AEL 2023/06
Academy of European Law
European Society of International Law Paper

# WORKING PAPER

## Frontex actions beyond EU borders: status agreements, immunities and the protection of fundamental rights

Martina Previatello

European University Institute

**Academy of European Law**

European Society of International Law
Annual Conference, Utrecht, September 2022

# Frontex actions beyond EU borders: status agreements, immunities and the protection of fundamental rights

Martina Previatello

ISSN 1831-4066



Published in June 2023 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu



With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

## Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.
Papers presented at ESIL events in 2011-2019 can be downloaded from SSRN. As of 2022, the papers are available in the EUI CADMUS Research Repository.

More information about the Academy of European Law

## European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

More information about ESIL

## ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

More information about the ESIL Paper Series

## 2023 ESIL Annual Conference, Utrecht, 1 – 3 September 2022

The 17th Annual Conference of the European Society of International Law was held in Utrecht on 1-3 September 2022. The overall theme of the conference was 'In-/Ex-clusiveness of International Law'. The 2022 Annual Conference was hosted by the Utrecht University School of Law.

More information about the 2022 ESIL Annual Conference

EUI ACADEMY OF EUROPEAN LAW

esil sedi EUROPEAN SOCIETY OF INTERNATIONAL LAW

## Abstract

Reg. (EU) 2019/1896 confers upon Frontex the power to deploy border management teams from the standing corps to any third country. It also provides for the conclusion of a status agreement between the EU and the third country concerned, on the basis of art. 218 TFEU, in cases where team members exercise executive powers on the latter's territory. Besides setting out the scope of the operations and the tasks and powers of Frontex team members, status agreements also contain provisions on their civil and criminal liability. In particular, members of the team enjoy immunity from the jurisdiction of the partner country in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.

At the same time, reg. (EU) 2019/1896 states that the Agency is bound by EU law – including the fundamental rights protection acquis – where cooperation with third countries takes place on the territory of those third countries. To this aim, both the regulation and status agreements contain various safeguards, among which a previous fundamental rights situation assessment by the Commission, the setting up of a complaints mechanism, a special role assigned to the Agency's fundamental rights officer and the creation of the fundamental rights monitor. The new model status agreement enacted by the Commission in December 2021 contributes to strengthen this toolkit.

Against this background, the present contribution analyses the legal remedies at disposal of people, especially third country nationals, claiming to have their fundamental rights been violated as a result of Frontex executive operations carried out beyond EU borders.

The analysis assesses the possibility to strike a balance between the effective protection of fundamental rights and the provisions concerning immunities of Frontex border guards.

## Keywords

EU status agreements; Frontex executive actions outside EU external borders; Immunity of Frontex border guards; Responsibility for fundamental rights violations; Legal remedies

## Author Information

Martina Previatello, Post-doctoral research fellow, Università degli Studi di Trieste, Italy
martina.previatello@units.it

## Table of Contents



## 1. Introduction

The role played by the European Border and Coast Guard Agency (hereafter referred to as "Agency" or "Frontex") in the implementation of the external dimension of EU migration policy has considerably increased over the last years, in line with the "agencification" and "externalisation" processes that have been recently characterizing the Area of Freedom, Security and Justice[1]. Indeed, permanent and structured forms of cooperation between Frontex and third countries are regarded as necessary for the protection of EU external borders and the effective management of the Union's migration policy[2].

As it will be further explained in the next paragraph, Reg. (EU) 2016/1624, while reforming the previous regulation establishing the Agency, already attributed to the latter the capacity to cooperate with third countries and international organisations in the fields covered by the said regulation[3].

This power has been reinforced by Reg. (EU) 2019/1896, constituting the legal framework within which the Agency currently operates. In particular, Frontex has been conferred the power to deploy to a third country "border management teams from the standing corps", whose

[1] For further analysis on this topic see D. VITIELLO, *Le frontiere esterne dell'Unione europea*, Bari, 2020, pp. 115 ff.

[2] See recital n. 87, Reg. (EU) 2019/1896, of the European Parliament and of the Council, of 13 November 2019, *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, OJ 14.11.2019, L 295, p. 1.

[3] Regulation (EU) 2016/1624 of the European Parliament and of the Council, of 14 September 2016, *on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*, OJ 16.9.2016, L 251, p. 1.

members exercise executive powers on the territory of the partner country. In order to do so, the European Union and the third country concerned must have previously concluded a so-called status agreement, which is drawn up on the basis of a model status agreement drafted by the EU Commission[4]. Thus, the conclusion of a status agreement is a precondition for the exercise of executive powers by Frontex border guards on the territory of third countries.

Status agreements are international agreements concluded by the EU by virtue of article 218 TFEU: besides setting out the scope of the operations and the tasks and powers of Frontex team members, they provide for the regime applicable to Frontex team members, with particular regard to their responsibilities, immunities and privileges[5]. Interestingly, as far as their civil and criminal liability is concerned, members of the team enjoy immunity from the jurisdiction of the partner country in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.

In this sense, status agreements bear some similarities to the EU status of forces and status of mission agreements (also respectively referred to as EU "SOFA" and "SOMA" agreements), that are international agreements concluded between the Union and third countries in the field of the European Security and Defence Policy (ESFP), aiming at regulating the status of civilian and military missions deployed by the EU to third countries that have consented to them[6].

These international agreements – known by the practice of Public International Law[7] – state the jurisdiction to which are subjected the members of the missions operating on the territory of the third country concerned. To this end, they usually provide that the personnel enjoy immunity from the jurisdiction of the State hosting the mission and are exempted from the obligation to pay taxes. Moreover, status agreements regulate both the right of access and movement of the members of the missions in the territory of the hosting State and their rights to carry and use weapons, ammunition and equipment on the latter's territory[8].

Against this background, the present contribution analyses the content of the status agreements concluded under Reg. (EU) 2016/1624 (hereafter referred to as "first generation status agreements")[9] and that of the status agreements concluded by virtue of Reg. (EU) 2019/1896 (hereafter referred to as "second generation status agreements")[10], in order to show the differences between them, especially as far as the provisions regarding the protection of fundamental rights are concerned. Indeed, as further explained in paragraph 3 of the paper, the new model status agreement enacted by the EU Commission in 2021 on the basis of the new Frontex regulation introduces a series of provisions aimed at enhancing the level of

[4] See Article 73, paragraph 3, Reg. (EU) 2019/1896.

[5] On status agreements in legal literature see L. LETOURNEUX, *Protecting the Borders from the Outside. An Analysis of the Status Agreements on Actions Carried Out by Frontex Concluded between the EU and Third Countries*, in *European Journal of Migration and Law*, 2022, pp. 330-356; Z. NECHEV, F. TRAUNER, *Status Agreements: Frontex's Novel Cooperation with the Western Balkans*, Skopje, 2019; F. COMAN-KUND, *The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond*…, in *Verfassungsblog*, 2020.

[6] J. J. RIJPMA, *External Migration and Asylum Management: Accountability for Executive Action outside EU-territory*, in *European Papers*, 2017, pp. 571-596, esp. p. 592.

[7] For further reflections on this topic see D. FLECK, *The Handbook of the Law of Visiting Forces*, Oxford, 2018.

[8] A. SARI, *Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice*, in *The European Journal of International Law*, 2008, p. 67 ff.

[9] See *infra*, paragraph 2.

[10] See *infra*, paragraph 3.

fundamental rights protection of people involved in Frontex operations outside the Union territory[11].

That having said, the present paper focuses on both administrative and judicial remedies at disposal of people, especially third country nationals, claiming fundamental rights violations as a result of Frontex executive operations carried out beyond EU borders.

The analysis will assess the possibility to strike a balance between the effective protection of fundamental rights and the provisions concerning immunities of Frontex border guards.

## 2. First generation status agreements

Reg. (EU) 2016/1624 already conferred upon Frontex the power to coordinate operational cooperation between Member States and third countries in relation to the management of EU external borders. To this end, Article 54, paragraph 3, Reg. (EU) 2016/1624 held that the Agency could carry out "actions at the external borders involving one or more Member States and a third country neighbouring at least one of those Member States, subject to the agreement of that neighbouring third country, including on the territory of that third country", provided that the said operations adhered to an operational plan specifically drafted for that purpose.

Besides that, Article 54, paragraph 4, Reg. (EU) 2016/1624 obliged the Union to conclude a status agreement with the partner country in cases where Frontex team members were endowed with executive powers to be exercised on the territory of the third country concerned, or where other actions in third countries required it. This status agreement – elaborated on the basis of a model status agreement drawn by the EU Commission[12] – should have covered "all aspects that are necessary for carrying out the actions": in particular, it should have "set out the scope of the operation, civil and criminal liability and the tasks and powers of the members of the teams". The same provision added, notably, that status agreements should have ensured "the full respect of fundamental rights during these operations".

On the basis of Article 54, Reg. (EU) 2016/1624 and the model drafted by the EU Commission in 2016[13], the European Union concluded status agreements with Albania[14], Montenegro[15] and Serbia[16]. On the same legal basis, status agreements with Bosnia-Herzegovina and North Macedonia have been signed, but not concluded yet.

The present paper refers to the provisions of the status agreement concluded between the EU and Albania; the agreements with Montenegro and Serbia, except from slight modifications[17], are to a large extent similar to the former.

---

[11] See on this topic M. PREVIATELLO, *Il nuovo modello di accordo sullo status: le azioni esecutive di Frontex oltre i confini dell'Unione europea*, in *Quaderni AISDUE*, 2/2022, Napoli, pp. 301-311.

[12] According to Article 54, paragraph 5, Reg. (EU) 2016/1624.

[13] See Communication from the Commission to the European Parliament and the Council, *Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard*, COM(2016) 747.

[14] Status agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, OJ 18.2.2019, L 46, p. 3.

[15] Status agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, OJ 3.6.2020, L 173, p. 3.

[16] Status agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ 25.6.2020, L 202, p. 3.

[17] See, e.g., Article 5, paragraph 6, last sentence and Article 5, paragraph 9, EU-Serbia status agreement.

EU-Albania status agreement covers "all aspects that are necessary for carrying out actions by the Agency [– be they joint operations, rapid border intervention or return operations –] that may take place in the territory of the Republic of Albania whereby team members of the Agency have executive powers"[18].

In order for each action to be carried out, the Agency and the third country shall draft an operational plan, whose application is conditioned upon its approval by the Member States bordering the operational area; the operational plan sets out in detail the organisational, procedural and financial aspects of each action, including the provisions in respect of fundamental rights and data protection[19].

The status agreement specifies the tasks and powers of the team members[20]: in general, the actions they perform must comply with the Albanian legal order and must be carried out under the command and control (and in the presence) of Albanian competent authorities. Under the same conditions, team members can be authorised to use force, including service weapons, ammunition and equipment, with the consent of the home Member State and the Republic of Albania. It is only in exceptional circumstances that Albania can authorise team members to act on its behalf and to use service weapons in absence of Albanian competent authorities.

While performing their tasks and exercising their powers, team members have to wear their own uniform, on which it appears "visible personal identification and a blue armband with the insignias of the European Union and of the Agency"[21]. Moreover, in order to be distinguished from Albanian competent authorities, an accreditation document is issued to team members which indicates, together with their personal information, the tasks they are authorised to perform during the deployment[22].

It is interesting to note that team members enjoy immunity from civil, criminal and administrative jurisdiction of Albania "in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan"[23].

Prior to the initiation of the proceeding before the third country's court, Frontex executive director certifies to the court whether the act in question was performed in the exercise of the member's official functions in the course of the actions carried out in accordance with the operational plan. This certification is binding upon the Albanian judge. Indeed, if the act was committed in the exercise of official functions, proceedings cannot be initiated; however, immunity from Albanian jurisdiction does not exempt team members from the jurisdiction of their home Member State. If the act was not committed in the exercise of official functions, proceedings may continue before the Albanian court.

The agreement states that, in principle, Albania is liable for any damage caused by a member of the team in the exercise of official functions in the course of the actions carried out in accordance with the operational plan. If damage is caused out of gross negligence or wilful misconduct or if the act is not committed in the exercise of official functions by a member of the team, the Republic of Albania may request, via the executive director, that compensation be paid by the Agency (in case of damage caused by a member of the team who is a staff

[18] Article 1, EU-Albania status agreement.
[19] Article 3, EU-Albania status agreement.
[20] Article 4, EU-Albania status agreement.
[21] Article 4, paragraph 4, EU-Albania status agreement.
[22] Article 7, EU-Albania status agreement.
[23] Article 6, paragraph 2, EU-Albania status agreement.

member of the Agency) or the participating Member State concerned (in case of damage caused by a member of the team from a participating Member State).
The status agreement is concluded for an indefinite period: it can be terminated or suspended by written agreement between the parties or unilaterally by either party[24].
A different provision of the status agreement confers on Frontex executive director and on Albanian authorities the power to suspend or terminate the action if the provisions of the agreement or of the operational plan are not respected by the counterpart: this may occur, notably, in cases of fundamental rights breach, violation of the principle of non-refoulement or of data protection rules[25].
Since the EU and the partner country agree that all actions of the Agency on the territory of Albania should fully respect fundamental rights and international acts to which the latter is party[26], they have inserted into the agreement two *ad hoc* provisions, dealing with fundamental rights protection and personal data processing respectively.
On the one hand, Article 8 of the agreement states that, in the performance of their tasks, team members act in compliance with the non-discrimination principle and they "fully respect fundamental rights and freedoms, including as regards access to asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions, the rights of the child and the right to respect for private and family life". If measures have to be adopted that interfere with such rights and freedoms, the agreement specifies that any limitation must be "proportionate to the objectives pursued by such measures and respect the essence of these fundamental rights and freedoms".
In order to grant effective application to this rule, each party is obliged to set up a complaints mechanism to deal with allegations of a breach of fundamental rights committed by its staff in the exercise of their official functions in the course of actions performed under the agreement[27].
On the other hand, Article 9 of the agreement precises that personal data can be processed only when necessary for the application of the agreement and, in any case, in line with the applicable EU and Albanian data protection law.

## 3. Second generation status agreements

Reg. (EU) 2016/1624 has been repealed and replaced by Reg. (EU) 2019/1896, which contains some clarifications and modifications with regard to status agreements.
Firstly, it restates that status agreements are international agreements concluded between the European Union and third countries *ex* article 218 TFEU and drafted on the basis of a model status agreement drawn up by the EU Commission, after consulting the Member States, the Agency, the Fundamental Rights Agency (FRA) and the European Data Protection Supervisor[28].

[24] Article 12, paragraph 3, EU-Albania status agreement.
[25] Article 5, EU-Albania status agreement.
[26] See third recital, EU-Albania status agreement.
[27] Article 8, paragraph 2, EU-Albania status agreement. The functioning of the complaints mechanism will be examined in paragraph 4 of the present paper, together with an assessment of its added value to fundamental rights protection.

[28] Articles 73, paragraph 3 and 76, paragraph 1, Reg. (EU) 2019/1896.

Secondly, the new Frontex regulation adds that status agreements contain practical measures related to the respect of fundamental rights. In particular, they provide for a complaints mechanism and for the obligation to consult the European Data Protection Supervisor on the provisions of the status agreement related to the transfer of data if those provisions differ substantially from the model status agreement[29].
Indeed, Reg. (EU) 2019/1896 pays more attention to fundamental rights protection: to that effect, it is noteworthy that Frontex has an obligation to comply with Union law – including norms and standards related to fundamental rights protection enshrined in the EU Charter of fundamental rights – where cooperation with third countries takes place on the territory of those third countries[30].
Thirdly, the new Frontex regulation states that, before asking the Council the authorisation for the negotiation of a status agreement with a third country, the EU Commission should "assess the fundamental rights situation relevant to the areas covered by the status agreement in that third country and inform the European Parliament thereof"[31].
Fourthly, Article 73, paragraph 3, Reg. (EU) 2019/1896 states that status agreements "ensure that fundamental rights are fully respected" during all actions that take place on their basis according to the operational plan.
Thus, it follows from these provisions, as reinstated also by status agreements, that fundamental rights protection standards, as guaranteed by Union law, apply beyond its borders, in the framework of external actions carried out by the Agency in the territory of third countries[32].
Finally, it is worth highlighting that, whilst Reg. (EU) 2016/1624 expressly prescribed that status agreements could be only concluded with third countries neighbouring the EU Member States, this geographical limitation is not anymore present in the new Frontex regulation[33].
As already mentioned, the new status agreement model adopted by the EU Commission in December 2021 updates the content of status agreements in the light of the modifications introduced by Reg. (EU) 2019/1986[34].
Interestingly, in line with Reg. (EU) 2019/1896, the new status agreement model introduces some provisions aimed at guaranteeing fundamental rights protection during Frontex operational activities based on status agreements. In this regard, it provides that the Agency's executive director must refrain from launching the operational activity when he considers that the latter "would likely entail or lead to serious and/or persistent violations of fundamental rights or international protection obligations"[35].

Moreover, the provision regarding the operational plan indicates that the latter contains, *inter alia*, information such as: general instructions on how to ensure the safeguarding of fundamental rights during the operational activity including personal data protection and

[29] Article 73, paragraph 3, Reg. (EU) 2019/1986.
[30] See Article 71, paragraph 3 and Article 73, paragraphs 1-2, Reg. (EU) 2019/1896.
[31] Recital n. 88, Reg. (EU) 2019/1986.
[32] S. AMADEO, F. SPITALERI, *Il diritto dell'immigrazione e dell'asilo dell'Unione europea*, Torino, 2022, p. 444.
[33] Cf. Article 54, paragraph 3, Reg. (EU) 2016/1624 with Article 73, paragraph 3, Reg. (EU) 2019/1896.
[34] Communication from the Commission to the European Parliament and the Council, *Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, COM(2021) 829.
[35] Article 3, paragraph 2, new status agreement model.

obligations deriving from applicable international human rights instruments; procedures whereby persons in need of international protection, victims of trafficking in human beings, unaccompanied minors and other persons in vulnerable situations are directed to the competent national authorities for appropriate assistance; and, finally, procedures setting out a mechanism to receive and transmit to the Agency and third country complaints against any person participating in an operational activity, alleging breaches of fundamental rights in the context of their participation in an operational activity of the Agency[36].

In addition, the standard clause on the obligation to respect fundamental rights is far more structured than that contained in previous agreements. Indeed, on one hand, it prescribes that all the actions undertaken under status agreements must comply with the EU Charter and all the human rights protection instruments ratified by the parties, which have to be expressly indicated. On the other hand, it imposes on every participant to the operations, included third countries authorities, to act in compliance with the non-discrimination principle enshrined in Article 21 of the Charter and to conform to the proportionality principle any action that could interfere with the fundamental rights of the people concerned[37].

The Agency's fundamental rights officer (established by the new Frontex regulation) is in charge of controlling that each operation complies with fundamental rights protection standards: to this end, he can carry out on-the-spot visits to the third country where the action is being implemented. Furthermore, the Agency's fundamental rights officer designates at least one fundamental rights monitor to each operational activity, to give advice on the compatibility of future operational activities with fundamental rights and to monitor compliance with fundamental rights standards of ongoing operations[38].

As far as data protection is concerned, the new status agreement model provides for a higher standard of protection, to the extent that it binds each party to respect minimum standards for data transfer. In particular, it requires that personal data are collected and processed according to the legality, transparency, proportionality and fairness principles[39].

Lastly, the new status agreement model modifies in a more favourable way for Frontex team members their regime related to the immunity from criminal jurisdiction.

As explained at paragraph 2 of the present contribution, status agreements concluded so far grant team members immunity from civil, criminal and administrative jurisdiction in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan, as long as the executive director certifies that the actions in question are covered by immunity. By contrast, the new status agreement model provides that, with regard to criminal jurisdiction, team members enjoy immunity "under all circumstances", unless waived by the Agency's executive director (in case of Frontex statutory staff) or by the competent authorities of the member's home Member State (in case of team members who are not members of the Agency's statutory staff)[40].

[36] Article 4, paragraph 3, new status agreement model.
[37] Article 8, new status agreement model.
[38] Article 9, new status agreement model.
[39] Article 16, new status agreement model.
[40] Article 12, paragraph 3, new model status agreement.

The EU-Moldova status agreement has been concluded on the basis of Reg. (EU) 2019/1896 and the new status agreement model[41].

## 4. Administrative remedies against fundamental rights violations in the course of Frontex actions outside EU borders: complaints mechanism

As it has been mentioned, both Frontex regulation and status agreements bind Frontex team members to respect fundamental rights during all operations carried out by them on the territory of the partner country[42].
In order to contribute to the effectiveness of this provision, status agreements confer upon both Frontex executive director and third country authorities the power to suspend or terminate the action in cases of fundamental rights breach, violation of the principle of non-refoulement or of data protection rules. In this regard, it should be highlighted that, to the extent that the suspension or termination of the action is only a faculty (and not an obligation incumbent upon competent authorities), the latter could decide not to put an end to operations that nonetheless violate fundamental rights. If that was the case, the effectiveness of this provision would be jeopardised.
Besides that, in line with Article 73, paragraph 3, Reg. (EU) 2019/1896, status agreements contain a provision obliging the European Union and its partner country to set up a complaints mechanism to deal with allegations of breaches of fundamental rights committed by its staff in the exercise of their official functions in the course of actions performed under the agreements[43].
As far as the EU side is concerned, the complaints mechanism – introduced by Reg. (EU) 2016/1624[44] by request of the European Parliament and the European Ombudsman[45] – is regulated by Article 111, Reg. (EU) 2019/1896[46].
According to this provision any person, whose fundamental rights are directly affected by the actions or failure to act on the part of the staff involved in an operational activity of the Agency in a third country, may submit a complaint to the fundamental rights officer. The latter assesses the admissibility of the complaints[47] and forwards them to Frontex executive director and – in case of alleged human rights breaches committed by EU Member states staff seconded to the

[41] Agreement between the European Union and the Republic of Moldova, *on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova*, OJ 18.3.2022, L 91, p. 4.
[42] Article 73, paragraphs 1-3, Reg. (EU) 2019/1896 and Article 8, paragraph 1, of status agreements so far concluded by the EU with third countries.
[43] See, for all, Article 8, paragraph 2, EU-Albania status agreement.
[44] Article 72, Reg. (EU) 2016/1624.
[45] On this topic, see the *European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI))*, OJ 24.11.2017, C 399, p. 2.
[46] See on the complaints mechanism D. VITIELLO, *Le frontiere esterne dell'Unione europea*, cit., pp. 303-307.
[47] In case the complaint is declared inadmissible, the fundamental rights officer informs the complainant through a motivated decision, which also contains indications about other available remedies at national level. They usually consist of complaints mechanisms established at the Minister of the Interior of the Member States, or complaints to the Ombudsman or other entities in charge of fundamental rights protection: see Frontex, *Consolidated annual activity report 2019*, Reg. No 5139, 27 May 2020, esp. p. 75.

Agency – to competent national authorities, which are in charge of ensuring the appropriate follow-up of the complaints.

Furthermore, the fundamental rights officer can send the authority that is competent for adopting a decision on the merits – be either Frontex executive director or the home Member State of the team member – recommendations concerning the appropriate measures to be taken in the case at hand, included disciplinary measures and the initiation of civil or criminal justice proceedings against the author of the violation.

Lastly, where a member of the teams is found to have violated fundamental rights or international protection obligations, he is immediately removed from the activity of the Agency or the standing corps.

It stems from the foregoing that the complaints mechanism, far from being a judicial remedy, is conceived as a remedy of administrative nature, in the framework of which the fundamental rights officer is only responsible for handling complaints received by the Agency in accordance with the right to good administration enshrined in Article 41 of the EU Charter[48]. By contrast, the decision on the merits of the complaint is up to the executive director or national authorities respectively.

Although the introduction of the complaints mechanism is to be regarded in a favourable way – as it shows a growing awareness of the need to set out remedies against fundamental rights violations committed by Frontex staff – the instrument at stake has been subject to criticism, due to the complexity of its procedure and its lack of transparency, impartiality and independence[49]. Indeed, the complaints mechanism is an administrative remedy internal to the Agency, where the fundamental rights officer is only competent for evaluating the admissibility of the complaints and plays no role with regard to the decision on the merits.

The fact that Frontex executive director, who gives instructions to the team members, later decides on violations of human rights allegedly committed by Frontex statutory staff has been considered as biased: for this reason, it has been suggested to transfer this competence to a more independent organ, such as the European Ombudsman[50].

On the other hand, complaints filed against Frontex team members who are not statutory staff are dealt with by competent national authorities of the respective EU home Member State, that are obliged to report back to the fundamental rights officer within a determined period as to the findings and follow-up of the complaints.

However, it emerges from the practice that national authorities do not often comply with the latter obligation, nor the fundamental rights officer, for his part, has any coercive power in this respect[51].

Therefore, the effectiveness of the complaints mechanism rests ultimately upon the discretion of Frontex executive director or Member States national authorities.

---

[48] See Recital n. 104, Reg. (EU) 2019/1896.

[49] S. CARRERA, M. STEFAN, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?*, Centre for European Policy Studies (CEPS), Bruxelles, 2018; EUROPEAN COUNCIL ON REFUGEES AND EXILES(ECRE), *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM (2018) 631 final)*, Bruxelles, 2018; J. J. RIJPMA, *External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory*, cit., esp. p. 589.

[50] EUROPEAN COUNCIL ON REFUGEES AND EXILES(ECRE), *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM (2018) 631 final)*, cit., p. 23.

[51] *Ibidem.*

In addition, by limiting the right to file complaints to people who are directly affected by the actions or failure to act of Frontex border guards[52], Reg. (EU) 2019/1896 excludes complaints that could have been brought in the public interest by journalists and NGOs. This runs counter the recommendations given by the European Ombudsman, who had expressly recognised the importance of complaints made in the public interest as a useful tool to raise Member States' and Frontex's awareness towards fundamental rights violations that occur in the course of the operations and to fight against them[53].
From a practical viewpoint, the complaints mechanism has been rarely resorted to *in concreto*, presumably because of the complexity of its procedure and the limited powers conferred to the fundamental rights officer[54].
Nevertheless, it must be noted that the complaints mechanism is without prejudice to further administrative and judicial remedies at disposal of people whose rights have been violated by the Agency in the course of external operations, nor it constitutes a *condicio sine qua non* to resort to them[55].

## 5. Civil judicial remedies against fundamental rights violations in the course of Frontex actions outside EU borders: the responsibility of Frontex statutory staff…

That having said, it is now worth clarifying which are these further judicial remedies and how they interact with the provisions enshrined in status agreements conferring Frontex team members immunity from civil, criminal and administrative jurisdiction of the partner country in relations to actions *iure imperii*.
First and foremost, a person claiming that his rights have been violated in the course of Frontex executive actions outside the EU could ask the partner country compensation for damage suffered, as Frontex team members act under third country authorities' command and control[56]. Indeed, as it has been mentioned, status agreements state that "[i]n case of damage caused by a member of the team in the exercise of the official functions in the course of the actions carried out in accordance with the operational plan, [the partner country] shall be liable for any damage", thus seeming to exclude liability of both the EU and its Member States.

[52] See Article 111, paragraph 2, Reg. (EU) 2019/1896.
[53] Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 9 April 2013, points 81-83.
[54] See Frontex, *Consolidated annual activity report 2019*, cit., pp. 75-77.
[55] According to Recital n. 104, Reg. (EU) 2019/1896 "[…] [t]he complaints mechanism should be without prejudice to access to administrative and judicial remedies and not constitute a requirement for seeking such remedies".
[56] It emerges from the interpretation of the relevant acts that Frontex team members operating on the territory of third countries act under the command and control (and in the presence of) the national authorities of the partner country. In particular, status agreement prescribe that Frontex team members perform tasks and exercise powers on the territory of the third country "under instructions from and, as a general rule, in the presence of border guards or other relevant staff of the [partner country]": see Article 4, paragraph 3, EU-Albania status agreement. See also Article 43, paragraph 1, Reg. (EU) 2019/1896, according to which "[d]uring the deployment of border management teams, return teams and migration management support teams, the host Member State or, in the case of cooperation with a third country in accordance with a status agreement, the third country concerned, shall issue instructions to the teams in accordance with the operational plan".

However, it appears at a closer look that, in case of fundamental rights breaches committed by *Frontex statutory staff* in the exercise of their executive powers, the victim could also file a complaint before the Court of Justice of the European Union (CJEU) claiming EU non-contractual liability *ex* Article 340, paragraph 2, TFEU[57].

Indeed, as is known, according to the latter provision "[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". Moreover, the right to have the Union make good any damage caused by its Institutions or by its servants in the performance of their duties is listed in Article 41, paragraph 3 of the EU Charter as an expression of the right to good administration.

Since international agreements concluded by the Union must abide by EU primary law, it can be held that provisions contained in status agreements cannot exclude the right of people, who suffered damage due to fundamental rights violations committed by Frontex statutory staff in the framework of executive operations, to file actions *ex* Article 340, paragraph 2, TFEU in order to ask for compensation, provided that the latter is not higher than the damage actually suffered[58].

As a confirmation of this, Article 97, paragraph 4, Reg. (EU) 2019/1896 affirms that "[i]n the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers"[59].

As is known, the Treaty does not indicate the necessary conditions to be met for EU non-contractual liability to materialise: thus, they have been established over time by the case-law of the CJEU.

In this regard, the CJEU has clarified that EU non-contractual liability can arise out of the exercise of EU legislative, administrative or jurisdictional power.

Moreover, it emerges from CJEU case-law that EU non-contractual liability presupposes the existence of a set of circumstances, comprising actual damage, a causal link between the damage claimed and the conduct alleged against the Institution and the illegality of such conduct[60].

Moreover, when EU Institutions' or organs' behaviour is characterized by a certain margin of discretion, the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious[61].

Although it must be acknowledged that these conditions pertain to EU non-contractual liability in general and there is no specific case-law concerning EU responsibility in case of human rights breaches[62], it seems that both they can apply to the present case and can be met in this

---

[57] On non-contractual liability actions for violations of fundamental rights by Frontex see D. VITIELLO, *Le frontiere esterne dell'Unione europea*, cit., pp. 286 ff.

[58] Article 340, paragraph 2, TFEU limits EU non-contractual liability to damage caused by its agents in the performance of their tasks: as a consequence, it does not cover damage suffered because of fundamental rights violations committed by Frontex staff *iure gestionis*.

[59] See also Article 98, paragraph 1, Reg. (EU) 2019/1896, according to which "[p]roceedings may be brought before the Court of Justice […] for non-contractual liability for damages caused by the Agency[…]".

[60] CJEU, Judgment of 28 April 1971, *Lutticke*, 4/69, ECLI:EU:C:1971:40, point 10.

[61] CJEU, Judgment of 4 July 2000, *Bergaderm*, C-352/98 P, ECLI:EU:C:2000:361 points 41-44.

[62] M. FINK, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*, in *German Law Journal*, 2020, pp. 532-548, esp. p. 542. In more general terms, on actions for damages

situation. Indeed, provisions concerning the protection of fundamental rights can no doubt be considered as conferring rights upon individuals[63], while the seriousness of the violation could be inferred from the absolute character of the fundamental rights at stake – think, e.g., of the prohibition of torture, inhumane treatment and non-refoulement – and from the lack of legality and proportionality of measures interfering with such rights, as required by status agreements, whose provisions recall Article 52, paragraph 1, of the EU Charter[64].
In case the CJEU condemned the Agency to pay damages to the claimant, Frontex could then – according to Article 340, paragraph 4, TFEU and Article 97, paragraph 6, Reg. (EU) 2019/1896 – turn to the individual member of Frontex statutory staff who is personally liable for the violation and ask him for refund.

## 6. …and the responsibility of Frontex team members from participating Member States

For its part, the affirmation of non-contractual liability *ex* Article 340, paragraph 2, TFEU upon *Frontex team members from participating Member States* for human rights violations committed in the framework of executive operations on the partner country's territory appears, at a first glance, more problematic.
Indeed, the CJEU has specified in its case-law that the Union is only liable *ex* Article 340, paragraph 2, TFEU "for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions"[65].

Thus, the fact that Member States' personnel seconded to the Agency is not linked to Frontex by an internal and direct relationship could lead to conclude that victims cannot file actions for

for fundamental rights violations by the EU see N. PÓŁTORAK, *Action for Damages in the Case of Infringement of Fundamental Rights by the European Union*, in E. BAGIŃSKA (edited by), *Damages for Violations of Human Rights. A Comparative Study of Domestic Legal Systems*, Cham, 2016, pp. 427-441, where the Author holds that the action for damages "is not a provision to ensure compensation in case of violations of fundamental rights (but of course also covers such violations)" (p. 429) and that "Currently, the action for damages can also be a consequence of the infringement of the provisions of the CFR" (p. 434). In addition, it is interesting to note that, after having examined the data related to the number of complaints filed (and upheld) every year *ex* Article 340, paragraph 2, TFEU, the Author concludes that "the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals" (p. 439).

[63] As it has been confirmed by the General Court, Judgment of 23 November 2011, *Sison v Council*, T-341/07, ECLI:EU:T:2011:687, point 75, according to which "[i]t is, here, not in dispute that the fundamental rights that the applicant claims have been breached constitute rules of law intended to confer rights on individuals. That breach, should it be proved, would therefore be such, if it were sufficiently serious, as to incur the non-contractual liability of the Community".

[64] According to Article 52, paragraph 1, of the EU Charter "[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. Subject to the principle of proportionality, limitations may 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". Status agreements echo this provision, to the extent that they state that "[…] [a]ny measures interfering with fundamental rights and freedoms taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures and respect the essence of these fundamental rights and freedoms" (see Article 8, paragraph 1, EU-Albania status agreement).

[65] CJEU, Judgment of 10 July 1969, *Sayag*, 9/69, ECLI:EU:C:1969:37, points 7/8; General Court, Order of 26 October 2005, *Ouariachi v. Commission*, T-124/04, ECLI:EU:T:2005:378, point 18.

damages *ex* Article 340, paragraph 2, TFEU in cases where fundamental rights violations are committed by Frontex team members from participating Member States.
However, besides this line of reasoning, it is worth recalling the CJEU case-law concerning EU non-contractual liability for actions carried out by its Member States. According to the latter, non-contractual liability is attributable to the Union if the illegal conduct is implemented by Member States' national authorities in accordance with EU instructions and without any margin of discretion[66].
*Mutatis mutandis*, this approach could be transposed to the case at hand in order to state EU liability also with regard to fundamental rights violations committed in the course of executive actions outside the EU by Frontex team members from participating Member States seconded to the Agency.

## 7. Dual attribution of conduct and joint liability of the EU and the partner country for fundamental rights violations committed by Frontex outside EU borders

It follows from the foregoing that, in cases of fundamental rights violations committed by Frontex team members – be they either part of the Agency's statutory staff or Member States' personnel seconded to the Agency – joint liability of both the partner country (according to the provisions of status agreements) and the Union (in line with Article 340, paragraph 2, TFEU and the case-law related to it) could be affirmed, without prejudice to the prohibition of overcompensation.
Having said that, one could wonder whether the statement of responsibility of the European Union in similar cases is at odds with the provision, enshrined in status agreements, which states that executive operations are usually carried out under the command and control (and at the presence of) the competent authorities of the partner country. Indeed, it would follow from international law rules that liability stands with the entity that is primarily responsible for the actions. According to Article 6 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter: ASR), adopted by the International Law Commission in 2001, "[t]he 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". This provision is further explained by the ASR Commentaries, which clarify that Article 6 ASR entails that the wrongful conduct at stake is attributed only to the receiving State, thus excluding any responsibility on the sending State[67].
Moreover, the ASR Commentaries set out two requirements for the conduct to be attributable to the receiving State alone: first, that the transferred organ exercises functions of the receiving state and, second, that it acts under the exclusive direction and control of the receiving State, the sending State not maintaining any control over the conduct of the said organ. Conversely, as specified by the Commentaries, situations whereby the organ of one State acts on the joint instructions of its own and another State fall outside the scope of Article 6, being governed by other provisions of the ASR. In particular, in similar cases the conduct in question would be

[66] CJEU, Judgment of 26 February 1986, *Krohn v Commission*, C-175/84, ECLI:EU:C:1987:8, points 18-23; General Court, Judgment of 13 July 2018, *Bourdouvali*, T-786/14, ECLI:EU:T:2018:487, points 79-80. See also in literature M. FINK, *EU liability for contributions to Member States' breaches of EU law*, in *Common Market Law Review*, 2019, pp. 1227-1264, esp. pp. 1240-1245.
[67] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, pp. 44-45.

attributable to both States according to Article 47 ASR, by which "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act" [68].

As it will be explained hereafter, actions carried out by Frontex on the territory of third States on the basis of status agreements are not implemented under the *exclusive* direction and control of the authorities of the partner country. For this reason, I tend to exclude the applicability to the case at hand of the rule enshrined in Article 6 ASR, in favour of the application of the dual attribution rule.

In other words, a deeper analysis of the whole legal framework governing tasks and powers of Frontex teams on the territory of third countries and the way in which they are exercised brings to the conclusion that also the Union, and not only third countries' authorities, maintains a certain degree of control both before and during the operations; thus, it can be held accountable for fundamental rights violations that occur in the course of the said actions.

In order to explain the role played by the EU in this sense, it is worth taking into consideration the following elements.

To start with, it should be noted that Frontex personnel deployed to the partner country act within a legal framework to which the Union has consented. Indeed, this legal framework is constituted by the status agreement and the operational plan, the former being a result of the agreement between the EU and the third country, the latter being agreed upon between the Agency and representatives of the third country.

Secondly, the third country authorities' power to command and control the operations is counterbalanced by some elements that allow the European Union to keep a certain degree of control over the actions: indeed, third country authorities can give instructions to the teams only to the extent that these instructions comply with the operational plan, that has been agreed upon in advance between the parties. In case of non-compliance of the instructions with the operational plan, Frontex executive director is allowed to take the necessary measures, included the suspension or termination of the action in question.

Furthermore, once third country authorities have issued instructions to the team, the Agency can notify them its views on the instructions given. In that case, the partner country has to take those views into consideration and follow them to the extent possible[69].

Ultimately, it emerges from the foregoing that team members' conduct is not entirely and exclusively attributable to the third country, as the control exercised by the Agency and, more generally, by the Union, also influences, to a certain degree, the operations at stake both before and during their performance.

Such influence seems to justify the fact that the Union bears, together with the partner country, responsibility for fundamental rights violations occurred in the course of Frontex executive actions carried out beyond EU borders.

---

[68] It is worth mentioning that attribution of wrongful conduct is a debated issue among international law scholars. Indeed, the view according to which a given conduct is in principle attributed to one actor, whilst dual or multiple attribution is exceptional, is currently upheld by the majority of legal literature: see, *ex multis*, A. NOLLKAEMPER, D. JACOBS, *Shared Responsibility in International Law: A Conceptual Framework*, SHARES Research Paper 03 (2011), ACIL 2011-07, revised May 2012, pp. 35 ff. By contrast, according to the opposite position, as a default rule whenever two or more States and/or international organisations act together, their conduct is jointly attributed to all the international law subjects that are involved (so called "dual or multiple attribution"), the exception being the provision enshrined in Article 6 ASR, that should for this reason be interpreted narrowly: see, in this regard, F. MESSINEO, *Multiple Attribution of Conduct*, SHARES Research Paper No. 2012-11.

[69] See Article 4, paragraph 3, EU-Albania status agreement.

Besides that, by taking into account that the Union is not a State, the accuracy of this conclusion could also be questioned in the light of the case-law regarding dual attribution in cases of conducts carried out by States and international organisations. Indeed, in the *Behrami and Saramati* cases, the European Court of Human Rights (ECtHR) excluded dual attribution of conduct in situations where the international law subjects at stake were the United Nations and some EU Member States as part of a UN Mission, on the basis that the "ultimate authority" over the mission rested upon the UN[70].

However, for the reasons stated below, it is unlikely that the abovementioned case-law can constitute an obstacle to the affirmation of joint liability of the European Union and the partner country when fundamental rights violations occur in the course of Frontex actions carried out on the territory of the third country.

To start with, in the light of both the specificities of the UN as an international organisation[71] and the fact that *Behrami and Saramati* dealt with cases of joint liability of an international organisation and some Member States that are part of it, this case-law cannot be transposed to the situation at hand, that concerns the dual attribution of conduct to the EU and a third country which is not a State member of it.

Secondly, this case-law seems to have been subsequently overcome by the ECtHR: indeed, in *Al-Jedda*, the Court acknowledged the possibility to attribute simultaneously the same conduct to a State and to an international organisation[72].

In any case, this possibility is also contemplated by the Commentary of the Draft articles on the responsibility of international organizations (ARIO), which states that "[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization"[73].

To end with, the analysis conducted so far seems to bring to the conclusion that international law rules do not stand in the way of dual attribution of conduct, carried out by Frontex during its operations outside EU borders, to the EU and the partner country.

## 8. Responsibility vs immunity of Frontex border guards

As explained in paragraph 2 of the present paper, status agreements provide that the certification issued by Frontex executive director grants Frontex team members immunity from

[70] ECtHR, 2 May 2007, *Behrami v. France and Saramati v. France, Germany and Norway (Admissibility)*, nn. 71412/01 and 78166/01.

[71] It is noteworthy that some scholars maintain that the conclusion reached by the ECHR in the *Behrami and Saramati* cases was mostly driven by the politically sensitive issues underlying the cases: P. PALCHETTI, *Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati*, in *Rivista di diritto internazionale*, 2007, pp. 681-704; A. MANEGGIA, *Controllo effettivo ed imputabilità della condotta nella decisione Behrami e Saramati della Corte europea dei diritti dell'uomo*, in *International Law*, 2007, pp. 236-252; S. VALENTI, *La questione dell'applicabilità della Convenzione europea dei diritti dell'uomo alle forze di mantenimento della pace in Kosovo: i casi Behrami e Saramati*, in *Pace diritti umani*, 2008, pp. 81-91.

[72] ECtHR, 7 July 2011, *Al-Jedda v. United Kingdom*, n. 27021/08, para 80. On this topic see M. MILANOVIC, *Al-Skeini and Al-Jedda in Strasbourg*, in *The European Journal of International Law*, 2012, pp. 121-139, esp. pp. 136 ff.

[73] Draft articles on the responsibility of international organizations, with commentaries 2011, p. 54.

civil, criminal and administrative jurisdiction of the partner country; however, this does not exempt team members from the jurisdiction of their home Member State.
As far as the responsibility of Member States' personnel seconded to the Agency is concerned, there should not be issues: indeed, their civil, criminal or administrative responsibility will be assessed by Member States' national competent authorities, according to national applicable law. To this aim, Article 43, paragraph 5, Reg. (EU) 2019/1896 provides that "[m]embers of the teams who are not statutory staff shall remain subject to the disciplinary measures of their home Member State. The home Member State shall provide for appropriate disciplinary or other measures in accordance with its national law regarding violations of fundamental rights or international protection obligations in the course of any operational activity by the Agency".
By contrast, some problematic aspects may arise when it comes to the criminal responsibility of Frontex statutory staff. In fact, if their actions were covered by immunity from the criminal jurisdiction of the partner country, the absence of a competent criminal court at EU level would lead to the impunity of their actions, unless criminal jurisdiction was recognised of the courts of the Member State of nationality of the Frontex statutory staff member whose criminal liability is at stake.
It is precisely to avoid impunity that it has been suggested to explicitly exonerate Frontex statutory staff deployed on the territory of the partner country from the performance of executive actions, until specific rules concerning their liability regime are introduced[74].
It should be underlined that the EU-Serbia status agreement seems to follow this rationale, to the extent that it states that Frontex statutory staff is not allowed to exercise executive powers nor to use weapons on Serbian territory[75].

## 9. Conclusions

Status agreements are international agreements concluded *ex* art. 218 TFEU between the European Union and third countries that allow Frontex border guards to exercise executive actions, namely joint operations, rapid border interventions and return operations, on the territory of the partner country. To this end, Frontex team members can also be authorised, under certain conditions, to use force, included weapons, ammunition and equipment on the partner country's territory.
Status agreements constitute instruments of direct cooperation between the Union and third countries: they are aimed at granting effective protection of EU external borders and assuring efficient management of the Union's migration policy. In other words, they contribute to the implementation of the European integrated border management, the final goal being the enhancement of the level of security at the external borders of the Union.

Although not new to Public International Law nor to EU Law, status agreements have been introduced for the first time in the European legal order to serve as legal basis for Frontex executive operations performed outside the European Union territory by Reg. (EU) 2016/1624.
It must be stressed that the application of status agreements is likely to raise sensitive issues, in particular with regard to fundamental rights protection of people, especially third country nationals, who are involved in the operations in question. These sensitive issues are made

[74] EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE), *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM (2018) 631 final)*, cit., pp. 11 and 17.
[75] See Article 5, paragraph 9, EU-Serbia status agreement.

even more difficult to deal with, due to the provisions granting Frontex border guards immunity from the jurisdiction of the third countries for actions carried out *iure imperii* and provisions ruling that the latter take place under the instructions of the third country authorities.

The European Institutions seem to be aware of these problems. Indeed, as it has been explained in paragraph 3 of the present paper, Reg. (EU) 2019/1896 and the new status agreement model now include new provisions and tools dealing with the protection of fundamental rights: think, for instance, of the fundamental rights officer and the fundamental rights monitors, who are in charge of monitoring compliance with fundamental rights standards of ongoing and future operations.

Besides that, second generation status agreements oblige the parties to set out a complaints mechanism to deal with fundamental rights violations allegedly committed by team members in the course of the operations. However, due to the complexity, inefficiency and lack of transparency and independence of the procedure, this administrative remedy has so far been rarely resorted to in practise.

Given that the complaints mechanism is without prejudice to further judicial remedies at disposal of people whose rights have been violated by the Agency in the course of external operations, the present contribution wondered about what judicial remedies could actually be at disposal of the victims in similar cases.

The analysis conducted at paragraph 5 to 7 of the paper seems to bring to the conclusion that there could be a civil judicial remedy, namely the action for damages, brought by the victim either against the partner country or the EU. If that was the case, the third country and the EU could be held jointly liable, without prejudice to the prohibition of overcompensation.

As far as criminal liability is concerned, immunity enjoyed by Frontex border guards could result in their impunity, and this issue is even more sensitive if we consider that second generation status agreements grant immunity from criminal jurisdiction under all circumstances, thus extending the scope of the immunity already enjoyed by Frontex team members on the basis of the first generation status agreements. This implies that, unless the immunity is waived, the liability of Frontex border guards can only be ascertained by the judicial authority of the Member State whose the team member is a national.

Clearly, this constitutes a sensitive issue with regard to the criminal responsibility of Frontex statutory staff, especially in the light of the fact that, at present, there is no criminal court at EU level endowed with jurisdiction over criminal responsibility of EU staff. In a similar case, if the actions of Frontex statutory staff were covered by immunity from the criminal jurisdiction of the partner country, this would lead to the impunity of their actions, unless criminal jurisdiction was recognised of the courts of the Member State of nationality of the Frontex statutory staff member whose criminal liability is at stake.

It is in order to avoid such risk of impunity that clear and specific rules should be introduced.