandat att genomföra gränsförvaltningsrelaterade uppdrag som sträcker sig bortom nämnda staters territorium. Dess personal får handla på tredje länders territorium samt på det fria havet, vilket väcker frågan om vad följderna är vad rör förpliktelserna EU:s regelverk kring grundläggande rättigheter ålägger de offentliga organen under deras insatser. Syftet med denna uppsats är därför att bedöma den verkan mångaktörsinsatser har vad gäller den territoriella räckvidden av grundläggande mänskliga rättigheter.

Genom att undersöka lagstiftningen på området rörande gränsförvaltning möjliggörs identifieringen av rättighetsträngande situationer uppkomna som en följd av EBCG:s verksamhet, vilket utgör grunden för utmålningen av konkreta grundläggande mänskliga rättigheter. Rättigheternas källor är sammanlänkade genom EU:s rättsordning, vars fördrag samt rättighetsstadga hänför sig till Europakonventionen (EKMR). Särskilda grundläggande rättigheter åtnjuter huvudsakligen juridiskt skydd i dubbel bemärkelse på grund av deras kodifikation på både Unionsnivå samt på internationell nivå. Efter deras härledning ur de identifierade situationerna bedöms de i ljuset av både den övergripande rättsliga ramen för grundläggande rättigheter, samt Unionens sekundärrätt.

Slutsatsen är att den territoriella räckvidden av de materiella rättigheterna ifråga inte är begränsad till händelser inom unionen, utan kan sträcka sig bortom medlemsstaternas yttre gränser och omfatta individer utanför dessa. De, för räckvidden avgörande villkoren skiljer sig åt beroende på vad för lag de omstridda rättigheterna har sitt ursprung ur. Enligt EU-rätten spårar ramverket kring de grundläggande rättigheterna varje handling som är en följd av de åtaganden som härrör från unionsrätten i sig. Rumsliga förutsättningar förhindrar därför nödvändigtvis inte individer från att åtnjuta de grundläggande rättigheterna. EKMR har bedömts tillskriva individer skydd för rättigheterna trots deras fysiska frånvaro i en kontraktsstat, villkorat att de är under en sådan stats kontroll. I motsats till de unionsrättsliga mänskliga rättigheterna, har de som härstammar från EKMR genom Europadomstolens praxis uttryckligen ansetts inneha extraterritoriell räckvidd.

EU-domstolen, som är den ledande instansen gällande tolkningen av EU-rätt, utövar ett stort inflytande över förståelsen av unionens rättssystem. Domstolen är i sin tolkning av de materiella rättigheter som har en motsvarighet i EKMR, med anledning av bestämmelserna i fördragen och rättighetsstadgan bunden av samma innebörd och räckvidd som de konventionsenliga rättigheterna tillskrivs av Europadomstolen. Eftersom rättighetsstadgan endast kan tillhandahålla ett högre skydd för rättigheterna, har således åtskiljandet av rättigheter med ursprung ur EU-rätt och ur EKMR en mindre inverkan på bestämmandet av den extraterritoriella räckvidden av

unionsrättsliga rättigheter. De olika rättighetskällorna förbinder dock inte nödvändigtvis samma aktörer, trots sammanlänkandet mellan dem; rättighetsstadgan förpliktigar EU, inklusive dess byråer medan EKMR ålägger tredje länder förpliktelser.

Preface

I would like to express my gratitude to my family for their continuous support not only during my years at the faculty, but throughout my whole life.

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Abbreviations

AFSJ	Area of freedom, security and justice
ARIO	Articles on the responsibility of international organizations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CoE	Council of Europe
EBCG	European Border and Coast Guard
ECHR	European Convention on Human Rights
EIBM	European integrated border management
GDPR	General Data Protection Regulation
SBC	Schengen Borders Code
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Setting the scene

While performing a traineeship in Greece during the autumn of 2018 I got acquainted with the EU agency of Frontex. The country had been battling with the continuous arrival of migrants over its maritime border to Turkey. Strained by austerity measures, Greece, as a member state at the external border of the Union, was subject to assistance from Frontex. A visit to its operational office revealed the national coast guard's reliance on equipment from other EU member states (henceforth, member states), such as boats and helicopters, and their use on the sea border was displayed. A subsequent visit to Lesbos, where numerous migrants arrive by boat, showed Frontex staff, some of them Swedish police officers, debriefing, identifying and in other ways assisting Greek officials in the reception of individuals who cross the external border clandestinely. This raised my curiosity on the agency and its role in what I had previously perceived as a national matter.

Frontex describes itself as a coordinating and organising agency, performing these actions to facilitate and assist the member states in the management of the external borders. The agency also engages in forced returns of individuals to third countries, disposing its seconded staff where needed.¹ In 2017 it was involved in the returns of 14 000 individuals. At the time of writing around 1500 officers are deployed by Frontex, a number to be upped to 10 000 within a decade, should the Union's plans with the agency progress smoothly.²

Migration and border control has for some time been among the paramount topics on the political agenda in several member states, where they have influenced parliamentary elections and raised state measures concerning border protection.³ The Union has been no less reactive, even referring to the migratory movements in the mid 2010s in the recitals of the European Border and Coast Guard (EBCG) Regulation, which establishes Frontex.⁴

¹ Frontex website, *Origin & Tasks*, available at <<https://frontex.europa.eu/about-frontex/origin-tasks/>>, accessed 16 July 2019.

² European Commission, 'European Border and Coast Guard: The Commission welcomes agreement on standing corps of 10,000 border guards by 2027*', 1 April 2019 Press Release, IP/19/1929; Frontex website, *Foreword*, available at <<https://frontex.europa.eu/about-frontex/foreword/>>, accessed 17 July 2019.

³ Raidió Teilifís Éirann, *Migration and borders key issues in European elections*, 28 April 2019, available at <<https://www.rte.ie/news/politics/2019/0428/1046111-europe-elections/>>, accessed 6 August 2019; La Repubblica, *Elezioni Italia, esulta l'estrema destra europea. Ue e Berlino: "Ora governo stabile". Macron: "Crisi migranti decisiva"*, 5 March 2018, available at <https://www.repubblica.it/esteri/2018/03/05/news/elezioni_italia_esulta_destra_europea_s_alvini_le_pen-190486076/>, accessed 3 August 2019.

⁴ Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, [2016] OJ L251/1 (henceforth EBCG Regulation), recital 1.

The EU has claimed itself as an area of peace and where fundamental rights are respected and protected at the highest level.⁵ Individuals within the external borders enjoy an array of freedoms and rights, deriving from the EU legal order. However, with the increasing measures taken in relation to the external borders and beyond, a relevant question is how, if at all, the Union-values described are guarded extraterritorially. Following the external actions of Union entities such as Frontex, and of the member states fulfilling their duties arising from the EU it may be argued that also other aspects of the EU legal order should be subject to externalisation. One such aspect is fundamental human rights, which are granted for persons within the realm of the Union.⁶ Not allowing for individuals to enjoy the same due to their presence in a physical space outside the Community, despite them being subject to measures deriving from the EU and affecting their interests, would constitute a method of legal cherry-picking possibly having adverse consequences for the addressees.

As this thesis will demonstrate, the EBCG is mandated to perform an array of tasks, pursuant to the 2016 regulation which expands its border-related activities. As all Union agencies, Frontex must abide by general Community law when fulfilling its obligations and respect what is enshrined within the Treaties. This includes fundamental rights, binding the EBCG in exercising its power.⁷ The agency operates in a sensitive area where rights such as the right to asylum and the prohibition on collective expulsions and non-refoulement are at stake. As a significant portion of the tasks may be carried through outside of the territory of the member states, both in third countries and in international waters, an intriguing query arises.

1.2 Purpose and research questions

In this dissertation I explore one key question; is the European Border and Coast Guard bound by EU fundamental rights when operating outside the member states' territory in multi-actor operations? The purpose of the examination is to evaluate the impact of Frontex' operations on the territorial scope of EU fundamental rights and whether its external actions ultimately renders an extension of the Union's legal order into third countries and the high seas.

1.2.1 Sub-questions

In order to clarify the reach of the rights and answer the main question it is necessary to engage with a number of additional questions;

⁵ Treaty on the European Union (consolidated version) [2012] OJ C326/13 (TEU), articles 2-3.

⁶ Ibid.

⁷ Charter of Fundamental Rights of the European Union, [2012] OJ C326/2, article 51.

- I. What is the place of Frontex and the EBCG Regulation within general EU law? This question aims to explain the reasons for its establishment, its purpose, and the actions it shall partake in. As the main question relates to how the EBCG's actions affect the scope of fundamental rights (and *vice versa*, since its constituents are bound by fundamental rights obligations), it is of essence to account for what the agency is set to achieve, and on what legal grounds. Aiding to explain Frontex' establishment and main objectives are Union priorities such as the internal market and the area of freedom, security and justice.
- II. What is the nature of Frontex' and the EBCG's tasks, and of the structure of organisation with regard to the involved public parties? In order to determine the territorial scope of fundamental rights it must be clear that it is an entity with obligations in regard to said rights which may be attributed a conduct. Therefore, the activities of Frontex and the involved entities should be examined, in particular those taking place outside the territory of the member states. This will also help in defining the extraterritorial situations sensitive for fundamental rights infringements.
- III. What are EU fundamental rights, their sources and scope? Clarifying the territorial reach of a legal notion requires an explanation of not only what that notion is, but also of what decisive sources it attains its traits from. The relevant sources in this case do not only stem from EU law, and therefore the interaction between the EU legal order and other sources, mainly the European Convention on Human rights (ECHR), must be assessed, since this has a great impact on the territorial scope.

1.3 Method of research and perspective

This thesis examines the territorial scope of a concept of positive law, fundamental rights, with the point of departure being a specific legal construct, i.e. the EBCG Regulation. The consistent approaches used for the research are several. First, the *why* of the EBCG Regulation is pursued. This teleological method of approaching EU law, the backbone method of this research, aims to explain the reasons for its existence and providing for a basis for evaluating whether the measures following border management are warranted.⁸ Secondly, the current law, which governs the management of the Union's external borders is laid out, the result of which is later used in a systematic interpretation of the law from an internal perspective. Identifying, describing and explaining the most relevant rules in the field of border management and migration necessitates dealing with an array of legal

⁸ Hettne, Jörgen, 'EU-rättsliga tolkningsmetoder' in Hettne, Jörgen and Eriksson, Ida Otken (eds), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (Stockholm: Norstedts Juridik, 2011), pp. 168-170.

sources. Therefore, a systematic method of interpretation is appropriate where provisions frequently cross-reference to other instruments and thus necessitates their assessment within a broader legal framework.⁹

The teleological approach persists where the research turns to the fundamental human rights regime.¹⁰ The rather vague and synthetic texts of the main sources, where a grammatical understanding of the rights does not always suffice, give rise to its interpretation based on mainly the jurisprudence of courts.¹¹ The findings of the examined rules regarding border management permitted through the means of secondary EU law, is assessed in the light of the fundamental rights framework, which in turn constitutes primary EU law.¹² Thus, rules dictating border management and territorially external actions with a foothold deriving from the EU legal order are systematically interpreted from an internal Union-perspective.¹³

An evaluation of Frontex is made early on in the thesis, where Frontex as an agency, together with its establishing Regulation is assessed against criteria of primary law: principles governing the exercise of power and Treaty-provisions. Subsequent to the systematization of primary and secondary law (fundamental rights *vis-à-vis* the border *acquis*) the teleological method is applied with respect to elucidating the scope of the rights. The ECHR, the Charter and the general principles of EU law are interlinked and in relation to secondary law ultimately, due to the findings in the thesis, treated as one fundamental rights framework, with which the rules on border management should be compatible.

The sources and notions of law are assessed under a conceptual framework of cosmopolitanism, evoked by the EU legal order itself through allowing the gradual introduction of fundamental human rights currently inherent in the legal system; the Union is expressly founded on the “values of respect for human dignity, freedom, [...] and respect for human rights”.¹⁴ The inclusion of these values thus guides this research and imposes an understanding of the way EU presents itself: an entity that represents human rights, even on a global scale, where any binding norms obligate for it.¹⁵ The implication of the perspective is that the particular fundamental rights discussed in the dissertation are viewed as universal when the EU legal order is applicable,

⁹ On the research approaches and methods of interpretation, see Kestemont, Lina, *Handbook on Legal Methodology* (Cambridge: Intersentia, 2018), pp. 19-33; Hettne, Jörgen, 'EU-rättsliga tolkningsmetoder' in Hettne, Jörgen and Eriksson, Ida Otken (eds), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), pp. 167-168.

¹⁰ See, e.g., Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/2.

¹¹ Hettne, Jörgen, 'EU-rättsliga tolkningsmetoder' in Hettne, Jörgen and Eriksson, Ida Otken (eds), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2011), p. 168.

¹² TEU, article 6.1.

¹³ Kestemont, Lina, *Handbook on Legal Methodology* (2018), pp. 60-63.

¹⁴ TEU, article 2.

¹⁵ *Ibid*, article 3.5.

attainable by affected individuals regardless of their spatial whereabouts, due to their capacity as human beings.¹⁶

1.4 Material

A wide variety of material has been used to answer the questions in section 1.2. Apart from legislation, which in an EU-context in itself may help to explain legal phenomenon due to the highly informative preambles and recitals, case law of the Court of Justice of the European Union (CJEU, or the Court) has been of help in clarifying the content of provisions and legal concepts such as general principles of EU law.¹⁷ The jurisprudence of the European Court of Human Rights (ECtHR) clarifies the Convention, the additional major legal construct used aside from Union law. Doctrine in the form of literature and legal articles have proven valuable throughout the work, primarily in explaining and interpreting *lex lata*. For material on Frontex, useful material has derived from in particular Melanie Fink and Roberta Mungianu. Violeta Moreno-Lax' work has been helpful in assessing the external dimension of the agency's tasks, and Peers with others' comments on the Charter have provided guidance on its rights and their scope.¹⁸ Similarly, policy documents and other publications of the Union have aided in the explanation and systematisation of its complex and comprehensive law.

The status agreements the Union may conclude with third countries for the purpose of cooperation involving executive powers of the former, and the norms ruling them, are relatively unexamined in doctrine. While the legislation subject to scrutiny in this thesis is becoming increasingly discussed about by scholars, it is still fairly uncharted waters and for these reasons this dissertation should hopefully contribute to the research on the extraterritorial impact the provisions on Frontex incur on the field of human rights.

1.5 Disposition and delimitation

The thesis consists of four additional chapters, relating to the sub-questions presented above. These discuss:

¹⁶ Eriksen, Erik Oddvar, 'The EU – a cosmopolitan polity?' (2006), in 13 Journal of European Public Policy 252, pp. 254-256; Cryer, Robert and others, *Research methodologies in EU and International law* (Oxford: Hart Publishing, 2011), pp. 46-47.

¹⁷ The terms 'CJEU' and 'Court' are used interchangeably.

¹⁸ For literature, see Fink, Melanie, *Frontex and Human Rights* (Oxford: Oxford University Press, 2018); Mungianu, Roberta, *Frontex and Non-Refoulement – The International Responsibility of the EU* (Cambridge: Cambridge University Press, 2016); Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017); Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014). Other publications and research contributions, e.g. articles, etc., may be found in the footnotes of this essay.

2. The EU legal framework and purpose with Frontex and the EBCG
3. The EBCG, its powers and operations
4. Fundamental Human Rights law, and
5. Conclusions from the above

In the second chapter Frontex is accounted for in the light of general EU law, excluding fundamental rights. The background leading up to the enactment of the EBCG Regulation is illustrated, subsequent to engaging in what the Treaties encompass in terms of principles and overall objectives which the agency is set to fulfil. The Regulation is examined in regard to its capacity as an agency of the Union, which sets out the bigger picture regarding Frontex.

In chapter three the Regulation itself is described as such, displaying what it mandates, Frontex together with the EBCG created as a result of it and the concrete results to be achieved, as well as the relation between the involved entities comprising the EBCG. Some legal-historic comparison is made to previous legislation on the area. This chapter introduces the main subject of this dissertation; extraterritoriality of fundamental rights, following Frontex operations taking place outside the territory of the member states. The abstract missions are materialised into concrete examples which are used in the following chapters.

Chapter four turns the light to fundamental human rights, their sources and scope, as well as on the courts interpreting them. The scenarios from chapter three are used to assess the territorial reach of certain rights at the risk of infringement, pursuant to the border *acquis*. The contested legislation is assessed against norms of higher hierarchy, displaying how rules of secondary law impacts the scope of fundamental rights and revealing their scope. Chapter five concludes the thesis and contains an assessment of the result of the research and a discussion thereof, measuring the findings against each other. The chapter is analytical in its entirety, as opposed to previous chapters which contain partial analyses.

The following text is centred around three sources of fundamental rights; general principles of EU law, the Charter of fundamental rights and the ECHR. There are other principal international instruments on human rights, especially on migratory topics such as the Convention Relating to the Status of Refugees. However, as the point of departure is the EU fundamental rights as their sources listed in article 6 TEU (and due to the lack of space), other human rights treaties are precluded from assessment in this dissertation despite their weight as such. Other limitations are pointed out in the main text where considered necessary.

2 Frontex: an agency of the European Union

Prior to engaging with the current EBCG Regulation and fundamental rights, the ‘bigger picture’ is framed out, unveiling the overarching legal framework on Frontex and what the agency is set out to achieve. This chapter also serves to give a brief account on the background of Frontex and its underlying legislation.

2.1 The Union legal framework

In the following paragraphs the principles of EU law are accounted for, guiding any action of the Community. It should be pointed out that the Union does not possess spatial territory of its own. It is, despite its proclamation on possessing legal personality, not a state.¹⁹ Whereas the definition of the EU as such, be it an intergovernmental or supranational organisation, is rightly subject to debate, it goes beyond the scope of this thesis to determine what it is instead of what it is not: a state.²⁰ Therefore, any reference to the Union’s territory is to be understood as to its member states’ territory.²¹

2.1.1 Division of competence

Title V of the TFEU deals with the area of freedom, security and justice (AFSJ). Its second chapter contains provisions on border controls and immigration. The most relevant provisions for the agency’s legitimacy and establishment of key purposes are article 77.2(b) and (d), together with article 79.2(c).²² The points of article 77.2 state that the European Parliament and the Council shall adopt measures concerning external border checks, and “any measure necessary for the gradual establishment of an integrated management system for the external borders”. According to article 79.2(c) the Union shall, for the purposes of the development of a common immigration policy, adopt

¹⁹ TEU, article 47; see also, for the CJEU’s own words on the Union as a non-state entity under international law, Opinion of the Court of 18 December 2014, Case Opinion 2/13, EU:C:2014:2454, paras 155-156.

²⁰ See for example, McCormick, John and Olsen, Jonathan, *The European Union: Politics and Policies* (Boulder, CO: Westview Press, 2013), pp. 15-31.

²¹ Moreno-Lax, Violeta; Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territory to Facticity, the Effectiveness Model’ in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), pp. 1663-1664; for an account of the specific territories subject to the applicability of the Treaties, see TEU, article 52; Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C236/47 (TFEU), article 355.

²² EBCG Regulation, preamble citations.

measures concerning illegal immigration and residence, “including removal and repatriation of persons residing without authorisation”.

According to article 4.2(j) TFEU, Title V falls under the competences shared between the Union and the member states. Article 2.2 defines shared competence as a specific area within which both the EU and the member states may legislate and adopt legally binding acts. Member states may however only exercise their competence as far as the Union does not exercise the competence of its own. Article 2.6 TFEU allows for specific provisions of the Treaties to determine the scope of competence, which relating to Frontex are the ones in Title V.

2.1.2 Principles on competence

The competences of the EU are administered by a series of principles listed in article 5.1 TFEU. The principle of subsidiarity states that the EU, in areas outside its exclusive competence, shall act “only if and in so as far as the objectives of the proposed action cannot be sufficiently achieved by the Member States” at any level of governance, but instead “better achieved at Union level”.²³ The principle of proportionality entails that EU acts “shall not exceed what is necessary to achieve the objectives of the Treaties”.²⁴ Protocol No 30 to the Amsterdam Treaty contains guidelines on EU acts still referred to by the Commission.²⁵ These guidelines prescribe the simplest form of action as possible, “consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement”.²⁶ Legislation should use a lesser degree of prescriptiveness, and unless on grounds of urgency or confidentiality, be subject to extensive consultancy before being proposed.²⁷ Both principles fall under the umbrella of the principle of conferral, which sets the limits from which the Union may attain its competence to that “conferred upon it by the Member States in the Treaties[,] to attain the objectives set out therein”.²⁸

2.1.3 Legislative instruments

Closely related to the principles above is the choice of legislative instrument of Union secondary law. Article 288 TFEU prescribes three binding instruments, two of which are of relevance here; regulations, which have general application and are binding in their entirety and directly applicable in

²³ TEU, article 5.3.

²⁴ Ibid, article 5.4.

²⁵ European Commission, ‘Report from the Commission on Subsidiarity and Proportionality’ (COM(2010) 547 final, 8 October 2010), p. 3.

²⁶ Protocol (No 30) on the Application of the Principles of Subsidiarity and Proportionality, [2006] OJ C321E/308, para 6.

²⁷ Ibid, paras 7; 9; Craig, Paul and De Búrca, Gráinne, *EU Law – Texts, Cases and Materials* (Oxford: Oxford University Press, 2015), pp. 172-173.

²⁸ TEU, article 5.1-2.

the member states, and directives, binding to the results but otherwise freely decidable to the member states regarding choice of form and methods.

There is no formal hierarchy between the instruments. The legislating institutions shall choose the type of act on a case-by-case basis where the Treaties do not specify what type of instrument is to be adopted. The assessment has to be made in compliance with the principle of proportionality.²⁹ The principle of subsidiarity also exerts influence in the procedure, even if not explicitly. Regulations are centralised and apply generally, irrespective of differences between individual member states which are identificatory of a country: economic, societal, cultural, etc. Directives, on the other hand, are more prone to take into account these traits of the member states. This approach is more compatible with the concept of subsidiarity, where decisions are to be taken as close to the citizens as possible. The Edinburgh Council deemed directives preferable over regulations, the prior offering discretion as opposed to the detailed regulations. The form of action is prescribed to be as simple as possible.³⁰

2.1.4 EU agencies' powers

Relating to the principle of conferral, is the establishment of agencies of the Union, such as Frontex. The idea of specialised entities emerged prior to the enactment of the Lisbon treaty, following a call for reform of the activities of the Commission, due to the inefficient use of Commission resources regarding the institution's core policy activities.³¹ A year later, the Commission again brought up the topic, stating the conditions for the creation of regulatory agencies: when the relevant area is specialised and of a single public interest.³²

The principle of conferral prohibits *ultra vires* acts of any Union-measure, including acts establishing EU-agencies and delegating power to these. In *Meroni*, the CJEU developed its doctrine on delegation of powers to agencies. The Court stated that agencies cannot be subject to delegation of powers differing from those that the delegating institution itself attains from the Treaties.³³ The Treaties are in turn, to put it in grossly simplified words, the product of the member states.³⁴ More than 60 years have passed since the judgement was given and a clear framework on the limits of Union agencies' powers has yet to be developed. Despite a rapid evolvement of the role of the

²⁹ TFEU, article 296.

³⁰ European Council (Edinburgh) 11-12 December 1992, Conclusions of the Presidency, SN 465/1/92, p. 21. See also Protocol (No 30) on the Application of the Principles of Subsidiarity and Proportionality, [2006] OJ C321E/308, para 6.

³¹ European Commission, 'Reforming the Commission', (COM(2000) 200 final, 1 March 2000), part I, paras 5-6.

³² European Commission, 'European Governance – A White Paper', (COM(2001) 428 final, 12 October 2001), [2001] OJ C287/1, p. 19.

³³ Judgement of 13 June 1958, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority*, C-9/56, EU:C:1958:7, p. 150.

³⁴ TEU, article 1.

agencies, there is still a lack of solid Treaty-provisions on their general regulatory powers.³⁵

2.2 An area of freedom, security and justice

The objective of Union policy in the field of external border management is to develop and implement European integrated border management [EIBM] at national and Union level, which is a necessary corollary to the free movement of persons within the Union and is a fundamental component of an area of freedom, security and justice.³⁶

The preceding is an extract from the EBCG Regulation. The recital highlights the necessity of certain measures, which, in conjunction with recital 5, includes the establishment of an EBCG in order “[t]o ensure the effective implementation of European integrated border management”. The EBCG constitutes of Frontex and the national authorities responsible for border management.³⁷ As an important purpose with the establishment of Frontex and the EBCG, the area of freedom, security and justice (AFSJ) necessitates a review highlighting the role awarded to an AFSJ management body.

What is inherent in the Union-aim of the AFSJ? Article 3.2 TEU, specifying the key objectives of the Treaties and thus the EU, reads as follows: “The Union shall offer its citizens an [AFSJ] without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” The Tampere program, the first agreement on the development of the AFSJ, sets out the rationale behind the development.³⁸ Genuine freedom is to be ensured, and the enjoyment of it “in conditions of security and justice accessible to all.” The freedom is referred to as the territory of the member states forming the Union, where citizens share an “area of prosperity and peace”.³⁹

The program addresses migration and border controls, where the aforementioned freedom through its “very existence acts as a draw to many

³⁵ Van Gestel, Rob, ‘European Regulatory Agencies Adrift?’ (2014), in 21 Maastricht Journal of European and Comparative Law, p. 195; In 2012 the institutions agreed on a common approach on the agencies, which aims to make the agencies more coherent, effective and accountable through the means of general guiding principles applicable to all of them; European Commission, ‘Breakthrough as EU institutions agree common approach on agencies’, 13 June 2012 Press Release, IP/12/604.

³⁶ EBCG Regulation, recital 2.

³⁷ Ibid, recital 5; article 3.1.

³⁸ Acosta Arcarazo, Diego and Murphy, Cian C., ‘Rethinking Europe’s Freedom, Security and Justice’ in Acosta Arcarazo, Diego and Murphy, Cian C (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Oxford: Hart Publishing, 2014), p. 5.

³⁹ European Council (Tampere), ‘Presidency Conclusions of the Tampere European Council 15 and 16 October 1999’ (SN 200/99), 1 October 2003, para 2.

others world-wide who cannot enjoy the freedom [...]. It would be in contradiction with Europe's traditions to deny such freedom to those [...]. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes".⁴⁰ Thus, in order to offer freedom the external borders need to be properly and jointly managed. It may seem contradictory that freedom entails borders, but the Council conclusions could be interpreted as the funnelling of irregular migratory movements to a legitimate, safe channel for asylum procedures, away from trafficking and human smuggling. Whether this channel in turn actually exists is immaterial to the questions of this thesis, acknowledged with the impact its absence may have on clandestine migratory movements and the consequential relevance for fundamental rights.⁴¹

Fichera points out dual legal objectives of the post-Lisbon AFSJ, from a perspective of the internal market. First, the policies within the area aim to secure the functioning of the internal market. He uses judicial cooperation in civil matters as an example, a measure pertaining to the notion of justice. Article 81.2 TFEU reads that measures shall be adopted "particularly when necessary for the proper functioning of the internal market". Second, the policies aim to ensure a secure market place. This refers both to safety and to freedom, i.e. security from measures hindering free movement.⁴² He argues that security, and thus the AFSJ, is a precondition for the entire existence of the internal market. The conclusion is supported by other scholars, stating that migration policy is a logic continuous of the single market, necessitating measures allowing free movement.⁴³

Article 67 TFEU decides on the purpose of the AFSJ. According to its first paragraph "[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." Thus, there is a Treaty-obligation that any measures attributed to the AFSJ shall comply with fundamental rights.⁴⁴ There is nothing in the Treaties indicating that the articles under Chapter 2 of Title V TFEU, 'Policies on Border Checks, Asylum and Immigration' containing the provisions constituting the legal basis for the EBCG

⁴⁰ Ibid, para 3.

⁴¹ As of 2015 (after amendments to the asylum legal instruments of the Union), there was, in the eyes of several migration scholars, no such channel. See Peers, Steve (ed), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Leiden: Martinus Nijhoff, 2015), p. 618.

⁴² Fichera, Massimo, 'Sketches of a theory of Europe as an Area of Freedom, Security and Justice' in Fletcher, Maria; Herlin-Karnell, Ester; Matera, Claudio (eds), *The European Union as an Area of Freedom, Security and Justice* (Abingdon: Routledge, 2017), pp. 36-38.

⁴³ Walker, Neil (eds), *In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey* (Oxford: Oxford University Press, 2004), pp. 19-20.

⁴⁴ Leczykiewicz, Dorota, 'Human rights and the Area of Freedom, Security and Justice' in Fletcher, Maria; Herlin-Karnell, Ester; Matera, Claudio (eds), *The European Union as an Area of Freedom, Security and Justice* (2017), p. 57.

Regulation, may deviate from the standard set in article 67, letting it to other legal instruments to decide the scope of the rights.

2.3 The EBCG Regulation: origin and general purpose

The conclusions of the Tampere program set in motion the actions ultimately resulting in the creation of Frontex. The following section displays the development of border management, from the idea of ‘no internal frontiers’ to the current EBCG.

2.3.1 Prior developments: Schengen

The objectives of the Union on the internal market, the AFSJ and the free movement between member states require the absence of internal border controls within the EU.⁴⁵ The scheme of open borders in Europe is owed to the Schengen Agreement of 1985, which, together with the *acquis* it is part of, was incorporated into the legal system of the EU with the Treaty of Amsterdam in 1999.⁴⁶ According to the convention implementing the agreement checks on persons crossing the internal borders shall be abolished.⁴⁷

The corollary of the freedom of movement has another effect in turn, in which the repeal of border checks between member states as a compensatory measure necessitates effective external border controls.⁴⁸ The rationale used by the representatives of the initial five signatory states to the convention was “the risks in the field of security and illegal migration”.⁴⁹ The 20 year old declaration has since been further developed with the Schengen Borders Code (SBC), and the reasoning behind the need for strengthened external borders now also entails fighting human trafficking.⁵⁰ A general wording on the

⁴⁵ TEU, article 3.2-3; TFEU, articles 26; 67.1-2.

⁴⁶ Treaty of Amsterdam, Protocol integrating the Schengen *acquis* into the framework of the European Union, 2 October 1997 [Schengen Protocol]; Mungianu, Roberta, *Frontex and Non-Refoulement – The International Responsibility of the EU* (2016), p. 19.

⁴⁷ Convention Implementing the Schengen Agreement of 14 June 1985 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, 19 June 1990, article 2; Treaty on the Functioning of the European Union (consolidated version), Protocol (No 19) on the Schengen *Acquis* Integrated into the Framework of the European Union, 13 December 2007, article 2.

⁴⁸ See, for the stance and reasoning of the Commission and the Court of Justice of the European Union, Judgement of 21 September 1999, *Wijzenbeek*, C-378/97, EU:C:1999:439, paras 28; 41-42.

⁴⁹ Convention Implementing the Schengen Agreement, Declaration by the Ministers and State Secretaries, 19 June 1990, para 2.

⁵⁰ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L77/1, recital 6.

security area expands the scope of protection to that against “any threat to the Member States’ internal security, public policy, public health and international relations”.⁵¹

The external borders are, despite a common framework of European rules applying to them, borders of the member states. The harmonisation measures following the Schengen *acquis* are to be carried out homogeneously by all Schengen-states, a challenging task considering the Schengen-area currently consists of 22 EU member states and four non-member states, with each possibly having their own idea of border protection.⁵² The Commission, in its Communication on the external borders, identified shortcomings in the uniform application of the Schengen rules, together with organisational deficiencies and a lack of coordination between the member states. It was emphasised that awareness was due as the abolition of internal border checks means that border officials now guard not only their nation’s borders but also those of all the member states.⁵³ The geographical position and traits of certain member states and the heavy financial burden imposed on them following border surveillance expenses was also acknowledged in the communication.⁵⁴

For these reasons the Commission suggested the creation of a common European policy on the management of the external borders which should, *inter alia*, include a common corpus of legislation and an External borders practitioners common unit, as well as a mechanism for sharing the financial burden.⁵⁵ This practice would address the difficulty of balancing, on the one hand the territorial sovereignty of member states, and on the other the uniform achievement of the goals expressed in the Schengen, thus intruding less in the politically sensitive issue of state sovereignty which could arise would the Union take more power of the borders.⁵⁶ The recommendations of the Commission were subsequently subject to approval in an action plan of the Council in 2002, to the applause of the Seville European Council.⁵⁷

A year later, prior to the European Council meeting in Thessaloniki and following a period of lack of operational progress, the Commission, in its communication on the development of a common border control policy, highlighted the need for alternative institutional solutions and suggested that

⁵¹ Ibid.

⁵² European Commission website, *Schengen Area*, available at <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en>, accessed 26 April 2019.

⁵³ European Commission, ‘Communication: Towards Integrated Management of the External Borders of the Member States of the European Union’ (COM(2002) 233 final, 7 May 2002), paras 4; 13; 15.

⁵⁴ Ibid, para 14.

⁵⁵ Ibid, paras 20; 27-28.

⁵⁶ Fink, Melanie, *Frontex and Human Rights* (2018), pp. 1-2; 25.

⁵⁷ Council of the European Union, ‘Plan for the management of the external borders of the Member States of the European Union’ (document 10019/02 FRONT 58 COMIX 398), 14 June 2002; European Council (Seville), ‘Presidency Conclusions’ (DOC/02/13), 21 and 22 June 2002, paras 31-32.

an operational body should perform the tasks of the common unit.⁵⁸ The subsequent European Council meeting itself resulted in a call for a new institutional mechanism, in line with the Commission's suggestion of an operational body.⁵⁹

2.3.2 A European Border and Coast Guard

The Commission acted and drafted a regulation in November 2003, which was adopted by the Council in October the following year, resulting in the establishment of Frontex.⁶⁰ The founding regulation was amended twice, further expanding the agency's powers. The first changes were brought about in 2007, in which the issue of member states with relatively understaffed border crossings facing many arrivals was addressed. The amendment enabled swift measures upon state request for temporary additional assistance, through the means of a Rapid Border Intervention Team.⁶¹ The second amendments were made in 2011, which aimed to further enhance the protection of fundamental rights and allowed for an increase in the cooperation with third countries.⁶²

2015 and 2016 saw the unprecedented arrival of migrants to the EU, with mainly Greece and Italy being the first member states of arrival.⁶³ Meanwhile, several member states introduced internal border checks, in accordance with

⁵⁸ European Commission, 'Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents' (COM(2003) 323 final, 3 June 2003), p. 7; Neal, Andrew W, 'Securitization and Risk at the EU Border: The Origins of Frontex' (2009), in 47 *Journal of Common Market Studies* 333, pp. 341-342.

⁵⁹ European Council (Thessaloniki), 'Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions' (SN 200/03), 20 June 2003, para 14.

⁶⁰ European Commission, 'Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 final, 20 November 2003); 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, [2004] OJ L349/1, article 1.

⁶¹ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 22 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 tasks and powers of guest officers, [2007] OJ L199/30, in particular recitals 1-7.

⁶² Regulation (EU) No 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 L304/1, in particular recitals 9; 20-22; 29-30; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 (COM(2010) 61 final, 24 February 2010), pp. 15-16.

⁶³ European Commission, *THE EU AND: The Migration Crisis* (2007), available at <<https://publications.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1>>, accessed 28 April 2019; International Organization for Migration, *Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM*, 22 December 2015, available at <<https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom>>, accessed 6 August 2019.

the provisions on temporary internal border controls, many of which are still on-going.⁶⁴ In the midst of what has been dubbed the migratory crisis, the original Regulation was replaced and repealed in its entirety, as the changes brought about were substantial. The agency was renamed to the European Border and Coast Guard Agency (keeping its short name Frontex) and remains the same legal person.⁶⁵

2.4 The EBCG Regulation: governed by EU law

Recital 59 of the EBCG Regulation formally fulfills the requirement of the protocol on subsidiarity and proportionality, regarding the justification-clause in article 5 of the protocol. The objectives of the regulation are stated to not be sufficiently achievable at any other level than that of the European one, as the nature of the objectives go beyond state level.⁶⁶ The absence of internal border checks, and thus control of the Union's external borders, is of common interest to all member states.⁶⁷ In the preparatory works of the regulation it is stated that uncoordinated efforts of member states cannot adequately handle migratory flows, adding further to the need of a European level of strategy.⁶⁸

As for proportionality, the regulation contains a reference to the principle, stating that the regulation in itself does not go beyond what is proportional.⁶⁹ The principle is repeated in relation to the enforcement of the powers permitted from the regulation, constraining for example EBCG team members actions and the processing of personal data.⁷⁰ The proposal to the regulation also contains a paragraph on proportionality, advocating its fulfilment of the principle. Ensuring that member states correctly implement provisions on integrated border management and that appropriate action will be taken to prevent a crisis, the draft states that measures on direct intervention would only take place where the situation at the external borders is critical.⁷¹

⁶⁴ Schengen Borders Code, art. 25; Council Implementing Decision (EU) 2017/264, OJ L36/59; European Commission website, *Temporary Reintroduction of Border Control*, available at <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en>, accessed 6 August 2019.

⁶⁵ EBCG Regulation, recitals 1; 11; article 6.1.

⁶⁶ Ibid, recital 59.

⁶⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015), p. 6.

⁶⁸ Ibid, p. 3.

⁶⁹ EBCG Regulation, recital 59.

⁷⁰ Ibid, articles 21.4; 46.2.

⁷¹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015) p. 6.

2.4.1 Frontex as an EU agency

The chain of delegation – from member states to the institutions, and in turn from those to the agencies – and rationale behind Frontex existence in the capacity of an EU agency could be explained by several of the reasons Thatcher and Sweet has identified in regard to delegation from member states to the institutions. According to them, there are four main purposes distinguishable. First, the pursuit of expertise, where technical areas of governance require specific knowledge. Second, a functional purpose aimed to improve efficiency, where specific problems are addressed. Third (and perhaps controversially), a symbolic purpose, where a certain policy is visible and renders an agency attributable for any problems and thus avoiding blaming the delegating party. And finally, credibility: resolving commitment problems, where agencies are expected to work to increase the credibility of promises made.⁷²

The authors' point of departure of non-majoritarian institutions subject to delegation partly covers the agencies of the Union. The question of function and efficiency was highlighted in 2.1.4, where the use of Commission resources prompted action for creating Frontex. The same rationale applies in respect for expertise, as border management is a rather narrow field and arguably a corollary of the previous reason. As for grounds of symbolism and credibility, there is presumably not much pronounced, although causal insinuations may rather be discerned following the content of the relevant legislation and the preparatory works. Indications building on these reasons exist, with the above presented terminology of 'risks' and 'threats', in regard to security and migration linking border management to terrorism and irregular migration, being symbolical of securitisation measures post 9/11. Neal, however, did not view Frontex as representative of the institutionalisation of the securitisation of border management and migration in the Union, even if he acknowledges the political impact the terror incidents of 9/11 and the Madrid bombings may have had prior to the agency's establishment.⁷³ The scene has changed since his 2009 comments though, and the reinforcement of security at the borders is regarded as "essential to restoring public confidence".⁷⁴ Frontex may also, at least partly, be the result of other measures, such as of credibility in the eyes of the member states' political powers in order to maintain the absence of internal borders.

As for the choice of legislation, the provisions referred to by the EBCG Regulation, article 77 and 79 TFEU, do not specify what type of legal acts should govern the content of the policies and measures within them. They merely prescribe the actions to be taken, thereby letting it to the institutions

⁷² Thatcher, Mark and Sweet, Alec Stone, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002), in 25 *West European Politics* 1, p. 4.

⁷³ Neal, Andrew W, 'Securitization and Risk at the EU Border: The Origins of Frontex' (2009), in 47 *Journal of Common Market Studies* 333, pp. 343-346.

⁷⁴ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015), p. 78.

to decide the most appropriate legislative option. The elemental grounds prompting a new regulation, i.e., coordination among member states, cooperation between the relevant authorities, disposal of officers for assistance, etc., would be difficult to address by the adoption of a directive on the area, which would not provide for the highest degree of uniformity possible. This, and the fact that the previous legislation on the area from 2004 itself was a regulation, was stated as the reasons for proceeding with the current act.⁷⁵ Following the classification by the Commission in its communication on Union agencies, Frontex' multifaceted tasks put the agency in just about any category of regulatory agencies.⁷⁶ A glance through the EBCG Regulation highlights this, displaying a duty to assist member states, manage operational activities, and gather and process information, among many more.

2.5 Concluding remarks

The above text has aimed at clarifying the place of Frontex and the purpose of the establishment of the agency, taking into account an overall goal of the Union. The AFSJ is inherent in the internal market, the economic purpose of the European project. The view is that these notions are put under risk where the external borders are not managed well, effectively explaining the reasons behind the measures, including Frontex, the EBCG and its establishing regulation. The following chapter will focus not only on the aforementioned, but also introduce other instruments of the EU border *acquis*.

⁷⁵ Ibid, p. 6.

⁷⁶ European Commission, 'Communication from the Commission to the European Parliament and the Council, European Agencies: The way forward', (COM(2008) 135 final, 11 March 2018), p. 7.

3 Tasks of the EBCG and its constituents

In this part, focus is turned to the EBCG and its constituents, depicting the tasks set to meet the objectives relating to border management. The establishment thereof enables the highlighting of delicate settings, where the heightened risks of infringement of fundamental rights emerge. Later subsections will focus on actions taking place in the space outside of the member states' territories.

3.1 Tasks and key developments of Frontex

The large influx of migrants crossing the external borders irregularly in 2015 exposed structural deficiencies regarding member state compliance with the standards set by the previous regulation. During the same period, foreign fighters, receiving training and experiencing combat in Syria and Iraq, were involved in terrorist attacks across Europe.⁷⁷ These events prompted EU action to reinforce the borders and award the agency greater capacity and tools.⁷⁸ With the help of a complete management system, the handling of migration is expected to become more efficient, enabling the free movement within the Union and removing obstacles such as the temporary internal border checks of certain member states.⁷⁹

3.1.1 Objectives of the agency

Frontex aims to effectively implement a “European integrated border management” (EIBM).⁸⁰ The concept of integrated border management was defined by the EU Justice and Home Affairs Council as consisting of five elements:

1. Border controls through checks and surveillance, including risk analysis and intelligence
2. Detection and investigation of crimes with a cross-border dimension

⁷⁷ OSCE/ODIHR, *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (2018), pp. 11-12, available at <<https://www.osce.org/odihr/393503?download=true>>, accessed 5 May 2019.

⁷⁸ Carrera, Sergio and den Hertog, Leonhard, *A European Border and Coast Guard: What's in a name?* CEPS Paper No. 88 (2016), p. 2, available at <<https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf>>, accessed 1 May 2019.

⁷⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015), p. 82.

⁸⁰ EBCG Regulation, recital 5.

3. A four-tier access control model made up of measures in third countries, measures with neighbouring third countries, external border control measures and measures within the Schengen area
4. Inter-agency cooperation in border management, and;
5. Coordination and coherence at a national and international level.⁸¹

Through TFEU, the Union is tasked to develop and adopt a policy and measures which introduces the above system of an integrated border management, deemed a fundamental component of the AFSJ in the 2004 Regulation.⁸² The Europeanisation of such management has evolved the concept further and made it part of EU legislation, with the legal meaning of EIBM defined in the current EBCG Regulation. It is described as a four-tier access control model, as presented above, adding weight to Frontex' foreign ambitions.⁸³ The model is comprised of strategic components which are listed in the regulation and consists of, among others;

- I.* Border controls: entailing measures to facilitate border crossings, detect and prevent crimes, and refer persons applying for international protection, search and rescue operations, risk analysis regarding internal security and security of external borders,
- II.* Frontex-coordinated member state cooperation – joint-operations – and;
- III.* Cooperation with relevant third countries, technical and operational measures within the Schengen area,
- IV.* Return of third-country nationals, etc.⁸⁴

The aim of the model is to manage the crossings of the external borders efficiently, address migratory challenges and potential future threats, contributing to the addressing of serious crimes with a cross-border dimension, and ensuring a high level of internal security. These measures shall be taken while ensuring respect for fundamental rights and the safeguarding of the freedom of movement of persons.⁸⁵

3.1.2 What may be done? Observations of the tasks and powers

The EBCG Regulation has several new provisions in comparison with its predecessor and the following amendments. In order to fulfil the objectives listed above Frontex has been equipped with a supervisory role and also had its regulatory and operational tasks expanded, enabling executive actions of its staff. The specific tasks are listed in article 8 of the EBCG Regulation, with appurtenant provisions detailing the specifics of each mission. The

⁸¹ Council of the European Union, Justice and Home Affairs, 2768th Council Meeting, Brussels, 4-5 December Press Release, 15801/06.

⁸² TFEU, articles 77.1(c); 77.2(d); Council Regulation (EC) No 2007/2004, recital 1.

⁸³ *Ibid*, recital 3.

⁸⁴ *Ibid*, article 4.

⁸⁵ *Ibid*, recital 2.

supervisory role was and still is exerted primarily through the liaison officers, which now have regular monitoring of the member states' management of the external borders as one of their main functions.⁸⁶ Their physical presence in member states aims to ensure proper and effective monitoring through other means than mere analysis and information exchange.⁸⁷ The officers' reports constitute part of vulnerability assessments, which have the purpose of informing the agency on the capacity and readiness of the member states regarding the situation at their external borders and enabling pre-emptive and reactive measures.⁸⁸

The vulnerability assessment is complemented by the establishment of a monitoring and risk analysis centre with the capacity to monitor migratory flows toward and within the EU, and to carry out risk analysis relating to the member states. A regulatory aspect is cast upon the agency with the residual obligation of the member states to provide the agency with "necessary" information.⁸⁹ Where a member state's inability to effectively control its external borders threatens the functioning of the Schengen area the Union has a 'right to intervene'.⁹⁰ Frontex role in these situations is to consult with the Commission, which may lay a proposal for the Council to adopt a binding decision on.⁹¹ Would the non-compliance of a member state on this persist the Commission may trigger a procedure in the SBC which lets the Council, as a last resort, to recommend the member states to introduce internal border controls.⁹²

The agency has since the 2004 Regulation seen its operational tasks expanded regarding staff and technical equipment. Its rapid reaction pool acts as a standing corps at the immediate disposal of Frontex on the behalf of the

⁸⁶ See Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004, [2011] OJ L304/1, article 14.3; EBCG Regulation, article 12.1.

⁸⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015), p. 9.

⁸⁸ EBCG Regulation, articles 12.3(h); 12.5; 13.4.

⁸⁹ Ibid, article 11.1-4; See Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004, [2011] OJ L304/1, article 4, which contains the provision on member states duty to provide information to Frontex.

⁹⁰ This right is watered down in the EBCG Regulation compared to the proposal, which entailed intervention without the consent of the member state concerned, constituting a remarkable transfer of sovereignty to the Union; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard' (COM(2015) 671 final, 15 December 2015), p. 34, article 18; Carrera, Sergio and den Hertog, Leonhard, *A European Border and Coast Guard: What's in a name?* CEPS Paper No. 88 (2016), p. 4, available at <<https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf>>, accessed 1 May 2019.

⁹¹ EBCG Regulation, articles 13.8; 19.1.

⁹² Ibid, articles 19.8; 19.10; Schengen Borders Code, article 29.

member states' border guards and other relevant staff.⁹³ Members of the EBCG teams and the teams involved in returns consist of guest officers from other member states than the host state, and they may be granted the same powers as national officers, e.g. using force, accessing national databases and the power to refuse entry.⁹⁴

The specific core operational tasks of Frontex, which are the focus of this thesis due to their extraterritorial nature, consist of activities at the external borders. This includes coordination and organisation of joint operations and, where “specific and disproportionate challenges” arise, rapid border interventions.⁹⁵ The agency also has obligations relating to forced returns and controls three pools of national return experts to support assistance-seeking member states returning non-EU nationals: return monitors, return escorts and return specialists.⁹⁶ The staff shall be made available to a requesting member state, with Frontex as a facilitating link to provide for the manpower.⁹⁷ The EBCG Regulation's provisions on returns refer to, *inter alia*, the Return Directive article 8, which decides on the removal itself. Its fourth paragraph, aimed at the return escorts, obligates that the use of coercive measures on a resisting returnee “shall be proportionate and shall not exceed reasonable force”.⁹⁸ The agency is mandated to process personal data for the purposes of performing its tasks of organisation and coordination of certain operations, projects, returns and information exchange with other stakeholders.⁹⁹

The previous paragraphs give a glimpse of how the agency has developed into an entity with wide border-related mandates.¹⁰⁰ It acts as a spider in a web of multi-level authorities and other agencies, both relating to border and coast guarding.¹⁰¹ The joint operations of the agency are now further streamlined by the addition of the possibility to launch rapid border interventions within just a few days of member state request.¹⁰² The development further highlights the role the agency plays in the interaction with individuals and in securing their fundamental rights.

⁹³ EBCG Regulation; articles 20.5, 17.9; see Regulation (EC) No 863/2007 of the European Parliament and of the Council of 22 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, [2007] OJ L199/30, article 4.

⁹⁴ EBCG Regulation, articles 2.4, 8; 40; see Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004, [2011] OJ L304/1, article 17.5; Regulation (EC) No 863/2007 of the European Parliament and of the Council of 22 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, [2007] OJ L199/30, article 6.

⁹⁵ EBCG Regulation, article 8.1(d, e); also see subsection 3.3.4 on joint operations.

⁹⁶ *Ibid.*, article 28.

⁹⁷ *Ibid.*, articles 29.4; 30.4; 31.4.

⁹⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L348/98.

⁹⁹ EBCG Regulation, articles 46-48. See also, for the circumstances under which Frontex may process data, article 47.2.

¹⁰⁰ See EBCG Regulation, article 3 on the agency and its part in the EBCG.

¹⁰¹ *Ibid.*, articles 52-54.

¹⁰² *Ibid.*, article 17.4.

3.2 Relation between Frontex and the member states

The following text focuses on the balance of tasks and powers of Frontex *vis-à-vis* the member states. Thus, the concluding of the section, together with the preceding text, effectively answers the question of what the nature of Frontex' and the EBCG's tasks and structure of organisation is. This subchapter aims to display what role each entity has in the activities Frontex takes part in, enabling the allocation of responsibility for action in which human rights sensitive circumstances, and possibly infringements, may arise. The allocation plays a decisive role in the territorial reach of said rights.

The key paragraph on responsibility is article 5 of the EBCG Regulation, which states that the EBCG shall implement EIBM "as a shared responsibility" between Frontex and the relevant national authorities. However, the member states themselves have the primary responsibility for the management of their part of external borders, with the agency supporting "the application of Union measures relating to the management of the external borders" by reinforcement, assessment and coordination of the member states actions regarding those measures.¹⁰³ The somewhat contradictory statement, paired with the lack of a definition of 'shared responsibility' has been noted by scholars, with Moreno-Lax given the impression that the significance of the agency increasing its powers and thus responsibilities is being downplayed.¹⁰⁴

3.2.1 Initiating party and planning

Joint operations and rapid border interventions are normally initiated at the request of a member state. The responsibility of the establishment of operational plans for joint operations, and mandate to decide on rapid border interventions rests mainly on Frontex' executive director. The relevant member states are to agree on the plan, but the creation thereof is for the agency.¹⁰⁵ The plan includes allocation of responsibilities and tasks and they may differ from one another, depending on the specific needs of an operation.

As for returns, where Frontex is to attain a leading role it shall be on the request of a member state.¹⁰⁶ The agency may however "propose to Member States that it coordinate or organise return operations".¹⁰⁷ Returns are not carried out independently by the agency. The two entities cooperate closely throughout the operation, including with monitoring officers from the pool of

¹⁰³ Ibid, article 5.1, 3.

¹⁰⁴ Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), p. 159.

¹⁰⁵ EBCG Regulation, article 16; 17.4

¹⁰⁶ Return operations are return-related actions where Frontex has a leading role, as opposed to return interventions where the agency merely assists; EBCG Regulation, articles 2.14-15.

¹⁰⁷ Ibid, article 28.1

forced-return officers and from the member states. A return plan, which details organisational and procedural parts of the operation is to be drawn by the executive director and requires the approval of the participating member states.¹⁰⁸

3.2.2 Who does what? Division of operational tasks

Deployed officers shall act on instructions of the host state, which shall be in accordance with the operational plan. Frontex shall give any views to the host state, which is required to consider these and follow them to the extent possible.¹⁰⁹ The staff of the EBCG-teams and those involved in return-related activities need authorisation to perform certain tasks and powers in order to fulfil the objectives of Frontex. Their limits are in part decided by national law, which is to be complied with by the staff. The exercise of tasks and powers is made under instructions from national authority personnel and as a general rule in the presence of them. The authorisation of the host state is needed concerning carry of firearms and exercise of force, and any use must comply with the national law of the host state. The home state shall give its consent regarding some specific aspects of these capacities. The host state may also authorise EBCG-team members to use European and national databases in their work under the Regulation, and they may even be awarded the power to refuse third country-nationals entry, on the behalf of the host state.¹¹⁰

There are several provisions ruling on the liability of Frontex' staff. According to article 42 and 43 EBCG Regulation on civil and criminal liability respectively, EBCG team-members are subject to national law following malicious conduct. Article 60 awards Frontex itself with liability by the obligation to “make good any damage caused by its departments or by its staff in the performance of their duties.” However, none of the provisions allocate the responsibility among several actors, including between host states, member states, third countries and Frontex itself. International law sets the question, elaborated in section 4.4.

3.2.3 Whose operation?

The principal point of departure on the initiation of Frontex operations is member state request. However, article 19 of the EBCG Regulation prescribes for an active initial role on the behalf of the agency with the backing of Union institutions. The right to intervene, while ultimately risking the introduction of internal border controls, as demonstrated in subsection 3.1.2, awards

¹⁰⁸ Ibid, article 28.4.

¹⁰⁹ Ibid, article 21.

¹¹⁰ Ibid, article 40. See also article 41 on accreditation documents serving as proof of Frontex staff's powers.

Frontex with a fundamental mandate for its future activities. Article 19 thus obligates relevant member states to comply with decisions on rapid border interventions and joint operations, including with third countries, on which Frontex consults prior to their issuing.¹¹¹

Baldaccini comments on the decisive function of Frontex in the prelude to an operation, challenging the notion of member states' "primary responsibility for the management of their sections of the external borders".¹¹² The risk analysis of Frontex shall be taken into account by member states in their planning of operations at the external borders and with regard to returns, and it also serves as material for the executive director in his decision on measures to be recommended to member states, and in his approval of proposals for operations.¹¹³ Similarly, the vulnerability assessment of Frontex is ground for measures recommended to those states, including operational ones.¹¹⁴ Together with the member states' duty to refrain from activities "which could jeopardise the functioning of the Agency or the attainment of its objectives", Baldaccini views the operational role of Frontex as something more than only a facilitating one, suggesting a "substantial shift from the previously intergovernmental approach to external borders management to a more supranational one".¹¹⁵ The duty has another implication, where the exact demarcation of responsibility is blurred as member states' autonomous actions – e.g. in its cooperation with another member state outside the Union framework – are limited to respect Frontex and the attainment of its objectives.¹¹⁶

The financial responsibility of disposing EBCG-staff lies with Frontex, which shall remunerate the cost to the member states supplying personnel.¹¹⁷ However, this only aims on the extra burden which arises by deploying people, nothing in the EBCG regulation indicates that Frontex will actually pay the salaries of the officers. In contrast though, the EBCG Regulation obligates Frontex to "finance or co-finance" the operations.¹¹⁸ Adding to the blurring of the determining party is the management board of Frontex, which consists of representatives of member states and of the Commission.¹¹⁹ The management board is responsible for strategic decisions on Frontex. It decides on necessary measures in respect of moderating vulnerability, appoints the executive director and sets the framework for operational tasks.¹²⁰ Thus, the question of what entity is responsible is not answered as

¹¹¹ Ibid, article 19.1-3, 8.

¹¹² Ibid, article 5.1.

¹¹³ Ibid, articles 11.2, 5; 13.7; 15.3.

¹¹⁴ Ibid, articles 8.1(b); 13.4, 7; 15.4.

¹¹⁵ Baldaccini, Anneliese, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard, Ryan and Mitsilegas, Valsamis (eds), *Extraterritorial Immigration Control* (Leiden: Nijhoff, 2010), pp. 234-253; EBCG Regulation, article 8.2.

¹¹⁶ Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), p. 160.

¹¹⁷ EBCG Regulation, article 24.

¹¹⁸ Ibid, articles 14.3; 27.1(e); 28.9; where operations take place in a third country, EU funding is optional; article 54.9.

¹¹⁹ Ibid, article 63.1.

¹²⁰ Ibid, articles 62;13.8.

straightforwardly as it might be expected. However, elucidating responsibility in sensitive fundamental rights situations and therefore the territorial reach of those rights, can be done closer to the activities of Frontex outside the Union.

3.3 Actions outside member state territory

The EBCG Regulation introduced a provision, article 54, expanding previous norms on operations outside the territory of the Union member states and developing rules on cooperation with third states. This engagement with external authorities coincides with the EIBM's four-tier access control model and thus makes it a priority of Frontex. The types of cooperation involving Frontex are numerous, implicating differing roles for the agency. The article states, in its first paragraph that "[i]n matters covered by its activities and to the extent required for the fulfilment of its tasks, the Agency shall facilitate and encourage technical and operational cooperation between Member States and third countries, within the framework of the external relations policy of the Union".¹²¹ Seeing as the quote aims at cooperation between member states and third countries, the second paragraph allows for the agency's own cooperation "with the authorities of third countries competent in matters covered by this Regulation".¹²² Thus, Frontex may play a part in two cooperative forms: as a facilitating link between member states and third states, and as an EU agency itself cooperating with third states. The latter form does in no way make Frontex independent, as the agency still has to rely on member state contributions.

The agency's own capacity to cooperate with third countries raises the question of whether it is Frontex or the EU which concludes agreements with third states. Doctrine indicates that agencies do not have international legal personality, and the Union's own pronounced capacity as party to international agreements precludes further discussion on the matter.¹²³

The conditions for cooperation vary depending on the involvement of the parties. However, some prerequisites must be met. Both initial paragraphs of article 54 state that any cooperation must be concluded "with regard to the protection of fundamental rights and the principle of non-refoulement." Also, Frontex, and the member states whenever a party, "shall comply with Union law".¹²⁴ The latter requirement specifies the diffuse reference to compliance

¹²¹ Ibid, article 54.1. See also articles 8.1(u) and 14.2(c).

¹²² Ibid, article 54.2.

¹²³ Griller, Stefan and Orator, Andreas, 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010), in 35 *European Law Review* 3, p. 7; Schusterschitz, Gregor, 'European Agencies as Subjects of International Law' (2004), in 1 *International Organizations Law Review* 163, pp. 169-170; TEU, article 47; EBCG Regulation, article 54.4.

¹²⁴ EBCG Regulation, article 54.1-2.

with norms “equivalent” to EU law found in the 2011 amendment.¹²⁵ Any cooperation between Frontex and third states shall be foregone by the conclusion of a working arrangement between the parties.¹²⁶

3.3.1 Powers of Frontex and deployed staff in third countries

Whenever EBCG-team members are to “be deployed to a third country in actions where the team members will have executive powers, or where other actions in third countries require it, a status agreement shall be concluded by the Union with the third country concerned”.¹²⁷ The status agreements differ from the working arrangements for a non-executive cooperative role of Frontex. The Commission’s model status agreement serves as a blueprint for any arrangement where actions on third countries are at hand, and resembles a scaled-down EBCG Regulation in content and structure.¹²⁸ What is of interest for the purpose of this thesis are the powers of team members, which are regulated similarly to when participating member state officers are performing their duties in host member states; exercise of powers and performance of missions may only occur under the instructions from national staff, and as a general rule also in the presence of the same. EBCG staff may also be authorised to carry arms, use force, and where necessary use national databases under the same conditions as under the EBCG Regulation. Thus, any measure requires the authorisation of the relevant third country and must also follow that state’s national law.¹²⁹

The actions provided for shall be agreed upon in an operational plan, which decides on control, command and other terms of cooperation during operations.¹³⁰ According to the agreement the different types of measures to be taken outside member state territory are joint operations – i.e. Frontex-coordinated and -organised assistance to a member state in regard to external border management – and rapid border interventions.¹³¹ Return operations, although subject to status agreements, cannot be launched from the territory

¹²⁵ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004, [2011] OJ L304/1, article 14; EBCG Regulation, article 54.

¹²⁶ EBCG Regulation, article 54.2.

¹²⁷ Ibid, article 54.4

¹²⁸ Ibid, article 54.5; European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’ (COM(2016) 747 final, 22 November 2016).

¹²⁹ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 4; see also EBCG Regulation article 40.

¹³⁰ EBCG Regulation, article 16.3(k).

¹³¹ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 2.

of a third state.¹³² It must be noted that the model status agreement is not a final, binding document. It is, as its name suggests, a template. Thus, negotiations with a third country prior to cooperation may alter the agreement.¹³³ On 21 May 2019 Frontex launched its first joint operation with a non-EU state, deploying 50 officers and equipment such as cars from various member states to Albania.¹³⁴ As teams are deployed per the EBCG Regulation article 54.4, a status agreement was established accordingly. Compared to the model status agreement, the EU-Albanian one does not differ to any greater extent save for the emphasis on the autonomy and sovereignty of the state.¹³⁵

The deployed staff may only perform their tasks and exercise power under the instruction of national officers, and “[a]s a general rule, in the presence of border guards”. Compared to the model status agreement, only exceptionally may deployed staff act on Albania’s behalf, i.e. in the absence of national officers.¹³⁶ Hence the Albanian agreement does not deviate to any greater extent in regard to the relation between Frontex staff and national authorities, despite the clause of negotiations in the blueprint allowing for a different end result. However, if this suffices to say that future status agreements can be expected to be similarly worded is too early to tell, but the parties have at least in one case heavily relied on the Commission’s suggestion.

Deployed staffs’ executive powers also come to light in matters where Frontex facilitates operational activities between a member state and a third state. Bilateral agreements may include provisions regarding Frontex and its involvement, setting the role and competence of the Agency, including the exercise of executive powers of deployed personnel during operations. These operations are listed and comprise of “joint operations, pilot projects, rapid border interventions, return operations or return interventions”.¹³⁷

3.3.2 Applicability of the EBCG Regulation in third countries

The provisions regulating the activities are by their wording aimed at the member states of the Union, leaving out any mentioning of third states.¹³⁸ This raises the question of whether the provisions of the EBCG Regulation are applicable to third state situations. An instance is article 16 of the EBCG

¹³² European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’ (COM(2016) 747 final, 22 November 2016), p. 3.

¹³³ Ibid p. 4.

¹³⁴ Frontex website, *Frontex launches first operation in Western Balkans*, 21 May 2019, available at <<https://frontex.europa.eu/media-centre/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM>>, accessed 6 August 2019.

¹³⁵ Status Agreement between the European Union and the Republic of Albania, [2019] OJ L46/3, article 1.3.

¹³⁶ Ibid, article 4.3.

¹³⁷ EBCG Regulation, article 54.10.

¹³⁸ See for example *ibid*, article 15.1-2.

Regulation, which contains rules on the operational plan of joint operations, in which the organisational and procedural aspects are determined by listing components to be included in the plan. Examples of what it shall cover includes the aim of the operation, a description of the tasks, composition of the EBCG-teams, etc. The responsibility of drawing the plan rests at the executive director, and the plan shall be agreed upon by the host member state and any other participating member states. The concluded status agreement, however, has its own reference to an operational plan including its components.¹³⁹

It is unclear whether article 16 of the EBCG Regulation applies to the agreement, adding to its rules on the operational plan. The Fundamental Rights Agency, in its opinion on a new regulation on Frontex, commented on the correspondent provision of article 16 on operational plans.¹⁴⁰ It stated that the new regulation should “clarify that Article 39 [...] also apply when the Agency cooperates with third countries”.¹⁴¹ This can be read as implying that all parties are bound by the content of the new regulation, a reasoning not less applicable on Regulation 2016/1624. However, EU law does not bind third states, hence the status agreement between the Union and the third country. The provision should therefore be understood as binding on Frontex, and on the executive director in his drawing of plans, which later will have practical effects in the cooperation with third countries and subsequent operational plans agreed on. In any intra-Schengen operation, the operational plan is the backbone of the three types of operations mentioned and shall be drawn prior to, in addition to joint operations, rapid border interventions and return operations.¹⁴² Presumably, the requirement of including respect for fundamental rights in the operational plan also applies to those based on status agreements.¹⁴³

The model status agreement and Albanian agreement both meet the requisite.¹⁴⁴ With article 3 of both instruments ensuring respect for fundamental rights in the operational plans, it may be argued that at least the plans are designed in a sufficient manner in regard to fundamental rights and the avoidance of their infringement. However, working with countries not

¹³⁹ Status Agreement between the European Union and the Republic of Albania, [2019] OJ L46/3, article 3.2.

¹⁴⁰ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard’ (COM(2018) 631 final, 9 December 2018), p. 70.

¹⁴¹ European Agency for Fundamental Rights, *The revised European Border and Coast Guard Regulation and its fundamental rights implications – Opinion of the European Union Agency for Fundamental Rights* (2018), pp. 48-49, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf>, accessed 24 June 2019.

¹⁴² EBCG Regulation, articles 17.6-7; 28.2.

¹⁴³ *Ibid.*, article 16.3(d).

¹⁴⁴ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 3; Status Agreement between the European Union and the Republic of Albania, [2019] OJ L46/3, article 3.2.

bound by EU fundamental rights may demand additional safeguards, which can vary depending on what third country is to cooperate.

3.3.3 Operations on the high seas

Extraterritoriality includes the high seas outside the territorial waters of any member state.¹⁴⁵ Where Frontex operations take place on any portion of the seas, the involved parties are bound by the Sea Borders Regulation.¹⁴⁶ The regulation's provisions set up rules of engagement with any vessel suspected of being involved in the smuggling of persons. Certain provisions are particularly interesting as they consist of, entirely or partial, elements of extraterritoriality during interceptions. Article 6.2(b), in conjunction with article 6.1, allows for the ordering and physical escorting of vessels out from "the territorial sea of the host Member State or a neighbouring participating Member State" into a destination beyond or in the high seas.¹⁴⁷ Article 7.2(b) regulates interceptions on the high seas, permitting "warning and ordering" of a vessel not to enter territorial waters. Participating units may also conduct the boat or persons onboard to a third country and its authorities.¹⁴⁸

The above text demonstrates a highly sensitive environment in regard to fundamental rights, with in particular the principle of non-refoulment at stake. This may explain the, compared to the EBCG Regulation, rather extensive article on protection of fundamental rights, which prohibits disembarkment to a state where refoulment is at "serious risk".¹⁴⁹ Aside for presuming that this risk is generally non-existent, individual cases must be taken into account when assuring that no one risks having his or hers human rights violated upon removal to a third country.¹⁵⁰

As opposed to when operating in a third country, no agreement can be agreed upon during sea operations between the Union or its member states on the one hand, and another party on the other. Therefore, the only involved entities are bound by EU law. As is evident by previous section, any operation on the territory of third countries, which should include that country's territorial waters, has an agreement as its point of departure, whereas the Sea Borders Regulation allows for extraterritorial activities of Frontex to be entirely in the ambit of the EU legal order. The regulation also helps in clarifying the territorial reach of Frontex' activities without having to recourse to

¹⁴⁵ See, for definition of the term "high seas", United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 10 November 1994), 1833 UNTS 3, article 87.

¹⁴⁶ Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external borders in the context of operation cooperation (Sea Borders Regulation), [2014] OJ L189/93, article 1; recital 4; EBCG Regulation, article 82.2.

¹⁴⁷ The same provision applies when interception is made in the contiguous zone, see Sea Borders Regulation, article 8.

¹⁴⁸ Sea Borders Regulation, article 7.2(c).

¹⁴⁹ Ibid, article 4.1.

¹⁵⁰ Ibid, article 4.2, 3.

agreements concluded with third states, in its explicit referrals to operations conducted on the high seas. The SBC, another instrument regulating Frontex activities, is comparatively rather vague on the territorial scope of its implementation, leaving it open for interpretation both for and against an extraterritorial scope.¹⁵¹

3.3.4 Operations on third country territory

Article 2 of the model status agreement defines three operation types, of which some are repeated in article 54.10 of the EBCG Regulation; joint operations, rapid border interventions and return operations. As stated, final versions of the agreements with third countries may differ, but the model status agreement will work as a beacon of guidance for this account of operations which may include Frontex' exercise of power. As will the Sea Border Regulation, which defines "sea operation" as "a joint operation, pilot project or rapid border intervention carried out by the Member States for the surveillance of their external sea borders under the coordination of the Agency".¹⁵²

Article 15.1 of the EBCG Regulation prescribes for member states to choose to request that Frontex launches "joint operations to face upcoming challenges, including illegal immigration, present or future threats at its external borders or cross-border crime, or to provide increased technical and operational assistance when implementing its obligations with regard to the control of the external borders." This definition of joint operation is consistent with the term expressed in the model status agreement.¹⁵³ Other than a lexical assessment of the words, any explaining of the notion is not at hand. The words themselves denote a certain activity, being an operation. This operation is performed in common, implying the comprisal of two or more entities. As mentioned above, the substance of the operations is decided in the operational plan. Rapid border interventions are ad hoc measures which are, as the name implies, urgent in nature. This lets the operational plan be drawn up after the decision to launch the activity.¹⁵⁴

3.3.5 Three hypothetical situations

To give a better understanding of the outcome after the application of the discussed legal constructs, a scheme of three hypothetical, albeit realistic fundamental rights-sensitive situations discernible from the preceding

¹⁵¹ Schengen Borders Code, article 3; 13; Marin, Luisa, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border' (2014), in 7 Journal of Contemporary European Research 468, p. 480.

¹⁵² Sea Borders Regulation, article 2.

¹⁵³ European Commission, 'Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624', Annex (COM(2016) 747 final, 22 November 2016), article 2.

¹⁵⁴ EBCG Regulation, article 17.6.

sections are drawn up. These, while not implying that any infringements have in fact occurred or in other ways prosecuting a conduct, will serve to demonstrate the extraterritorial impact of fundamental rights in practice. In the next chapter the scenarios are assessed in the light of Charter and ECHR-provisions, together with the relevant primary and secondary Union law.

Scenario 1, ‘Processors’: members of the EBCG are deployed in the third country of A, where they assist national officers in screening migrants arriving irregularly. The country has a status agreement with the Union, in accordance with the model status agreement following article 54 of the EBCG Regulation. In order to perform their tasks, the Frontex-staff must access and process personal data. The officers know that the national databases are not legally well-protected, yet they must abide by national law on the matter.¹⁵⁵

Scenario 2, ‘Sailors’: members of Frontex are deployed in the member state of B, where they patrol international waters together with national officers according to an operational plan following a joint operation. Upon the interception and stoppage of a boat carrying undocumented migrants, they receive authorisation to order the vessel to alter its course. The coast guard leaves the vessel after assuring it will not head into B’s territorial waters.

Scenario 3, ‘Removers’: members of Frontex return teams escort an individual to his country of origin, following a member state’s return decision and subsequent request for escort of the returnee, article 30 of the EBCG Regulation. The EU has an agreement with C in accordance with article 79.3 TFEU. Just before the handover to the authorities in C, while being on C’s territory, the escorted person resists, which leads to a Frontex officer using heavy physical force.

3.4 EBCG Regulation and fundamental rights

In order to explain the territorial scope, the EBCG Regulation and its general fundamental rights ambitions should be highlighted. The regulation does emphasise fundamental human rights. Throughout the preamble of the EBCG Regulation, the requirement of acting with respect for fundamental rights is repeated.¹⁵⁶ The mantra culminates in recital 49, where the regulation in itself is said to “seek to *ensure full respect*” for certain, specific fundamental rights. Although the preamble of the regulation does not have any binding legal force as such, the statements therein explains the following content in the articles

¹⁵⁵ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 9.

¹⁵⁶ EBCG Regulation, recitals 2; 34; 47-48.

and provides the purpose of the regulation.¹⁵⁷ The recitals also serve an end in the interpretation of the binding EU law.¹⁵⁸ The notion is repeated in other articles of the regulation, often regarding a specific mission and how it should be performed in respect of those rights.

Article 34 sets the overall standard on fundamental rights and the protection thereof in the regulation, stating that the “[EBCG] shall *guarantee* the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law”. The provision thus goes a step further than certain articles merely ensuring ‘respect’ for fundamental rights, e.g. article 54.4 on status agreement content. The insertion of multiple, rather abstract provisions relating to the rights should however not instantly be viewed as Frontex’ and the EBCG’s mainstreaming of human rights and consequential satisfactory adherence to the protection of the same.¹⁵⁹ Importantly, this should also induce a practical effect of the obligations which the provisions relating to an EIBM assign the operations of Frontex and the states.¹⁶⁰

3.4.1 Fundamental rights officer and complaints mechanism

Concrete measures to uphold respect for the rights are, *inter alia*, the existence of a fundamental rights officer, which shall contribute to “the Agency’s fundamental rights strategy, of monitoring its compliance and of promoting its respect of fundamental rights”.¹⁶¹ The officer is thus a tool of mitigation of fundamental rights risks, and plays part in the withdrawal of financing, termination or suspension of Frontex activities which seriously or continuously violate said rights.¹⁶² The officer also plays part in the complaints mechanism, which lets individuals affected from Frontex operations to submit a complaint when they consider their fundamental rights breached.¹⁶³ A standardised complaint form shall be made available to individuals during all activities, and on Frontex’ website, including on the

¹⁵⁷ Judgement of 24 November 2005, *Deutsches Milch-Kontor*, C-136/04, EU:C:2005:716, para 32; Judgement of 2 April 2009, *Tyson Parketthandel*, C-134/08, EU:C:2009:229, para 16.

¹⁵⁸ European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation* (2015), p. 31, available at <<https://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>>, accessed 5 May 2019.

¹⁵⁹ On the concept of mainstreaming, see Zdzisław Kędzia, ‘Mainstreaming Human Rights in the United Nations’ in Alfredsson, Gudmundur and others (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller: 2nd Revised Edition* (Leiden: Nijhoff, 2009), p. 231.

¹⁶⁰ Benedek, Wolfgang; Ketteman, Matthias C.; Möstl, Markus, *Mainstreaming Human Security in Peace Operations and Crisis Management* (London: Routledge, 2011), p. 2.

¹⁶¹ EBCG Regulation, article 71.

¹⁶² *Ibid*, article 25.4.

¹⁶³ *Ibid*, articles 72; 16.3(m).

languages third persons are “reasonably believed” to understand. In addition, complaints not submitted on the form shall also be considered.¹⁶⁴

3.5 Concluding remarks

The text above has demonstrated what Frontex is set to achieve and how it actually operates in the field of interest for this thesis. Due to upholding an internal market without internal frontiers, and as a corollary of this an AFSJ, Frontex shall assist the member states in managing their portion of the external border. It is the host member state who is the deciding entity, working off of the operational plan. Frontex does however play an important role in planning and setting up the operational plan. The implications thereof are further discussed in chapter five. It is without a doubt that the activities of the EBCG are performed in fundamental rights sensitive situations, where the subject of the staffs’ actions may be vulnerable individuals. Thus, a review of fundamental rights is warranted.

¹⁶⁴ Ibid, article 72.10.

4 EU Fundamental rights – sources, scope and responsibilities

This chapter aims to answer the question of what EU fundamental rights are and elucidating their scope, including their extraterritoriality. Defining this requires an overhaul of their sources, which through the Treaties and case law of the CJEU have come to be interlinked. This means that the constituents of the EBCG – Frontex and the member states – have obligations deriving from several sources, which in turn may have differing effects depending on what specific fundamental rights that are subjects of matter. The sources constitute, as below sections will demonstrate, a yardstick against which the EBCG Regulation and other border management instruments shall be assessed. This chapter, together with the subsequent analysis challenge any conception of the EU not being bound by the ECHR, rendering not only the member states, but possibly also agencies such as Frontex bound by the content of the Convention, even if not by the instrument itself.

4.1 Sources of EU fundamental rights: internal law

Fundamental rights – “Human Rights within a specific EU internal context” – have developed over a long period of time in its search for a place within the Union legal framework.¹⁶⁵ Following the direct effect of EU law and primacy over the national ditto the CJEU, in *Internationale Handelsgesellschaft* affirmed that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”.¹⁶⁶ It further stated that “[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must

¹⁶⁵ On the difference between fundamental rights and human rights, the Fundamental Rights Agency has stated the following: “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.”, Fundamental Rights Agency website, *Frequently asked questions*, available at <<https://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights>>, accessed 10 June 2019.

¹⁶⁶ Judgement of 17 December 1970, *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:114, para 4 (grounds of judgement, p. 1133); on the direct effect and primacy of EU law, see Judgement of 5 February 1963, *van Gend & Loos*, Case 26/62, EU:C:1963:1; Judgement of 15 July 1964, *Costa v E.N.E.L.*, Case 6/64, EU:C:1964:66.

be ensured within the framework of the structure and objectives of the Community”.¹⁶⁷

Whether this was a defensive move by the Court to further secure the supremacy of EU law is up for discussion, since it predates the famous national cases rejecting the Union’s unconditional supremacy over their constitutional values.¹⁶⁸ It can be argued that the expansion of the Union and impact on not only the EU citizens but also, as the chapter on Frontex has displayed, non-EU citizens and even individuals outside the territory of the member states, rendered the development of fundamental rights protection inevitable.¹⁶⁹ The written worries of the Court supports the former, which expressed that “[r]ecourse to legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law”.¹⁷⁰ Regardless, an intertwining with the member states’ legal orders has emerged following the Treaty’s reference to the principles of the constitutional traditions common to the member states.¹⁷¹ In *Omega*, the CJEU even opened for the possibility of fundamental rights to restrict the obligations of economic nature imposed by EU law, such as the freedom to provide services.¹⁷²

The result of the case law is the recognition of fundamental rights as a general principle of European law. Following the Treaty of Lisbon, the Charter of Fundamental Rights obtained its binding force, providing a second layer of fundamental rights.¹⁷³ The codification means that the Union now also may derive the protection of rights from another source than those of the member states’ constitutions.¹⁷⁴ An independent European framework of rules has thus emerged. Third, internationally, the ECHR may be relied upon.¹⁷⁵ However, despite the intention of accession, the instrument is still not formally binding upon the Union as a party. This does by no means render the Convention irrelevant, not in regard to Frontex and especially not to the member states, which below sections will highlight.¹⁷⁶

¹⁶⁷ Judgement of 17 December 1970, *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:114, para 4 (grounds of judgement, p. 1133).

¹⁶⁸ *Solange I* [1974] 2 CMLR 540; *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

¹⁶⁹ Fabbrini, Federico, *Fundamental Rights in Europe* (Oxford: Oxford University Press, 2014), pp. 9-10.

¹⁷⁰ Judgement of 17 December 1970, *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:114, para 3 (grounds of judgement, p. 1133); it can be argued that this was the CJEU upholding a notion which would in itself be beneficial for the citizens.

¹⁷¹ TEU, article 6.3.

¹⁷² Judgement of 14 October 2004, *Omega Spielhallen*, Case C-36/02, EU:C:2004:614, para. 35.

¹⁷³ TEU, article 6.

¹⁷⁴ General principles also draw inspiration from international agreements member states are signatories to, see Judgement of 14 May 1974, *Nold*, Case 4/73, EU:C:1974:51, para 13. (on the law, p. 507).

¹⁷⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (ECHR), 4 November 1950, ETS 5.

¹⁷⁶ TEU, article 6.2.

4.1.1 The unwritten: general principles of EU law

When assessing what constitutes fundamental human rights of Union law general principles should be included. These unwritten rules are referred to by the EBCG Regulation, which implies their codification in the Charter.¹⁷⁷ Although an old notion, the general principles are more difficult to define than anything codified such as the contents of the Charter. Bengoetxea dismantles the concept into its lexical and systemic components to bring clarity. Principles are normative, but do not, as opposed to rules, in themselves provide for a legal consequence and strict enforcement until annulled. They may fill gaps which rules are insufficient to do and can be interpreted in different, albeit plausible ways.¹⁷⁸ This leads to the generality thereof, enabling interpretation without the shackles of specific wording and thus permitting deviation from a text which served as inspiration to the principle. Tridimas uses both words as one conception when addressing the legal meaning of it, as fundamental unwritten principles of law, underlying a legal system.¹⁷⁹

General principles of EU law stem from the member states' legal orders and from the ECHR.¹⁸⁰ However, no direct transfer is made but the principles, although not always prevalent in all member states' constitutions, get refined and shaped by the EU polity. They act as limits to the powers of the Union, and after *Mangold* also the member states when implementing EU law, attributed to the creativity of the Court and not necessarily, as *Internationale Handelsgesellschaft* displayed, the Treaties or other primary sources of EU law.¹⁸¹ General principles thus affect the interpretation of EU law, where acts must be compatible with them in order to be valid. Due to their loose prescriptiveness, they may prove a valuable tool for the CJEU to expand the protection for fundamental rights beyond the external borders.

¹⁷⁷ EBCG Regulation, recital 49.

¹⁷⁸ Bengoetxea, Joxerramon, 'General Legal Principles Navigating Space and Time' in Bernitz, Ulf; Groussot, Xavier; Schulyok, Felix (eds), *General Principles of EU Law and European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2013), p. 46.

¹⁷⁹ Tridimas, Takis, *The General Principles of EU Law* (Oxford: Oxford University Press 2006), p. 1.

¹⁸⁰ TEU, article 6.3.

¹⁸¹ Tridimas, Takis, *The General Principles of EU Law* (2006), pp. 5-6; Judgement of 22 November 2005, *Mangold*, Case C-144/04, EU:C:2005:709, paras 75-78; Judgement of 13 July 1989, *Wachauf*, Case 5/88, EU:C:1989:321, para 19; Groussot, Xavier, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006), p. 271.

4.1.2 The written: The Charter of Fundamental Rights

4.1.2.1 Scope of application

The Charter enjoys the same primary legal status as the Treaties.¹⁸² It is addressed in its entirety to the entities comprising the EU, including the agencies, and the member states, on whom it is binding only when they are implementing EU law. The result is that any EU act must be interpreted in the light of the Charter, including those setting up agencies such as Frontex. The addressees do not only have a duty to respect the rights and freedoms listed but must also “observe the principles and promote the application thereof in accordance with their respective powers”.¹⁸³ The agencies are not differentiated from one another by article 51 and it is therefore of no significance whether an agency is regulatory or executive in nature. Even if the scope includes acts of the agencies it is not a certainty that these have the intended legal effect *vis-à-vis* third parties required to enable the judicial review of the Court.¹⁸⁴ The functions of many agencies comprise of other tasks than producing legal effects, e.g. monitoring and providing assistance to other entities such as member states, etc.¹⁸⁵ However, where decision making with a binding effect is an agency’s tasks, amenability for judicial review is at hand.¹⁸⁶

As for the member states’ obligation, it is necessary to make clear when they are ‘implementing EU law’.¹⁸⁷ The explanations of the provision state that the content of the Charter is binding on member states when they act within the scope of EU law.¹⁸⁸ Lenaerts, current President of the CJEU, has interpreted the meaning of the explanations regarding member state action as that whenever a member state fulfils obligations imposed by Union law the Charter applies.¹⁸⁹ Subsequent to the president’s commentary the CJEU, in the case *Åkerberg Fransson* stated that the Charter applies also where measures adopted by a member state were not intended to implement a particular directive, should the national measure still implement an obligation imposed by EU law.¹⁹⁰ This statement has, as the sections below will display, expanded the scope of application of the Charter to incorporate situations pertaining to member state action beyond their duties within the EBCG, e.g., to where they act bilaterally.

¹⁸² TEU, article 6.1.

¹⁸³ The Charter, article 51.1.

¹⁸⁴ TFEU, article 263.

¹⁸⁵ Ward, Angela, ‘Article 51’ in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), p. 1426.

¹⁸⁶ See also TFEU, article 340 on the non-contractual liability of the Union.

¹⁸⁷ The reasoning on member states’ ‘implementation’ is applicable not only for the sake of the Charter, but also for the general principles.

¹⁸⁸ Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/2, p. 32.

¹⁸⁹ Lenaerts, Koen, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012), in 8 *European Constitutional Law Review* 375, p. 378.

¹⁹⁰ Judgement of 26 February 2013, *Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, para 28.

4.1.2.2 Limitations

The rights in the Charter are subject to limitations. These are general in nature, as opposed to the ECHR which has its limitations in connection to each provision, usually in the second paragraph.¹⁹¹ The Charter instead provides for this generally in article 52.1, stating that “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.” In addition to the two conditions, limitations must be “made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”, and proportional.¹⁹²

4.1.2.3 Supremacy and fundamental rights

The introduction of the Charter and its concrete norms on rights raised questions on the supremacy of EU law. Its article 53 states that the content of the Charter shall not be interpreted “as restricting or adversely affecting human rights and fundamental freedoms as recognised [...] by [...] international law, [...] including the European Convention [...] and by the Member States’ constitutions.” This could be interpreted as allowing the disapplication of EU law where other legal sources allowed for a higher standard of protection. The Court later affirmed the supremacy of EU law in *Melloni*, where it held that national courts are free to apply national standards of fundamental rights protection where an EU act calls for national implementing measures. However, this is under the condition “that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”.¹⁹³ Here, two conditions are added; the national standard may apply only if it is not below that of the Charter, and the application of national standards does not compromise the primacy, unity and effectiveness of EU law.¹⁹⁴

The CJEU effectively shut down questioning on the primacy and cannot accept any interpretation of article 53 which “would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”.¹⁹⁵ Thus, the court upheld one of the core principles of EU, on the duty to set aside any national law in conflict with Union law.¹⁹⁶ This trait of the principle in itself is according to De Witte reason for the authors of the

¹⁹¹ See e.g. ECHR, article 10 on the Freedom of Expression.

¹⁹² The Charter, article 52.1.

¹⁹³ Judgement of 26 February 2013, *Melloni*, Case C-399/11, EU:C:2013:107, para 60.

¹⁹⁴ Besselink, Leonard F.M., ‘The Parameters of Constitutional Conflict after *Melloni*’ (2014), in 39 *European Constitutional Law Review* 531, p. 546.

¹⁹⁵ Judgement of 26 February 2013, *Melloni*, Case C-399/11, EU:C:2013:107, para 58.

¹⁹⁶ (166).

Charter to formulate any intended limitations to it clearer.¹⁹⁷ As is discussed in 5.1.3, the *Melloni*-doctrine may have an adverse consequence in respect for the application of the ECHR, and in turn the instrument's extensive (extra)territorial scope.

4.1.3 The written and the unwritten

With the coming into force of the Charter, the question arises of how the instrument interplays with the general principles of EU law. As of yet, the codification of fundamental rights has not led to the abandonment of the Court's referral to certain rights as general principles. In *Kadi*, the CJEU acknowledged the place of a human right (to effective judicial protection) as a general principle, "which has been enshrined in [...] the ECHR", and "affirmed by Article 47 of the Charter".¹⁹⁸ Moreover, article 6 TEU assures the presence of general principles, linking ECHR and its content on fundamental rights to EU law. Due to their nature, there is no exhaustive list of what fundamental rights constitute general principles. The following section will therefore focus on the written. However, as is argued in the next chapter the principles may prove a useful tool for the CJEU as a counterweight due to its independency from the Convention.

4.2 What fundamental rights are at risk during Frontex operations?

As this thesis focuses on the scope of fundamental rights it is appropriate with a review of the rights jeopardised, materialising the risk in an apprehensible way. As the CJEU's jurisprudence on fundamental human rights pales in comparison to that of the ECtHR's, a majority of the references to those rights concern the case-law of the latter court.¹⁹⁹ Thus, prior to engaging with the material rights in question an account for the impact of the ECHR as regards to the interpretation of EU fundamental rights is warranted.

The Charter explicitly refers to the Convention, both in the preamble as well as in its articles. The Charter is to be interpreted in a non-restrictive way

¹⁹⁷ De Witte, Bruno, 'Article 53' in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), pp. 1531-1532.

¹⁹⁸ Judgement of 3 September 2008, *Kadi*, Joined Cases C-402/05 and 415/05, EU:C:2008:461, para 335.

¹⁹⁹ A snapshot comparison of the case law between the CJEU and the ECtHR shows that the former has delivered 455 judgements containing references to either the Charter or the Convention, whereas the latter has delivered 60644 judgements pertaining to the Convention; European Agency for Fundamental Rights, *Case-law database*, available at <<https://fra.europa.eu/en/case-law-database>>, accessed 4 August 2019; European Court of Human Rights Human Rights Documentation Portal HUDOC, available at <<https://hudoc.echr.coe.int/eng#%20>>, accessed 4 August 2019.

regarding the rights and freedoms in the Convention.²⁰⁰ According to its article 52.3, any corresponding rights of the Charter shall have the same “meaning and scope” as that of the ECHR. Furthermore, the “provision shall not prevent Union law providing more extensive protection”.²⁰¹ According to the explanations of the paragraph, “[t]he reference to the ECHR covers both the Convention and the Protocols to it. The meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the [ECtHR] and by the [CJEU]”.²⁰² The content of the Convention is further materialised into EU law by setting the scene on fundamental rights through general principles.²⁰³

The first reference in case law implying the Union’s notice of the ECHR was in the case *Nold*, where the CJEU referred to international human rights treaties as guidelines for Community law. The reference is not made to any specific treaty and the member states’ relation to them are considered, with a high degree of connectivity as a denominator for providing guidance.²⁰⁴ Legal doctrine and the CJEU’s own opinion on ECHR-accession refers to the Convention as ‘the’ legal instrument in the mind of the Court.²⁰⁵ Following the case, the Union court has lived up to its words and regularly refers to the Strasbourg court and its judgements. However, this custom is, as will be demonstrated in 4.3.5, increasingly derogated from.²⁰⁶

4.2.1 The rights

It should be kept in mind that only fantasy limits the construing of scenarios in which different fundamental rights are infringed. However, in this section the target rights are those easily identifiable from joint operations, rapid border interventions and returns. First and foremost is the principle of non-refoulement. Article 19.2 of the Charter prohibits removal, expulsion or extradition “to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” In *NS*, the Court interestingly did not refer to the provision when stating that “to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States [...] may not

²⁰⁰ ECHR, article 53.

²⁰¹ The Charter, article 52.3; While the Charter incorporates certain rights other than those of the Convention (e.g. social and economic rights), the bulk of the two acts’ content overlaps.

²⁰² Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/2, p. 33.

²⁰³ TEU, article 6.3.

²⁰⁴ Judgement of 14 May 1974, *Nold*, Case 4/73, EU:C:1974:51, para 13.

²⁰⁵ Besselink, Leonard F.M., ‘Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998), in 35 Common Market Law Review 629, p. 650; Opinion of the Court of 18 December 2014, Case Opinion 2/13, EU:C:2014:2454, para 37.

²⁰⁶ Guild, Elspeth and Lesieur, Guillaume, *The European Court of Justice on the European Convention on Human Rights* (London: Kluwer Law International, 1998), p. xviii; Judgement of 28 October 1975, *Rutili*, Case 36/75, EU:C:1975:137, para 33.

transfer an asylum seeker to the Member State responsible [...] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker” may risk inhuman or degrading treatment prohibited by article 4 of the Charter.²⁰⁷

The first paragraph of article 19 forbids collective expulsions. The international prohibition of the same was introduced with Protocol No 4 of the ECHR.²⁰⁸ Article 18 of the Charter guarantees the right to asylum “with due respect for the rules of the Geneva Convention [...] relating to the status of refugees and in accordance with” the Union Treaties. As opposed to the other rights concerned, the right to asylum does not have a Convention-equivalent (see below). The right to an effective remedy, on the other hand, enshrined in article 47 of the Charter, is also protected by article 13 of the ECHR and the case law of the Court.²⁰⁹

The Charter right of protection of personal data in article 8 has its Conventional counterpart in article 8 on the right to respect for private life. This provision of the ECHR has been developed to present-day standards by the ECtHR, which stated that “[t]he processing of information relating to an individual’s private life comes within the scope of Article 8”.²¹⁰ The Charter provision states that personal data “must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law”.²¹¹

Also dually protected are the arguably most fundamental rights of them all: the right to life and prohibition of torture, including inhuman or degrading treatment.²¹² Any recourse to violence in regard to a person deprived of his liberty must “be made strictly necessary by his own conduct”.²¹³ Despite the use of force potentially being found justified, the obligation persists in regard to procedural aspects, where a subsequent investigation must be adequate.²¹⁴ Meanwhile, article 3 ECHR on the prohibition of torture has in case law been found to include the principle of non-refoulement. The same jurisprudence denounces the right to asylum as a Convention right, with the ECtHR stating that “the Convention does not guarantee a right to asylum or refugee status but only prohibits the expulsion of persons to a country where they may be subjected to treatment contrary to Article 3”.²¹⁵ It should be noted that some

²⁰⁷ Judgement of 21 December 2011, *N.S. v Secretary of State for the Home Department and M.E. and Others*, Joined cases C-411/10 and C-493/10, EU:C:2011:865, para 94.

²⁰⁸ Protocol No. 4 to the ECHR, article 4.

²⁰⁹ Judgement of 15 May 1986, *Johnston*, Case 222/84, EU:C:1986:206, paras 18-19.

²¹⁰ *I v. Finland* (App no 20511/03) ECHR 17 July 2008, para 35; see also *Leander v. Sweden* (App no 9248/81) 26 March 1987, Series A no. 116, para 48.

²¹¹ The Charter, article 8.2.

²¹² *Ibid*, articles 2; 3; ECHR, articles 2; 3.

²¹³ *Bouyid v. Belgium* (App no 23380/09) ECHR [GC] 28 September 2015, para 88.

²¹⁴ *El-Masri v. “The Former Yugoslav Republic of Macedonia”* (App no 39630/09 ECHR [GC] 13 December 2012, para 182.

²¹⁵ *Alimzhanova and Lisikov v. Sweden* (App no 38821/97) ECHR 24 August 1999; see also, on the principle of non-refoulement, *Soering v. UK* (Application no 14038/88) 7 July 1989, Series A no. 161, para 88.

Convention-rights are absolute, meaning that they can never be derogated from or subject to exceptions. Article 15 ECHR and its paragraphs specify the non-derogatory rights, including the right to life and the prohibition on torture (article 2 and 3 ECHR). The provisions guaranteeing these rights lack clauses of exception, which in other provisions state the exceptional circumstances permitting deviation from certain rights (see subsection 4.5.2).

The two absolute ECHR-rights have another implication, apparent from the ECtHR's case law; it "considers it important to point out that an applicant's complaint alleging that his or her extradition would have consequences contrary to Articles 2 and 3 of the Convention must imperatively be subject to close scrutiny by a "national authority" [...]"²¹⁶ The control over the applicants in *Hirsi Jamaa*, and deprivation of "any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced", was found to be in breach of article 13, on the right to an effective remedy, in conjunction with article 3 and 4 of protocol no. 4 ECHR.²¹⁷

As pointed out above, the clauses of exception in the provisions of the ECHR are construed within the articles themselves. The only exception found among the rights above is relating to the right to respect for private life. Article 8.2 establishes that the only interference with the right, save for derogation following article 15, shall be of that which "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime", etc.²¹⁸

4.2.2 The scenarios and the rights

The scheme in 3.3.5 presents numerous possible infringements of the rights described in the previous subsection. In 'Processors', the right to privacy is jeopardised, where individuals' personal information risks getting into unauthorized hands by the means of conduct of the third country of A, or an entity acquiring the data from A.²¹⁹

In 'Sailors', the principle of non-refoulement and the prohibition on collective expulsions is at stake; the individuals in the boat are turned back as a group and may, depending on where the vessel ends up, embark in a state where "there is serious risk" for the treatment in article 19 of the Charter. It could also be argued that one is deprived of his or hers right to an effective remedy

²¹⁶ *Shamayev and Others v. Georgia* (App no 36378/02) ECHR 12 April 2005, para 448.

²¹⁷ *Hirsi Jamaa and Others v. Italy* (App no 27765/09) ECHR [GC] 23 February 2012, paras 201-207.

²¹⁸ See the provision for additional grounds for exception.

²¹⁹ The scenario 'Processors' does not include transfer of data from the EU to a third country, therefore any relating EU legislation is disregarded.

by not having a decision on removal individually assessed. Individuals on the boat seeking refuge cannot enjoy the right to asylum.

Assuming a national decision on removal is following the principle of non-refoulement, ‘Removers’ endangers the prohibition on torture and possibly the right to life, should the force not be regarded as necessary and justified. These rights-sensitive actions, not unreasonable to take place when and where the circumstances are ripe, occur outside of member state territory, either in a third country or in international waters, hence the turn to the main question.

4.3 Extraterritorial implications of fundamental rights

Previous chapters have displayed the nature of the operations of an EU agency and how individuals get affected by Union legislature despite their spatial presence outside the EU. As is evident now, Union measures may have a great impact outside its member states territory. In *Boukhalfa v. Germany*, the Court affirmed the possible extraterritorial legal effects of Union law by stating that article 227 EC (now article 355 TFEU, which concerns the territories subject to EU law) does not “preclude Community rules from having effects outside the territory of the Community”.²²⁰ The general wording leaves open for the same effect regarding fundamental rights, which is what will be elucidated in this section.

As for the Convention, its article 1 states that contracting states have a duty to ensure that every individual under its jurisdiction enjoys the rights and freedoms of the Convention.²²¹ According to the ECtHR, which has jurisdiction in all matters concerning the Convention and its protocols, its jurisdiction may under certain conditions have an extraterritorial application. In *Hirsi Jamaa and Others v. Italy*, where Italian authorities intercepted a vessel on the high seas carrying migrants for the subsequent immediate return to Libya, the ECtHR found that the Italian authorities had exercised jurisdiction within the meaning of article 1 of the Convention.²²² What is of importance is the control over the individual concerned. In the case, national authorities exercised “continuous and exclusive de facto and de jure control” over the persons between the time of boarding to the time of handing over control to Libyan authorities. The nature and purpose of the Italian warship’s presence on the high seas was considered immaterial to the scope of application.²²³ Following the two cases, both the Treaties and the Convention may have an extraterritorial application. What about the extraterritorial scope of the Charter?

²²⁰ Judgement of 30 April 1996, *Ingrid Boukhalfa v Bundesrepublik Deutschland*, Case C-214/94, EU:C:1996:174, para 14.

²²¹ ECHR, article 1.

²²² *Hirsi Jamaa and Others v. Italy* (App no 27765/09) ECHR [GC] 23 February 2012, paras 76-82; 177-180; ECHR, article 32.

²²³ *Ibid*, para 81.

4.3.1 The Charter

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify its powers and tasks as defined in the Treaties.²²⁴

The above extract of the Charter's functional provision article 51 is silent on the territorial scope of the instrument. From the wording, it can be understood that any activity of Union agencies is tracked by the obligation to uphold Charter rights, immaterial to where it occurs.²²⁵ This reasoning is in line with the Advocate General Mengozzi's understanding of the CJEU following its judgement in *Åkerberg Fransson*. Accordingly, the inapplicability of the Charter due to extraterritorial circumstances despite implementation of EU law would undermine the parallelism between EU action and the application of the Charter.²²⁶ Thus, as Moreno-Lax puts it, "[t]he scope of application *ratione loci* of the Charter is, accordingly, to be determined by reference to the general scope of application of EU law, following autonomous requirements" of Union law.²²⁷ This scope of application includes the exercise of Union bodies executive powers.²²⁸

The Court, in *Bank Saderat Iran v Council*, has according to doctrine appeared to have established the territorial scope of the Charter, which applies in regard to an entity located outside the EU, at least when that entity's legal interests have been affected by EU law.²²⁹ The functionalistic, rather than

²²⁴ The Charter, article 51.

²²⁵ Moreno-Lax, Violeta; Costello, Cathryn, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territory to Facticity, the Effectiveness Model' in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), p. 1662.

²²⁶ Opinion of Advocate General Mengozzi of 7 February 2017, *X and X*, Case C-638/16, EU:C:2017:93, paras 91-92.

²²⁷ Moreno-Lax, Violeta; Costello, Cathryn, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territory to Facticity, the Effectiveness Model' in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), p. 1679; 1660.

²²⁸ Judgement of 5 October 1994, *X v Commission*, Case 404/92 P, EU:C:1994:361, paras 23-24.

²²⁹ Judgement of 5 February 2013, *Bank Saderat Iran v Council*, Case T-494/10, EU:T:2013:59; Ward, Angela, 'Article 51' in Peers, Steve; Tamara, Hervey; Kenner, Jeff; Ward, Angela (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), p. 1423.

territorial view on jurisdiction may be explained with the fact that the Union does not have any territory of its own, yet needs to establish a link for the fundamental rights obligations to arise. A similar wording to that of article 1 of the ECHR would not suffice as it would not include the Union itself. In regard to article 52.3 of the Charter, on its same meaning and scope as the ECHR, the case has given rise to doubts on whether this incorporates jurisdiction; the Court refused to apply the provision on limitations deriving from the ECHR (article 34) since it is procedural in nature and thus not “applicable to the procedures before the Courts of the [EU]”.²³⁰ According to Moreno-Lax, by analogy, this should also apply to article 1 of the ECHR on jurisdiction, which is the basis of the extraterritorial application of the ECHR.²³¹

What are the powers defined in the Treaties to remain untouched by the Charter, pertaining to the scope of fundamental rights? In similarity to the Charter, there is no Treaty-provision delimiting the scope of application of fundamental rights. Article 2 TEU describes the founding values of the Union but not more. Article 6 TEU, on the Charter, is silent on the matter while article 21 TEU does rule on foreign aspects. It prescribes EU action on the international scene by guidance with the values of article 2. None of the provisions can be read as restricting the territorial scope of fundamental rights.

4.3.2 Secondary law and specific rights

In ‘Sailors’, the right to asylum is highlighted. The Union asylum *acquis* clearly sets out the territorial scope in regard to Union procedures on international protection. Article 3.1 of the Asylum Procedures Directive states that it “shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States”.²³² The obligation to examine asylum applications arises whenever it is made “on the territory of” a member state, including at the border.²³³ In contrast, the EBCG Regulation expressly prohibits, “[i]n performing its tasks, the European Border and Coast Guard” from action risking contravention of the principle of non-refoulement.²³⁴ There is no territorial limit to the obligation. The principle stands where Frontex is facilitating member state cooperation with third countries, and itself engages

²³⁰ Judgement of 5 February 2013, *Bank Saderat Iran v Council*, Case T-494/10, EU:T:2013:59, para 36.

²³¹ Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), p. 293.

²³² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L180/60.

²³³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (Dublin Regulation), [2013] OJ L180/30, article 3.1.

²³⁴ EBCG Regulation, article 34.2.

in cooperation.²³⁵ The clause is also included in the model status agreement, where “[m]embers of the team shall, in the performance of their tasks and exercise of their powers, fully respect fundamental rights and freedoms, including [...] the principle of non-refoulement and the prohibition of collective expulsions”.²³⁶

Under the course of a sea operation, before handing over any individual to a third country, the involved units shall “use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement”.²³⁷

‘Processors’ concerns the protection of personal data, a matter covered by extensive Union secondary legislation. However, the scenario as depicted is not properly covered by secondary EU law. The General Data Protection Regulation (GDPR) precludes the application of the regulation and its safety mechanisms on member states fulfilling tasks falling under the EBCG-Regulation, including return operations.²³⁸ Outside the context of such operations, transfer of personal data to third countries is prohibited.²³⁹ In regard to the territorial scope of the GDPR, relevant for situations involving personal data without extraterritorial transfer of it, the GDPR reads that it “applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law”.²⁴⁰ However, the provision does not help to address extraterritorial protection of personal data which is processed in the context of Frontex personnel deployed in a third country, due to the exemption clause of article 2.2(b).

Moreover, Regulation 2018/1725 on the protection of personal data processed by Union institutions and bodies, prescribes for transfers to third countries to be permitted only where that country “ensures an adequate level of protection”.²⁴¹ By referral to GDPR, it is the Commission which decides on this level, taking into account the rule of law, respect for fundamental rights, relevant legislation including public security, national security, the existence

²³⁵ Ibid, article 54.1-2.

²³⁶ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 8.

²³⁷ Sea Borders Regulation, article 4.3.

²³⁸ Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), [2016] OJ L119/1, article 2.2(b); EBCG Regulation, articles 45.4; 48.

²³⁹ EBCG Regulation, article 45.4.

²⁴⁰ GDPR, article 3.3.

²⁴¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, [2018] OJ L295/39, article 47.

and effective functioning of supervisory authorities, international commitments of that country, etc.²⁴² Regulation 2018/1725 is explicitly referred to by the model status agreement and the agreement with Albania.²⁴³

The Frontex code of conduct “shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights”.²⁴⁴ The ruling provision has a separate paragraph “which shall apply during all return operations and return interventions coordinated or organised by the Agency”. This includes the assurance of returns to be performed in full respect for fundamental rights, “in particular [...] the prohibition of torture and of inhuman or degrading treatment or punishment, [...] and the right to protection of personal data”.²⁴⁵ The significance of the formulation should however not be overemphasised, since the code is not a binding document and should be regarded as soft law.

4.3.3 The EBCG Regulation and its approach to rights in general

The common provision on fundamental rights in the EBCG Regulation, article 34, is silent on the territorial scope of the rights; “The European Border and Coast Guard 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, relevant international law [...] and obligations related to access to international protection, in particular the principle of non-refoulement.” Likewise, territorial limitation on fundamental rights is absent in the recital prescribing an EIBM-approach.²⁴⁶ Article 40, directed toward the team-members, states that they shall, while performing their tasks and exercising their powers, “comply with Union and international law and observe fundamental rights”. There are no limits to the territorial scope of fundamental rights in regard to cooperation with third countries; the functional approach is prevalent in article 54 of the EBCG Regulation as well as in the model status agreement, as stated above. It should also be noted that

²⁴² By reference to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2018 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, [2016] OJ L119/1, article 45.

²⁴³ European Commission, ‘Communication: Model status agreement as referred to in article 54(5) of Regulation (EU) 2016/1624’, Annex (COM(2016) 747 final, 22 November 2016), article 9.3; Status Agreement between the European Union and the Republic of Albania, [2019] OJ L46/3, article 9.3; Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, [2018] OJ L295/39, article 99.

²⁴⁴ EBCG Regulation, article 35.1; Frontex website, *Code of Conduct for all Persons Participating in Frontex Activities*, available at <https://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf>, accessed 23 July 2019.

²⁴⁵ EBCG Regulation, article 35.2; the Return Directive contains no provisions on Frontex-coordinated returns.

²⁴⁶ EBCG Regulation, recital 2.

the Sea Borders Regulation states the duty to comply with international law during the contested measures described above.²⁴⁷

4.3.4 ECHR: dual obligations for the member states

All 47 of the Council of Europe (CoE) member states are bound to the ECHR. This includes every single member state of the EU.²⁴⁸ They thus have a dual legal obligation to live up to regarding human rights law: Union-affiliated and that of the Convention. With the dual obligation of the member states comes the question of what the outcome is of EU actions incompatible with the duties flowing from the Convention, as regards state responsibility. The landmark case concerning this is *Bosphorus*, which established the main principle on the indirect review of Union acts by the ECtHR. Its Grand Chamber stated that “a Contracting Party is responsible under article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”.²⁴⁹ Thus the Strasbourg court enabled its review over the parties contracted to the Convention who perform acts contrary to the rights inherent when implementing law, regardless of the source of the duty signatory states fulfil.

The judges then proceeded to the question of equivalent protection, stating that “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the convention when it does no more than implement legal obligations flowing from its membership in the organisation”.²⁵⁰ Being a presumption, it can get rebutted should the protection be considered manifestly deficient.

The outcome of *Nold*, and the adoption of articles 52.3 and 53 of the Charter on corresponding Convention-rights’ equal meaning, scope and level of protection respectively, implies that Union legislators aim to live up to the set presumption of the ECtHR. However, this does not mean that fundamental human rights actually do enjoy adequate protection throughout the whole EU apparatus. As the Grand Chamber pointed out, the substantive guarantees

²⁴⁷ Sea Borders Regulation, article 7.2.

²⁴⁸ Council of Europe website, *The European Convention on Human Rights – how does it work?* Available at <<https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>>, accessed 17 May 2019.

²⁴⁹ *Bosphorus v. Ireland* (App no 45036/98) ECHR [GC] 30 June 2005, para 153.

²⁵⁰ *Ibid*, paras 155-156.

protecting the rights must also be paired with “the mechanisms controlling their observance”, a referral to the CJEU.²⁵¹

4.3.5 The Court and the Convention

Since engaging with fundamental rights, the Court has ruled in cases relating to fundamental rights which go beyond economic policy, to fields in the likes of migration, privacy, social security, etc.²⁵² The introduction of a Union-centred term for human rights – fundamental rights – signals a strive for autonomy of the EU legal system vis á vis public international law. Yet, renaming and adapting notions of law to an EU-context does not in itself mean that the CJEU prioritises fundamental rights over any other objective. As a result of the ECHR’s status as a major international agreement with its own guardian, and the exceptional position the instrument stands in due to article 6 TEU, the CJEU’s use of the Convention is of particular interest, considering the clarity the instrument has been awarded by the ECtHR regarding its extraterritorial scope.

As previous sections have shown, the scope and meaning of the fundamental rights may be highly affected by the Convention following the important part it plays on the EU fundamental rights regime and the interpretation thereof. A different understanding of the trait of EU acts being tracked by the duties inherent in the Charter and the general principles, could be countered with the help of the geographical scope of the material rights of the ECHR, maintaining a great effect on the EBCG’s entities in conducting their activities. This would, however, be dependent on the courts interpreting EU law actually treating the Convention as a source of fundamental rights.

De Búrca took note of a lack of references from the part of the CJEU to the Strasbourg court’s case law following the entry into force of the Charter in 2009 and the three following years. In cases in which the Court engaged with the substance of the Charter, references to the case law of ECtHR were made at a declining rate.²⁵³ She gives multiple relevant reasons justifying the refrain of comparison and referral and adequately strikes down on them. Most interesting though is part of her conclusion, where she emphasises that the Court is “missing the opportunity to improve the quality and fairness of its judgements and to strengthen their legitimacy in the eyes of the European citizens and other relevant constituencies”.²⁵⁴ One case where the CJEU did engage with the substance of fundamental rights (after De Búrca’s inquiry) is *Melloni*. As much as it did reassure the basic legal doctrine of supremacy, it

²⁵¹ Ibid, para 155.

²⁵² Judgement of 21 December 2011, *N.S. v Secretary of State for the Home Department and M.E. and Others*, Joined cases C-411/10 and C-493/10, EU:C:2011:865; Judgement of 8 April 2014, *Digital Rights Ireland*, Case C-293/12, EU:C:2014:238; Judgement of 8 March 2011, *Ruiz Zambrano*, Case C-34/09, EU:C:2011:124.

²⁵³ De Búrca, Gráinne, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator’ (2013), in 20 Maastricht Journal of European and Comparative Law 168, pp. 173-176.

²⁵⁴ Ibid, p. 184.

did it on the expense of a national higher standard of human rights.²⁵⁵ As a result, the Court upheld and reinforced the autonomy of the EU legal order.

4.3.5.1 (Non)-accession to the ECHR, and Opinion 2/13

The case is an example of the CJEU's defence toward the national law of the member states. De Witte differentiates between this internal type of autonomy and the defence toward international law, external autonomy.²⁵⁶ Whereas *Kadi* can be said to be *Melloni*'s case law counterpart regarding external autonomy – in which the Court addressed the Union's international obligations as not having “the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights” – Opinion 2/13 of the CJEU is *the declaration* on the autonomy of EU law.²⁵⁷ It is a review of a draft agreement proposed in respect of the Union's accession to the ECHR, in which the Court stated the following in respect of article 6.2 TEU, which obligates the accession to the Convention while prohibiting any effect of the Union's competences as defined in the Treaties:

“[T]he conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law”.²⁵⁸ The Court then proceeded to describe these characteristics, which include those relating to the constitutional structure of the Union, its legal order's independency from and supremacy over national law, common values, and the fundamental rights.²⁵⁹ Stating its purpose of ensuring consistency and uniformity in the interpretation of EU law in order to ensure that the characteristics and autonomy of the legal order are preserved, the Court said that:

“[A]s a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would [...] be binding upon the institutions of the EU and on its Member States [...]. Accordingly, the EU [...] would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR [...]. [T]he EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR”.²⁶⁰ Even if the Court did find that an agreement establishing a court being able to give binding decisions on the institutions is “not, in principle, incompatible with

²⁵⁵ Kuijer, Martin, 'The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession' (2018), in *The International Journal of Human Rights* 1, pp. 6-7.

²⁵⁶ De Witte, Bruno, 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019), in *88 Nordic Journal of International Law* 65, pp. 65-66.

²⁵⁷ Judgement of 3 September 2008, *Kadi*, Joined Cases C-402/05 and 415/05, EU:C:2008:461, paras 282-285.

²⁵⁸ Opinion of the Court of 18 December 2014, Case Opinion 2/13, EU:C:2014:2454, paras 163-164.

²⁵⁹ *Ibid*, paras 165-169.

²⁶⁰ *Ibid*, paras 180-181.

EU law”, it did reaffirm itself when stating that it “has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order”.²⁶¹

The CJEU then proceeded to argue for consequences following the accession which would have an adverse effect on the characteristics and autonomy of EU law.²⁶² Notwithstanding the substance of the arguments, scholars interpret the approach of the Court as primarily focused on the autonomy of EU law. The protection of human rights seems to be second to autonomy, and the Court disregards the obligation in article 6 TEU.²⁶³ De Witte even interprets the opinion as using autonomy as a means for protecting the CJEU’s exclusive jurisdiction in EU law matters, disguised as the contrary: exclusive jurisdiction as a tool to uphold autonomy.²⁶⁴

It may be asked whether accession would not seem superfluous since the adoption of the Charter and its status as primary law. Spaventa counters the matter when she raises the question of external scrutiny, i.e. that accession would result in fundamental rights enjoying residual protection, in a court not concerned with matters of Union integration and the internal market. The rationale is that full protection of fundamental rights cannot be guaranteed, even in democracies.²⁶⁵

4.4 Attribution of conduct

Whereas the attribution of conduct and allocation responsibility goes beyond the ambit of the extraterritorial scope of Union fundamental rights, it has an impact in practice. The deterrent effect of allocating responsibility to a party should an infringement occur cannot be disregarded, necessitating an assessment of the matter.

As stated, article 43 of the EBCG Regulation rules on criminal liability, determining that team members “shall be treated in the same way as officials of the host Member States with regard to any criminal offence that might be committed against them or by them.” Article 42 similarly refers to the host state, prescribing that “that Member State shall be liable in accordance with

²⁶¹ Ibid, paras 182-183.

²⁶² Ibid, paras 185-200.

²⁶³ De Witte, Bruno, ‘The Relative Autonomy of the European Union’s Fundamental Rights Regime’ (2019), in 88 *Nordic Journal of International Law* 65, pp. 71-73; Kuijer, Martin, ‘The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession’ (2018), in *The International Journal of Human Rights* 1, pp. 7-8.

²⁶⁴ De Witte, Bruno, ‘The Relative Autonomy of the European Union’s Fundamental Rights Regime’ (2019), in 88 *Nordic Journal of International Law* 65, p. 71.

²⁶⁵ Spaventa, Eleanor, ‘A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13’, in 22 *Maastricht Journal of European and Comparative Law* 35, pp. 37-38.

its national law for any damage caused by them during their operations.” The provisions do not clarify the question of responsibility in regard to international law, leaving out entities other than member states.²⁶⁶

4.4.1 International law on responsibility

Two legal instruments are of importance to address the issue; ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (ARSIWA), and ‘Articles on the responsibility of international organizations’ (ARIO).²⁶⁷ The instruments are not formally binding. However, the former is considered to “be in whole or in large part an accurate codification of the customary international law of state responsibility”.²⁶⁸ The status of ARIO is contested, with (in)sufficient state practice considered, at the time of drafting the articles, to be “a major obstacle to any codification attempt”.²⁶⁹ However, it has been referred to by the ECtHR and still holds a legal value and will therefore serve as a point of reference.²⁷⁰

Article 6 ARSIWA reads as follows; “The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former state under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.” It is thus a presumption that the home state is responsible, insofar as the host member state is not exercising governmental authority over the organ, in which case the presumption is rebutted, and responsibility placed on the host state. The condition is that the deployed organ acts under the host state’s “exclusive direction and control”, and “not on instructions from the sending State”.²⁷¹

ARSIWA does not address the involvement of an international organisation. The equivalent provision of ARIO is article 7, which states that “[t]he conduct of an organ of a State [...] that is placed at the disposal of another international

²⁶⁶ The model status agreement does not have any provisions on liability of the Union or responsibility of states.

²⁶⁷ ILC, ‘Report of the Fifty-Third Session: Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)’ (UN Doc A/56/10, 2001); ILC, ‘Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations (ARIO)’ (UN Doc A/66/10, 2011).

²⁶⁸ Crawford, James, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), p. 43.

²⁶⁹ Hafner, Gerhard, ‘Is the Topic of Responsibility of International Organizations Ripe for Codification?’ in Fastenrath, Ulrich and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), p. 700.

²⁷⁰ *Al-Jedda v. the United Kingdom* (App no 27021/08) ECHR [GC] 7 July 2011, para 84; *Behrami and Behrami v. France, Germany and Norway* (App no 71412/01 and 78166/01) ECHR [GC] 2 May 2007, para 121; Fink, Melanie, *Frontex and Human Rights* (2018), pp. 83-84; Mungianu, Roberta, *Frontex and Non-Refoulement – The International Responsibility of the EU* (2016), pp. 59-60.

²⁷¹ ILC, ‘Report of the Twenty-Sixth Session’ (UN Doc A/9610/Rev.1, 1974), p. 287, para 5.

organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.” This element of attribution is a cumulative condition for establishing an internationally wrongful act, with the second element being that the action “constitutes a breach of an international obligation of that organization”.²⁷² The ECtHR reasoned in a manner consistent with the aforementioned instruments in *Al-Jedda*, where it took the view that effective control and ultimate authority over an act is required in order to attribute a breach to a certain party.²⁷³ Pursuant to the agreements presented, both a host state and an international organisation may be found responsible should they exercise control in the manner required.

The purpose of this thesis precludes the highly complex and, in regard to fundamental rights, scarce jurisprudence on liability of the Union. As it has been established that fundamental rights may apply extraterritorially, it is of interest to highlight whether it is an EU-affiliated entity, including the member states, or a third country which is found responsible. As EU law does not decide on the responsibility of third countries the question of liability in turn remains an issue of whether it is the Union as such, i.e. the institutions, bodies and agencies, or a member state which is liable for infringing fundamental rights. The extraterritorial scope of fundamental rights applies regardless of which of those two entities are performing their duties according to the EBCG Regulation: member states fulfilling their obligations under the Regulation equals the implementation of EU law, for the sake of article 51 of the Charter. Therefore, the question of allocation of liability between the Union and its member states is left at that, being subject to other researcher’s contributions.²⁷⁴

²⁷² ARIO, article 4(b).

²⁷³ *Al-Jedda* (App no 27021/08) ECHR [GC] 7 July 2011, paras 74-86 (in particular para 84).

²⁷⁴ See, in particular Fink, Melanie, *Frontex and Human Rights* (2018), pp. 180-306.

5 Concluding discussion

To recap and sum up; the above material answers the main research question affirmatively. Frontex' operations may have the effect of extending the territorial scope of application of the fundamental human rights, thereby extending at least part of the EU legal order into the space beyond the external borders. However, the answer should not be delivered without taking the below considerations into account.

5.1 Applicability of the fundamental rights regime extraterritorially

The Charter itself does not possess any territorial limit to its application. Instead it simply always applies when EU law applies. Therefore, the Charter is applicable in its entirety during all actions, including those taken outside the territories of the member states. However, also article 52.1 applies, allowing for the limitation of the rights. To complicate things even further, the Charter also refers to the ECHR, which in turn has its own conception on limitations of rights.

5.1.1 Fundamental rights sources and their scope

The ECHR is an instrument with one objective and one objective only: guaranteeing the protection of Human Rights. The Convention does not take any other interest into account, be that of economic or political nature. While it is farfetched to say that the Union does not protect fundamental human rights, when its own Charter's wording is generally similar to that of the Convention, it does have other interests. Opinion 2/13 and the words of the Court therein did not exactly embrace the CJEU's priority of fundamental rights over its own autonomy. This was the hindrance of accession, and the concern of not having the ultimate say on the expense of the ECtHR, a court only concerned with the Convention, counters the duty to accede obligated in the TEU. Paired with De Búrca's inquiry of ECHR-references in the jurisprudence of the CJEU, the opinion raises questions of doubt in regard to fundamental rights and the ambition of the EU. This even despite *Omega*, which concerned fundamental rights protection at the cost of other key purposes of EU law but did not touch upon the question of the Court's power.

As demonstrated in 4.2.1, all rights and freedoms considered at stake during Frontex operations enjoy dual protection under both the EU fundamental rights regime and Human Rights listed in the ECHR. The only exception from the construed scheme is the right to asylum. This disregarded, on the other rights derived from the scenarios, article 52.3 of the Charter is applicable, guaranteeing that the protection of them is not of any lower standard than

what is prescribed in the Convention. Hence, for the sake of this thesis, the ultimate priority of the CJEU may be of lesser importance following the existence of the Charter. Another corollary of the provision is support for the extraterritorial scope of the Charter, as compared to the ECHR. The wording of article 52.3, added to the meaning of article 53 on nothing in the Charter to be interpreted as restricting Human Rights, implies (at least) the same reach in space as the ECHR. Should there be any doubt about this interpretation, the explanations mitigate concerns for anomalies, attributing not only the Convention but also the jurisprudence of the ECtHR.

As its case law indicates jurisdiction and thus the scope of application extensively, the scope of the Charter and its rights should be at least equally far-reaching. The implication of the ECtHR's interpretation of article 1 of the ECHR means that the material rights of the instrument are awarded an extraterritorial scope when certain conditions are met. When the right in question is subject to interpretation, this scope is inherent within it due to the Strasbourg court's understanding. This approach would bypass Moreno-Lax' interpretation of *Bank Saderat Iran v Council*, since the CJEU would be forced to the guidance of the ECtHR jurisprudence on the material rights, and not necessarily have to deal with the procedural rules of the Convention when deciding on the scope of fundamental rights. Thus, when the ECtHR has delivered a judgement where the right in question has been awarded an extraterritorial scope, the corresponding right in the Charter should have the same understanding, pursuant to article 52.3. This approach would however require a rich case law to be bound of, and a willingness to adhere to it.

The above provisions also address any issues in regard to limitations. Whereas the wording of article 52.1 allows for limitation on any right should the conditions inherent in it be fulfilled, the non-derogatory limitations of the ECHR still stand. Therefore, for example, there is an absolute prohibition on refoulement even if article 19 in conjunction with article 52.1 of the Charter does not provide for this alone, due to the equal meaning of article 3 ECHR. As for the general principles of EU law, the same arguments could be applied. However, it is the Court who decides what makes general principles and the content of them and should it for any reason seek to confine the spatial reach of the ECHR, however unlikely, it would do so. Therefore, the Charter and its analogy to the Convention safeguards the expansion of fundamental rights. Equally, the Court may, as a counter-measure to Opinion 2/13, create vastly extensive interpretations of the principles, to cover situations beyond that of the Convention, as it has previously done with the dynamism of principles. Only time will tell.

5.1.2 Processors, sailors and removers

As indicated previously, the rights may be subject to limitation. In this subsection, these rights and their potential reach under Frontex activities will be discussed, illuminating the possible implications thereof. Certain rights associated with the operations are undisputed. These include the right to life

and the prohibition on torture. The status of the remaining rights should be elaborated. Since article 52 of the Charter on limitations of rights is general in nature and as already laid out in 4.2, deemed a ‘floor of protection’ of the Charter *vis-à-vis* the Convention, discussions on limitations in the following focus on those deriving from the ECHR.

The right to protection of personal data entails that the information must be processed fairly, for specified purposes and on the basis of either consent of the individuals concerned, or on another legitimate basis laid down by law. While the subjects may agree to the processing, there is a risk of a legal gap on the protection in ‘Processors’. If the third country does not have a sufficient legal framework, Frontex-seconded staff is operating in a manner which may be in breach with fundamental rights obligations, depending on what entity is in charge of the operation. Regardless of the party in control, there is an ambivalence in the ambitions of the Union. On one hand, the transfer of personal data to third countries is prohibited, and where it is made it is subject to heavy scrutiny of the Commission following an adequacy assessment. On the other, there is no safeguard for personal data which derive from the work of an officer deployed in a third country, save for any specifications laid out in an operational plan. This may lead to paradoxical situations; the officer cannot work in a manner which contravenes national law, should the actions infringing the right follow an obligation arising from that law. Should cooperation with certain third countries cease to exist? Or perhaps it is sufficient to restrict EBCG-personnel’s work with personal data.

The condition for third country cooperation in article 54 of the EBCG-regulation requiring compliance with EU law, and the code of conduct applicable of the deployed staff, both aim to prevent the infringing actions of the officers despite national lawfulness. These two requirements both help to at least uphold a negative obligation on the protection of fundamental rights, where refraining from an action, in this case processing of personal data, gives the right to privacy/protection of data an extraterritorial application, regardless of the scope the Charter and Convention provides for. The reasoning is applicable in other situations too, which involve a deployed officer in third countries facing instructions contrary to EU law.

The method of action in ‘Sailors’ does not immediately threaten the principle of non-refoulement. However, depending on the actual seaworthiness of the vessel, it is not far-fetched to assume that the boat sooner or later may have to head to shore in a country where the principle of non-refoulement is at stake. E.g., it is possible that the vessel is not in any distress at the moment of interception, but after some time runs out of supplies such as food and water, forcing the persons onboard to disembark in an unsafe third country. Where a person applies for international protection, the Union legislation is inapplicable due to the presence on international waters. The right to asylum may only be limited according to the provision on general limitations in the Charter, which includes the condition of a legal norm providing any limitations. Neither of the two instruments on asylum presented rules on the matter, only leaving for their interpretation *e contrario* for reaching the

conclusion meeting the condition in article 52 of the Charter; i.e., that the absence of rules allowing for the enjoyment of the right to asylum outside member state territory equals a limitation.

In the particular scenario construed, the element of control over the individuals in the boat does not amount to that of which the Italian authorities had over the applicants in *Hirsi*. The Sea Borders Regulation does however, as pointed out previously, allow for the conducting of a vessel and its passengers to a third country. In such situations the jurisprudence of the ECtHR requires the availability of remedies for the subjects of the decision of removal. In practice, the availability of information to vulnerable persons on a dinghy may be non-existent. People of varying backgrounds take on the irregular journey to the member states by sea, and it cannot be expected that in every operation, despite efforts with translators, each individual affected will be able to express their need for protection, or protest against a decision and put forward claims against being escorted to a country where they may face refouling treatment. Similarly, the expectation of individuals to, in all cases of interception, reasonably understand the complaint form or even access it after they may have gotten turned away before reaching territorial waters is remarkable.

The actions in ‘Removers’ do not entail legal issues to the extent of the other scenarios. The right mentioned in the related paragraphs are absolute and can never be derogated or excepted from. No legal instruments limit the obligation to respect the right to life and prohibition on torture. Presuming that the use of force is made necessary by the conduct of the returnee, the actual force may be found justified and deemed defence. However, this does not mean that an inadequate subsequent investigation of an incident resulting in serious injury or even death will be overlooked.

5.1.3 Spill-over effect: member state action

This thesis aims at Frontex and the EBCG Regulation, including the involved entities. However, the existence of a legal framework on border management, including the Sea Borders Regulation, may entail an effect on the territorial scope of fundamental rights not highlighted hitherto: independent member state activity. The implication of the case law of the Union presented in 4.1.2.1, in particular *Åkerberg Fransson*, is that the Charter may apply even where member states arrange border operations without the involvement of Frontex, e.g. independently or jointly with a third state and/or another member state bi- or multilaterally. As noted in sections 2.1-2, the Treaties permit member state action in matters of the AFSJ, as far as it attains to grounds not covered by the Union. The working methods of a member state may however in some cases conform with the EBCG Regulation or Sea Borders Regulation on even a minimal basis, creating duties in respect of the Union legal framework to respect and fulfil. Following Opinion 2/13, this question of interpretation lies with the CJEU, which has proven its creativity before and put more and more of its trust in the Charter.

Whereas member states must implement EU law in order to be bound by the Charter, they are always bound by the obligations deriving from the ECHR. It has been established that the rights protected in the Convention may have an extraterritorial application. Where a member state is found to implement EU law, the duties imposed by the Convention still persist. An issue may arise where a member state of the Union acts in a manner compatible with the ECHR, but which jeopardises the primacy, unity and effectiveness of EU law. In *Melloni*, the Court intervened where constitutional rights did put those three notions at risk. Opinion 2/13 and its emphasis on the autonomy of EU law is alarming and raises the question of whether a similar outcome is at hand where a member state is complying with the Convention, but in a conduct incompatible with the *Melloni*-doctrine and thus a thorn in the side of the CJEU. An argument against this would be that the member state would simply be complying with the Charter, as it has the same meaning as the ECHR. However, this would mean that another instrument is dictating EU law, a possibility highly improbable to be permitted by the Court. Therefore, the Opinion and non-accession may still pose an obstacle to the genuine, full protection of fundamental human rights.

5.2 Entity in charge: roles and responsibilities

Having established that fundamental rights may have an extraterritorial effect and discussing rights particularly sensitive in Frontex operations and the overarching legal framework, this section turns to the question of responsibility. As the previous parts have displayed, differing circumstances challenge the notion of constant member state responsibility over the staff. International law provides for responsibility on the party which exercises effective control over the organ infringing fundamental rights. The point of departure should be that which is the closest to the staff, i.e. the commands which the personnel shall obey. These instructions derive from the host state, regardless of whether the state is a member of the Union or a third country.

What complicates matters is the background work of the agency and the impact it has on member states in the form of the duty to refrain and parallelism of implementation of EU law and application of fundamental rights. Suppose the unlikely event of the Frontex-drawn operational plan being manifestly indifferent to fundamental rights, the question arises of whether the agency may incur responsibility. Similarly, the fact that Frontex finances operations, gives views mandatory for host states to consider, has liaison officers producing material on which recommendations are made, etc., signals informal powers which are more far-reaching relative to the degree of accountability the agency may be held with, considering the legal shielding the EBCG Regulation incurs on Frontex on the expense of the host and home state. The blurring of responsibilities risks limiting the effect the many provisions on fundamental rights incorporated on to the EBCG Regulation,

as it has evolved, since the complex legislation obscures the practical responsibility in Frontex activities. This risks the undermining of the fundamental rights guaranteed, regardless of territorial application.

5.2.1 Deployment in third states

A legal void in regard to fundamental Human Rights may exist where a third country cooperating with the EBCG is not a party to the ECHR. That third state, in its capacity as a non-signatory state would have no obligations following neither the ECHR nor the Charter. Thus, the EBCG may theoretically deploy its officers in a state where they may be ordered to conduct in violation of the two instruments, in practice not rendering the host state responsible, save for other international conventions and customary international law. It would be in such an instance that article 21 TEU on the EU's external actions, and article 51.1 of the Charter on promoting its application, should guide the Union in its conclusion of a status agreement, ensuring that any acts of deployed officers may be subject to repercussions.

The EBCG shall not only respect the fundamental right but also, as is evident in subsection 4.3.3, guarantee their protection. Thus, it can be argued that a positive obligation is cast upon Frontex and the member states, which opens up for residual responsibility. Where an officer would be deployed in a third country not bound by the ECHR, the EU and its member states would have to uphold the provisions of the Charter where this would not extend their competences.

5.3 Final remarks

The efforts of mainstreaming human rights in the EBCG Regulation and Frontex activities is of course welcomed. Yet it seems to skip over the developing aspect of operations in the territory beyond the member states. Perhaps it is time for the dictating Union legal instruments to evolve in the manner in which fundamental rights started getting incorporated in the EU legal system in the previous century, as EU entities are getting increasingly active in areas beyond the territories of the member states. The need for clarifying and establishing what applies extraterritorially is called for, not because of the securing of supremacy of EU law, but for the division in the approach on border management, ensuring that the political motives of certain member states do not render fundamental rights vulnerable on the basis of spatial existence. The scrubby rules in regard to Frontex and its activities, with cross-references between legislation and fluctuating responsibilities due to the complex roles between the parties involved, may otherwise risk erode the protection of the individuals being subjected to actions of border management.

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