

Human Rights at the EU's common external maritime border

Recommendations to the EU legislature

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I. A usual summer in the Mediterranean: thousands of deaths and cases of refoulement

Thousands of migrants – some only looking for a better life in Europe, some in need of international protection – leave the North and West African coasts.

An unknown number of men, women and children drown, because they are not rescued in time, or because they are diverted back to the high seas. At least 2,755 persons are estimated to have died while trying to enter the EU by sea between 2003 and 2007.¹

An unknown number of men, women and children are – *without any examination of their need for international protection* – intercepted, diverted,² or towed back to third countries. They are detained under inhuman and degrading conditions, abandoned in the desert, or otherwise left alone without any support. Some are also deported to fourth countries where they face a risk of torture or degrading or inhuman treatment.

The UN High Commissioner for Refugees has underlined the need to grant access to protection in the EU to persons in need of international protection as a result of an imminent threat of persecution, torture or inhuman treatment in their country of origin.

Media and NGOs³ have reported grave human rights violations, including maltreatment and torture by border

guard officials. With regard to current practice in the Mediterranean, the UN High Commissioner for Refugees has compared Europe with the Wild West, where human life no longer has value.⁴

II. Control and rescue operations

1. Lack of transparency: what happens to the migrants?

As in years past, national and joint-control operations coordinated by FRONTEX are carried out. The operations, which are systematically shifted to areas beyond state borders, are guided by the Schengen Borders Code and the premises of the EU border management strategy. The aim of border and pre-border sea operations is to intercept and prevent migrants from arriving at the coasts of EU Member States. Statistics offered by FRONTEX⁵ contain information on the number of persons intercepted and diverted back. They contain neither information about where the persons concerned were diverted to, nor how many persons claiming international protection were among the migrants. No information is available on the number of dead migrants detected. Not even Member States participating in the operations can offer information in this regard.⁶

1 Commission Staff Working Document accompanying the Policy Plan on Asylum, impact assessment; SEC (2008) 2029, p. 5, with a reference to www.noborder.org/dead.php. This number only includes incidents reported by the media.

2 For further information and statistics concerning persons diverted back, see, for example, FRONTEX News Release, 15.7.2008 and FRONTEX Press Kit Vol. 2/11 issue 1.

3 A summary of problems relevant to human rights in current practice on the basis of reports of NGOs and the media can be found in Weinzierl/Lisson: Border Management and Human Rights. A Study of EU Law and the Law of the Sea, pp. 18–25, <http://www.institut-fuer-menschenrechte.de/sl.php?id=243>. See recently Roman Herzog, Krieg im Mittelmeer [War in the Mediterranean], Radio Feature (German only), <http://www.swr.de/swr2/programm/sendungen/feature/-/id=659934/nid=659934/did=3510294/w8hs6t/index.html>.

4 The Independent (28.05.2007), Europe's Shame.

5 See footnote 2.

6 For Germany, see Answer of the German Government to the Written Question of the parliamentary party Bündnis 90/Die Grünen, Bundestags-Drucksache 16/9888, pp. 5, 6. <http://dip21.bundestag.de/dip21/btd/16/098/1609888.pdf>.

2. Lack of EU-regulation: applicable human rights standards

In carrying out border checks and border surveillance, Member States are bound by the principle of non-refoulement. The principle of non-refoulement is grounded in legal mechanisms that include the European Convention on Human Rights (ECHR), the Geneva Refugee Convention, and EU fundamental rights. The principle prohibits the return, rejection, diversion or towing back of persons to countries where they face serious human rights violations. Together with the right to an effective legal remedy, the principle of non-refoulement obliges states to identify protection-seekers and to guarantee access to a procedure for examination of an application for international protection. To secure this right of the applicant, both the ECHR as well as EU fundamental rights prescribe a legal remedy with suspensive effect, which grants a right to stay in-country pending review of a decision rejecting an application for international protection. This applies to control as well as rescue operations. From a human rights point of view, exceptions can only be made in rare cases where disembarkation in an EU country as such would put the life or health of migrants at risk. For practical reasons, the human rights obligations described above cannot be observed on a ship. In North and West Africa, countries safe enough to meet human rights requirements do not exist. Therefore, protection-seekers encountered during rescue and control operations must be brought to an EU country for examination of their asylum claim.

The German Institute for Human Rights has published an extensive analysis of the validity of these human rights obligations during rescue and control operations at sea beyond the territorial waters of Member States.⁷ The jurisdiction of the flag state of a search and rescue or border patrol vessel and the prohibition on circumventing human rights obligations are only two legal arguments for the validity of human rights obligations during pre-border control and rescue operations.

The study of the German Institute for Human Rights also contains a detailed analysis of existing EU law in the light of EU fundamental rights.⁸ The Schengen Borders Code obliges the Member States to carry out border checks and border surveillance and to refuse entry to persons not fulfilling entry conditions. As foreseen in the EU border management strategy, control and rescue operations are systematically shifted beyond state borders.⁹

At the same time, neither the Asylum Procedures Directive nor the Schengen Borders Code contains provisions on the securing of human rights for persons in need of international protection encountered during pre-border controls.

Concerning protection seekers at the border, the Asylum Procedures Directive does not meet the requirements of EU fundamental rights and the European Convention on Human Rights as it does not clearly oblige Member States to grant a legal remedy with suspensive effect. An effective legal remedy with suspensive effect means a right to stay in-country pending review of the rejection of an application for international protection.

3. Lack of efficiency: rescue and control operations

A lack of consensus among EU Member States about questions of core human rights and the countries in which intercepted migrants should be disembarked hinders efficient joint control and rescue and operations. It decreases the willingness of the Member States to support FRONTEX with technical resources and personnel.

EU states are not willing to share the burden with those states along the external maritime borders. This results in a reduced political will on the side of the overburdened EU external border states to rescue shipwrecked persons and people seeking protection.

7 Weinzierl: The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders (pre-publication excerpt, July 2007), <http://www.institut-fuer-menschenrechte.de/sl.php?id=212>; Weinzierl/Lisson: Border Management and Human Rights. A Study of EU Law and the Law of the Sea (December 2007), <http://www.institut-fuer-menschenrechte.de/sl.php?id=243>.

8 See Part 5 of the study of Weinzierl/Lisson, footnote 7.

9 See Council of the EU, Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union, Doc. No. 15445/03 and Integrated border management. Strategy deliberations, Doc. No. 13926/06.



III. Disagreement of EU member states on basic human rights standards

A working group launched by the European Commission and mandated to draft guidelines on the treatment of persons encountered during control and rescue operations at sea got stuck. A consensus on such core human rights questions as identifying protection-seekers and their access to asylum procedures could not be reached. The reason: EU Member States cannot find an answer to the questions of where protection-seekers should be disembarked and who should be responsible for the examination of asylum claims.

The EU and its Member States run the risk of violating the European Convention on Human Rights and EU fundamental rights¹⁰ if they continue to fail to agree on adequate human right standards for border and pre-border controls.

IV. Recommendations to the European Commission, the Member States and the European Parliament

The German Institute for Human Rights recommends:

- A broad and public debate with full participation of the European Parliament should be initiated.
- The Schengen Borders Code should be amended in order to create binding EU law that regulates border and pre-border control operations in the areas of:
 - the identification of protection-seekers;
 - their access to an asylum procedure in an EU country;
 - and access of protection-seekers to an effective legal remedy with suspensive effect.
- An agreement on a fair and reliable burden-sharing system that distributes the burden of border control and asylum management among all Member States is overdue.
- A consistent use of surveillance technology for rescue purposes must be secured.

¹⁰ In the same vein SEC (2008) 2029, p. 5. (see footnote 1).

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