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Border Management and Human Rights

A study of EU Law and the Law of the Sea

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Study

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Preface

The "Green Paper on the future common European asylum system" presented by the European Commission in June 2007 declares an intention to create "a single protection area for refugees" in which the "full and inclusive application of the Geneva Convention" is guaranteed. With this the European Commission professes its support for the goal of high-level legal harmonisation and declares itself prepared to explore ways "for increasing the EU's contribution to a more accessible, equitable and effective international protection regime".

The reality at the EU's external borders is far from this stated goal. With the primacy of repulsing illegal migration, border-control measures are shifting further beyond state borders – into the high seas or into the sovereign area of third states. This occurs without appropriate systematic observation of the obligations arising from human and refugee rights beyond state borders. New supranational and international structures of border security are being established, but without similarly precise formulation of the associ-

ated human- and refugee-rights requirements or their accompaniment in procedural law or institutions. This discrepancy has dramatic consequences for numerous people whose lives are lost or whose human rights are abused.

The following study highlights – with reference to the Geneva Refugee Convention, the European Convention on Human Rights, EU fundamental rights and other guidelines – the obligations to guarantee effective human rights and refugee protection that apply to the European Union as a whole, as well as to its individual Member States.

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Introduction

Although only a small percentage of migrants seek entry to the European Union (EU) through the external maritime border, dramatic pictures and reports of refugee boats on the Mediterranean shape the idea of the situation at the robustly secured external border of the EU. Non-governmental organisations keep statistics on persons who have lost their lives in the attempt to reach Europe.¹ The UN High Commissioner for Refugees reminds that persons requiring international protection because they face persecution, torture or inhumane treatment in their country of origin must be enabled access to protection in the EU²; in light of current events in the Mediterranean, he has compared Europe with the Wild West, where a human life no longer has value.³

Which human rights obligations must be observed in border protection? Who is responsible: "the EU", the individual EU states on the external border, the EU-Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)? Additionally, special questions arise for human rights protection in connection with the protection of maritime borders. How can it be prevented that thousands of people drown in the attempt to reach the EU? How can such small island states as Malta manage the onslaught? How should persons be handled who are intercepted on high seas? How can it be guaranteed that persons in need of international protection find access to the EU? How must an EU border management policy look that is in conformity with human rights? Who is responsible for human rights and refugee protection when EU and non-EU states conduct joint control measures? In

November 2006 the European Commission presented a Communication on "Reinforcing the management of the European Union's Southern Maritime Borders". From this it is evident that there is disunity within the EU over which obligations arise from EU fundamental rights and international human rights and refugee law, and how these obligations relate to the international law of the sea.⁴

This study⁵ should contribute to clarifying the obligations for border management arising from human rights and maritime law. This will include treatment of general human rights obligations that are also applicable for border controls at land borders and airports. Additionally, the study examines the special questions of human rights and maritime law that arise in connection with the protection of maritime borders. The human rights obligations for migration-control measures conducted on the dry land of a third state will not be addressed.

As a basis for later legal analysis, the first part of the study will present current border problems and occurrences, principally on the basis of press reports and reports of non-governmental organisations.

The second part of the study gives an overview of the status of the EU border management strategy's development and that of EU secondary law in connection with management of the EU's external border.

Parts three and four provide an analysis of legal obligations for the EU and its Member States. Part three

¹ UNITED for Intercultural Action, European network against nationalism, racism, fascism and in support of migrants and refugees (2007): List of 8855 documented refugee deaths through Fortress Europe. http://www.united.non-profit.nl/pdfs/actual_listofdeath.pdf [accessed on 9 July 2007].

² See, for example, UNHCR (2007c), pp. 8-9.

³ The Independent (28 May 2007).

⁴ EU, European Commission, COM (2006) 733, paras. 31-35.

⁵ Parts 4 and 5 of this study were pre-published in English in July 2007; see Weinzierl (2007). Based on that excerpt, the German Institute for Human Rights published a policy paper on the topic in September 2007; see Weinzierl (2007a).



describes the obligations arising from the international law of the sea. Part four contains an analysis of human rights obligations for the management of the EU's external border. This analysis is conducted by applying the standards of fundamental and human rights; namely the European Convention on Human Rights (ECHR), EU fundamental rights and UN human rights treaties by which the EU or its Member States, respectively, are bound. The Geneva Refugee Convention, as the fundamental body of regulations for refugee protection binding both the EU⁶ and its Member States, is naturally also a standard for consideration. Existing EU law is measured against these standards.

Part five of the study deals with the question of who bears responsibility for human rights protection when several states conduct joint actions of border or migration control, or rescue at sea. On the one hand, it will be examined whether next to the Member States' obligations arising from international law, the EU has its own obligation to enact norms protecting human rights with respect to border and migration controls. On the other hand, an object of the examination is whether, or under which pre-conditions, the EU and its Member States carry a share of the legal responsibility for human rights violations committed in the course of joint actions with non-EU states.

⁶ See article 63(1) of the Treaty establishing the European Community (EC).

Main Findings

Currently at EU level, draft guidelines are being developed that are supposed to clarify the obligations regarding persons encountered in interception, control and rescue measures at and beyond the EU's southern maritime border. The guidelines are the subject of discussions in the Council of the EU and the European Commission.

In the background to this are pre-border migration controls, which are already being conducted on the basis of the EU border management strategy developed in the Council. Such pre-border migration controls beyond state borders also take place in the framework of joint EU operations that are coordinated by the EU border protection agency, FRONTEX.

Additionally, differences of opinion between Member States exist over human rights obligations with regard to persons picked up through interception, control and rescue measures beyond the EU's external border.

From a human rights perspective, two fundamental sets of problems can be identified in connection with management of the EU's external borders. One is the endangerment of the health and life of many migrants who are trying to reach the EU. There are daily media reports of deaths, especially at the southern maritime borders. In a legal regard, this set of issues is not exclusively, but fundamentally formed by the international law of the sea, including its duty to rescue at sea.

The second problem concerns access to international protection in the EU. In many cases this is prevented, or at least made considerably more difficult. On the basis of the EU border management strategy and/or EU law, controlling and securing the borders has been bolstered, pre-border migration controls have been established in areas beyond the EU's external border, and states of origin and transit have been integrated into migration control measures.

Reports of abuse in EU states and deportations in violation of international law affect the life and health of migrants as well as the realization of their possible right to international protection.

I. Life and health of migrants – rescue at sea

Rescue at sea also serves the protection of human rights, namely the right to life and freedom from bodily harm of those affected. However, the duty under the law of the sea to rescue shipwrecked persons must be clearly differentiated from the legal obligations arising from human rights law. Differences exist both in regard to the subject and the extent of the legal obligations, as well as in regard to those who are obligated. In many cases, however, it is the rescue of shipwrecked persons from distress that is prerequisite to the ability of the rescued persons later to claim rights flowing from human rights law, for example a claim to asylum or other international protection.

1. Implementation of the duty under the law of the sea to rescue at sea

Despite fundamentally undisputed obligations with regard to rescue at sea, in practice there are deficits in the implementation of this duty.

This study comes to the conclusion that the legal obligations regarding rescue at sea are fundamentally undisputed. However, there is disunity over the important question of whether in choosing the place of safety to bring rescued persons, criteria of human and refugee rights should be applied, or whether it suffices that temporary accommodation and basic medical care are

guaranteed at the place of safety. For the human rights analysis of this question, which concerns access to international protection, see details below in II 1.1.

There are two basic causes for why in many cases private vessels do not carry out rescue at sea. First is the overburdening of private ship owners, who in taking aboard shipwrecked persons can expect large financial losses, especially if coastal states in the region cannot agree on where on land the shipwrecked persons may disembark. Second is the uncertainty of ship masters in the face of criminal trials against crews who rescued shipwrecked persons in accordance with their duty under the international law of the sea and brought them to land without entry papers. Under the international law of the sea, the responsibility for the enforcement of the duty to conduct rescue at sea lies with the states. Additionally, the states concerned have the duty under international law to agree as fast as possible on which ports the vessels concerned will be allowed to enter. In the coordination and cooperation of the states concerned, the statutory goal is to carry out the disembarkation of the rescued persons as quickly as possible with minimum diversion from the planned route.

In practice, the required coordination among EU states with regard to port of safety and the rapid rescue of shipwrecked person by state border-control or rescue vessels is poor. This can fundamentally be attributed to the overburdening of such EU Member States as Italy and Malta at the EU's maritime borders. The overproportional burden on these states under EU law together with the lack of an internal EU burden-sharing system often results in actual overburdening, and in any case a reduction in political will to pick up shipwrecked persons and people seeking protection. Additionally, disunity over obligations regarding persons encountered beyond maritime borders who are seeking international protection hinders joint actions of EU Member States in the FRONTEX framework that could contribute to the saving of lives and providing of persons in need of protection with such protection in the EU.

Among steps to support the implementation of the international duty to rescue at sea, and therefore the saving of many human lives, legislative measures could

be taken up at EU level. Especially conceivable would be regulation under EU law with regard to criminal immunity to rescuers, obligations arising from the human and refugee rights of persons seeking protection beyond state borders, and the development of a reliable, internal EU system of burden sharing.

2. Formation of state services for rescue at sea and sea monitoring

The international law of the sea obligates states to establish search and rescue centres in dedicated zones. On the exact formation and form of coast and sea monitoring, as well as the rescue services within the search and rescue zones, the international law of the sea provides no binding guidelines.

Although indications of far-reaching radar and satellite surveillance of the Mediterranean exist, little is known about the – in part, certainly military – structures of this surveillance. Information on the position of vessels in distress gained through surveillance can provide a starting point for duties to rescue, which are grounded in the international law of the sea and human rights law. Currently, the extent to which the locating of vessels in distress leads to rescue at sea is unclear. In this context, creating transparency with regard to surveillance structures would be of crucial importance. Questions that must be clarified at EU level are the extent of human rights obligations to protect and duties to rescue in connection with the planned creation of a European coast guard and a European Surveillance System for Borders.

II. Access to international protection

1. The requirements of human rights and EU fundamental rights

1.1 Applications for international protection made in the territorial sea or at land or maritime borders

Persons seeking international protection in the territorial sea⁷ or at maritime borders⁸, independent of the

⁷ The territorial sea falls under the sovereignty of the coastal state. The territorial sea of Spain, France, Italy, Malta, Cyprus, and for the most part those of Germany, is twelve nautical miles wide, while that of Greece are six nautical miles wide.

⁸ The maritime borderline of a state divides its territorial sea and the adjacent high seas.

situation and the form of protection sought, are to be handled the same as persons who apply for protection on land. This arises from Article 3 of the EU-Asylum Procedures Directive⁹ and the prohibitions of refoulement. The principle of non-refoulement forbids the expulsion, deportation, rejection or extradition of a person to a state in which he or she would face threats of elementary human rights violations. Different prohibitions of refoulement derive from international customary law, EU fundamental rights¹⁰, the European Convention on Human Rights (ECHR), Article 33(1) of the Refugee Convention, Article 3(1) of the UN Convention against Torture (CAT)¹¹ and from Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR). In this respect, states are also obligated to examine whether the said dangers pose a threat through chain deportation.

From the validity of the principle of non-refoulement at the border there arises a basic obligation to allow entry to the person concerned, at least for the purpose of examining his or her application, and to guarantee his or her right to remain. A right to remain that protects the applicant's elementary human rights in effect can only be guaranteed within the state's territory. This is also the assumption of the EU-Asylum Procedures Directive, which, as a rule, grants applicants the right to remain in the Member State, at its border, or in its transit zone until their applications are examined.

Against the background of the principle of non-refoulement, other approaches would be theoretically conceivable only where and insofar as a country exists that accepts the applicant, and in which none of the discussed elementary violations of human rights threaten the applicant. This constellation corresponds to the safe third-country concept in the variant of so-called "super-safe countries", which, taking the German example of a third-country arrangement as a model, has found entry into the Asylum Procedures Directive. UNHCR and international literature in the field remain very critical of the conformity of such third-country arrangements with international law – especially against the backdrop of jurisprudence of the European Court of Human Rights (ECtHR) that requires an individual examination of each application for international protection. In any case, however, the representatives of the Member States in the Council have

not yet succeeded in assembling a binding list of such super-safe third countries as foreseen by the Asylum Procedures Directive because currently no states outside the EU exist that fulfil the requirements for the necessary safety of the third country and are not already attached to the Dublin system. Therefore, on no account is return or rejection to a third country outside of the EU without any examination of the application currently under consideration. With a view to the Mediterranean neighbours and West African states, this also will not change in the medium-term.

International Human and EU fundamental rights require that the enforceability of the non-refoulement principles be secured through procedural law and rights to effective legal remedy. Especially required then, are a thorough, individual, and substantive examination of the application for international protection; the right to legal representation; the right to contact the UNHCR; and an effective legal remedy with suspensive effect that enables a stay in-country pending a decision on the remedy. Because from a human rights perspective the severity and potentially irreversible nature of the harms through expulsion are decisive, there is no room for a limitation of the guarantees of procedure and legal remedy at the border.

For practical reasons, these requirements for procedures and legal remedy can not be observed on a ship. For that reason, if applications for international protection are submitted at the maritime border or in the territorial sea of a coastal state, the applicants are to be allowed disembarkation and a stay on dry land pending a decision on legal remedy.

1.2 Human rights obligations beyond EU maritime borders (high seas and territorial sea of third states)

The establishment of pre-border and migration controls in areas beyond state borders at sea is part of the EU border management strategy. They are implemented by individual Member States and in joint operations, including those involving multiple EU states and/or third states, coordinated by the EU border control agency FRONTEX.

Member States have different interpretations of which obligations arise from human and EU fundamental

⁹ Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive), (OJ (2005) L 326. p. 13).

¹⁰ See Art. 19 (1) of the EU Charter of Fundamental Rights.

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

rights in interception, control and rescue measures beyond state borders. For this question that is fundamental for persons seeking protection having access to international protection, the European Commission and apparently the Council plan to develop guidelines without binding legal character; these are currently being negotiated at EU level. This study examines which obligations exist in interception, control and rescue measures arising from human rights and EU fundamental rights. Of central importance in this, the Geneva Refugee Convention, the ECHR and the UN human rights treaties are reference norms.

Weighty arguments exist for the acceptance of the validity of the principle of non-refoulement deriving from the Refugee Convention in situations of interception, control and rescue measures beyond state borders. The arguments exist in the wording, as well as the Refugee Convention's object and purpose. As the international organisation for the defence and promotion of the Refugee Convention, the UNHCR also supports this argumentation. There is no legally relevant common practice and legal view among States Parties and no unambiguous historical interpretation that would lead to the exclusion of extra-territorial validity.

The prohibition of refoulement found in the Refugee Convention is not applicable for persons who are still in the territorial sea of their state. But in this respect, prohibitions of refoulement stemming from the human rights treaties can be applied.

The ECHR and the UN human rights treaties are applicable on ships engaged in border protection or official rescue at sea, also those moving beyond their own territorial sea. From this arises a duty of the states to respect all of the rights contained in these treaties.

Thus the actions of officials on ships may not lead to human rights violations. In light of problems encountered in practice, it must especially be pointed out that beyond the duty of rescue at sea under the law of the sea, migration controls may not be carried out in such a way as to bring harm to people – for example through collisions with small refugee boats or through driving unseaworthy boats out to high seas. EU Member States are bound in all of their measures by the prohibition on discrimination, so that the differentiated treatment of migrants, for example on the basis of their ethnic

or social origin, is in violation of human rights. This obligation stemming from the prohibition on discrimination arises from the Schengen Borders Code, EU fundamental rights, ICERD¹², and the international law of the seas.

In connection with persons in need of international protection¹³, the commitments from the prohibitions on refoulement in the Refugee Convention, the ECHR, the UN human rights treaties and EU fundamental rights are particularly important. These prohibitions of refoulement are also applicable on high seas and in the territorial sea of third countries. The extra-territorial application of the human rights treaties can arise from the jurisdiction in situations of interception, control or rescue measures. This jurisdiction may be based on the nationality of the state ship, the accountability of actions of officials, effective control over persons, and/or the prohibition on the circumvention of human rights obligations. The prohibitions of refoulement must be secured in accordance with the general guarantees of procedure and legal remedy arising from the human rights treaties. This requires, for example, a thorough examination of whether a danger of human rights violations threatens in other states. Additionally, a crucial requirement is the suspensive effect of a legal remedy against the rejection of applications for international protection. This cannot be ensured on a ship, which, in the absence of adequately safe third countries, means that protection seekers must have access to a procedure in an EU state that examines their need for protection.

The liability of states is grounded in the action that causes the danger of human rights violation. Therefore not every omission beyond state borders triggers liability. The Refugee Convention and the international human rights treaties do not give rise to a general duty to provide every person encountered at sea access to state territory for the examination of their applications for international protection. However, they prohibit exposing people to grave violations of human rights through actions beyond state borders. Return or rejection to a country in which the life or freedom are threatened, or the danger of torture or inhuman or degrading treatment or punishment exists, is thus forbidden. In this, ECHR states are bound by the previously described standards for procedural law and legal remedy, just as these apply at the border.

¹² International Convention on the Elimination of All Forms of Racial Discrimination.

¹³ Asylum and other subsidiary forms of international protection.

When government ships carry out rescues at sea in accordance with their commitments stemming from the international law of the sea, they are bound by the obligation of the law of the sea to bring those shipwrecked to a place of safety. The bringing of those shipwrecked to a place of safety is an action that also must be measured against the prohibitions of refoulement. This means that rescued persons, too, may not be brought to third countries without first having their applications for international protection examined in an EU state.

Duties also exist with regard to mixed groups of migrants who are not on a state ship, but are encountered in the course of border and migration controls, or actions of rescue at sea. It is recognised that, as a rule, boats also contain persons in need of international protection, though not exclusively. In light of this fact, grounds always exist to assume that the escorting or towing back of a boat to states outside the EU could result in grave violations of human rights. Thus it is incompatible with human rights for state ships engaged in border protection or rescue at sea to force ships with migrants to sail to third countries.

If government ships of an EU state are located near harbours of origin on the southern Mediterranean or West African coast, collaboration in emigration controls can additionally represent a violation of the human right to leave and the right to seek asylum. Furthermore, with regard to the access to refugee protection thus thwarted, a violation of the commitment to interpret the Refugee Convention in good faith can exist.

2. EU secondary law's lack of conformity with fundamental rights

This study examines the conformity of relevant EU secondary law with the above-mentioned demands of human rights and EU fundamental rights. The result of this examination is that the EU *acquis* regulates the aforementioned human rights requirements only incompletely, and in some points explicitly or implicitly even permits actions of the EU Member States in violation of fundamental rights.

The Asylum Procedures Directive obligates the Member States to examine applications for international protection made in the territorial sea, at the border and during controls in the contiguous zone. As a rule, the Directive guarantees the right of applicants to remain in-country pending an examination of the application, as well as fundamental procedural guarantees.

Articles 35 (border procedures) and 39 (right to an effective remedy) of the EU-Asylum Procedures Directive are contrary to EU fundamental rights. Article 35 allows the Member States to maintain border procedures that from a human rights perspective have completely inadequate procedural guarantees. Article 39 contains the principle that applicants have effective legal remedy before a court or tribunal. But the directive leaves to national regulation by the Member States the form of legal remedy, including its suspensive effect and concomitant right to stay in the territory until a decision has been reached on the legal remedy. It would be impermissible both according to international law, and with regard to EU fundamental rights, according to EU law – if the Member States actually reduce procedural guarantees in border procedures to the minimum intended in the Directive, and do not provide for the suspensive effect of a legal remedy.

The EU *acquis* does not contain further provisions on how to deal with applications for international protection made during interception or search and rescue measures beyond state borders. The Asylum Procedures Directive has no application beyond state borders, with exception of the contiguous zone. The Schengen Borders Code is also applicable beyond state borders but contains only a reference to the rights of refugees and persons seeking international protection, especially with regard to non-refoulement. The obligations of the Member States deriving from those rights are not prescribed. At the same time, while the Borders Code anticipates that a right of appeal against denials of entry must be guaranteed, it determines that such a right of appeal has no suspensive effect. This provision conflicts with EU fundamental and human rights as far as it is applicable to persons seeking international protection who are encountered beyond state borders during pre-border controls.

3. The EU legislature's duties to adopt legal norms

There is a fundamental and human rights obligation to provide to persons seeking protection, taken up at or beyond state borders at sea, access to a procedure in an EU state that examines their need for protection. The human rights of the protection seekers must be secured through procedural rights and a legal remedy with suspensive effect. At the same time, EU fundamental and human rights prohibit the escorting or towing back of boats with a mixed group of migrants on board to states outside the EU, because this could

result in grave violations of human rights. Although EU law regulates border protection and refugee law and the EU border management strategy foresees pre-border migration controls, EU law does not regulate this obligation. Rather, it even or explicitly or implicitly permits actions in violation of EU fundamental and human rights. The duty to regulate in this regard, arising from EU fundamental rights, lies at the feet of the EU legislature. Due to the tightly interlocking actions of the Union and Member States in border protection and the functional distribution of responsibility to overburdened EU border states, adequate protection of fundamental rights can only be efficiently guaranteed through regulation under EU law.

4. Joint action with third countries: no release from human rights responsibility

If Member States are conducting joint border and migration controls with third countries, this raises the question of responsibility for possible human rights violations. The actions of one state's organs are only attributable to another state when these organs are made available to the other state in such a way that the other state exercises exclusive command and control, and when the actions of these state organs appear to be the sovereign actions of the other state. For joint patrols with third countries in the territorial sea and contiguous zones of these third countries, such effective control by other states does not exist. For this, the contractual transfer of individual control rights to which only the coastal states are entitled is insufficient. Thus EU states in these cases remain fully responsible for human rights violations.

It is also significant that, even when a state's action itself does not violate human rights, international law provides for human rights responsibility if the action constitutes an act of abetting a violation of human rights on the part of another state. Such an abetting act that triggers responsibility exists if the assistance is offered in knowledge of the circumstances of the violation of international law, and the abetting act supports the main action of the primarily acting state. Such abetting acts can include the provision of infrastructure and financing, but also such political actions as declarations, assurances and the conclusion of contracts that support an act that violates international law. In this connection, joint patrols in the territorial sea of third countries and the support and advising of third countries must be considered critically, as these especially can constitute the abetting of violations of

the right to leave. Additionally in this regard, the external dimension of the migration strategy must be considered critically. The exercise of political pressure on issues of migration control or the granting of financial or technical assistance in border control can possibly support the treatment of migrants in violation of human rights, and in ways that are foreseeable. This is especially true when assistance is given to states that are recognised as having an particularly low standard for human rights protection and an inadequate asylum system.

EU-primary law defines the objective of developing and consolidating of the rule of law, and respect for human rights and fundamental freedoms as an objective of the EU's external policies. Therefore, in the external migration strategy as a whole, the EU interest in easing its burdens should not be at the fore, but rather, along with the battle against causes for flight, support for systems of human rights and refugee protection in countries of origin and transit. Creation of an international burden-sharing system should ensure that the EU and its Member States take on the burdens of international protection to a degree that corresponds to their strong economic position.

Part 1:

Problems relevant to human rights in current practice

I. Multitude of deaths in the attempt at entry

In the attempt to reach EU territory, many migrants¹⁴ at sea in recent years have gone missing or met their ends.¹⁵ People also die in attempting entry at land borders. Among others, deaths are documented resulting from use of force¹⁶, suffocation in lorries, cargo holds of airplanes or in containers¹⁷, and cases of drowning in attempted crossings of border rivers.¹⁸ According to reports, deadly incidents at the EU's maritime borders in 2006 occurred primarily off the coasts of Spain and Italy, but also in Greece and Malta. In 2006, 1,167 dead or missing were documented for the Canary Islands and the Spanish mainland coast.¹⁹ If, however, one considers undocumented cases, according to estimates for 2006, around 6,000 people lost their lives in the crossing to the Canary Islands, or went missing.²⁰

Over the course of 2006, over 31,000 migrants are reported to have arrived in the Canary Islands: more than six times as many as in 2005.²¹ It is reported that over the first nine months of 2006, 16,000 people reached the island Lampedusa through Libya.²²

1. Distress at sea and inadequate rescue at sea through state search and rescue services

There are various reasons why so many migrant boats encounter distress at sea and are not rescued in time. From reports of incidents at sea, it follows that migrants' boats are often not seaworthy or are overloaded. Most deadly accidents in the Mediterranean and Atlantic occur therefore due to unseaworthy boats that technically are poorly equipped and have no (adequate) possibilities for navigation.

Additionally, migration routes have changed and are becoming ever-riskier. For example, after controls increased in the Straits of Gibraltar, now many refugee boats start for the Canary Islands from Mauritania, the coasts of Cape Verde, Senegal, or even from The Gambia, Guinea or Guinea-Bissau.²³ A shift in routes can also be discerned for migration from Libya to Italy. There, bolstered controls in the Strait of Sicily led to a shift of the route over the Greater Gulf of Sidra.²⁴ Evasive routes lengthen the distances that boats must travel, and therefore increase the danger of accident and death for their passengers.

¹⁴ Migrants arriving by sea in the EU are male and between the ages of 20 and 30 in 80% of cases. EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL study, p. 15.

¹⁵ There are no official statistics on deaths. For the organisation UNITED's collection of deaths, see: UNITED for Intercultural Action, European network against nationalism, racism, fascism and in support of migrants and refugees (2007). For source, see footnote 1, above.

¹⁶ Amnesty International (2006), p. 418. According to this report, a migrant was killed when the Spanish border patrol, the Guardia Civil, fired rubber bullets at migrants.

¹⁷ Der Tagesspiegel (11 May 2001). On 15 February 2007 the body of a young African was found in the landing gear compartment of an airplane: Migration Policy Group (2007), p. 7.

¹⁸ German Bundestag (2005), printed paper 16/22.

¹⁹ This according to the Spanish human rights organisation APDHA (Asociación Pro Derechos Humanos de Andalucía). In 2005 the organisation documented 368, and in 2004 289 dead or missing. For the statistics from 1997-2006, see APDHA (2007).

²⁰ See APDHA (2007); tageschau.de (28 December 2006); BBC News (28 December 2006); PRO ASYL (2006).

²¹ BBC News (22 January 2007); For statistics on the first nine months of 2006, see Human Rights Watch (2007), p. 384.

²² Human Rights Watch (2007), p. 381. At the same time, it should be considered that only 10% of illegal migrants reached Italy by sea. Most who are in the country illegally entered legally by land and over-stayed their visas: Financial Times (7 August 2006).

²³ See Meijers Committee (2006), p. 3; Frankfurter Allgemeine Zeitung (14 November 2006), p. 3.

²⁴ Meijers Committee (2006), p. 3.

Such state surveillance systems as SIVE²⁵ that are used to track illegal immigrants along the Spanish coast are reportedly unreliable in finding smaller boats.²⁶ This can lead to migrants not only using dangerous routes, but also resorting to dangerous, unseaworthy, small boats.

On the other hand, from a number of reports there are also indications that information obtained by observation systems about the position of refugee boats often is not used for rescue of the boat's passengers. Reports on the exact position of small refugee boats in distress are supposed to be repeatedly sent through the shipping broadcaster NAVTEX.²⁷ These NAVTEX reports warn of collisions, but do not urge the rescue of shipwrecked persons.²⁸ It is possible that these reports result in private vessels giving wide berth to the relevant positions to avoid the dangers of an accident rather than sea rescue attempts by private or government vessels. Little is known about the structures and extent of satellite surveillance of the Mediterranean. However, it should be regarded as probable that the Mediterranean is very extensively observed by satellite and that such military structures as NATO play a role in this.²⁹

Because the EU is planning the gradual development of a common European Surveillance System for Borders (EUROSUR)³⁰, the question of whether all available information about shipwrecked persons is also actually used for rescue at sea will have to be clarified at the European level. On the coastal states' duty to rescue within the search and rescue zone, see below.³¹

Recently there have been some cases where state search and rescue or border-patrol missions saved

shipwrecked persons only very belatedly, or not at all. For example, in May 2007 a Maltese military airplane discovered a boat with 53 persons 80 miles south of Malta. According to official sources, the ten-metre-long boat was over-filled and the passengers were in clear distress. Among other indications, it could be seen that they were attempting to bail inflowing water from the boat with canisters. The airplane returned to its base. A patrol boat sent to the location hours later could no longer find the boat with the shipwrecked persons.³²

Around that same time there was an accident in which a Maltese fishing vessel did not let shipwrecked persons on board in order not to endanger a valuable tuna catch. According to reports, the shipwrecked persons were able to save themselves by clinging to nets used in raising tuna at sea. The ship master informed Maltese officials. Nevertheless the affected persons drifted for over 24 hours in the sea between Libya and Malta. The two states could not come to agreement over the jurisdiction for the rescue of the shipwrecked persons. In the end, these persons were rescued by the Italian navy.³³ This incident moved the United Nations High Commissioner for Refugees to remark that Europe is like the Wild West, where a human life no longer has value.³⁴

2. Private parties' omission to undertake rescue at sea and unsuccessful rescue at sea

When a vessel is in distress, not only state, but also private vessels have a duty under international law to save the shipwrecked persons; this will be examined in detail later.³⁵ There are indications that in several

²⁵ SIVE (Sistema Integrado de Vigilancia Exterior), the so-called integrated system for exterior observation, is an electronic observation system used at the EU's maritime external borders, primarily on the Spanish coast, to locate boats attempting to reach EU territory. Therefore the observation measures serve foremost migration control. The system consists of static radar towers with a reach of ten kilometres and mobile units that can be sent to specific locations if needed, either to intercept the located boat or rescue its passengers if they are in distress. See also: Navas (2006) or the official website of the Guardia Civil, the Spanish border patrol: <http://www.guardiacivil.org/prensa/actividades/sive03/localizacion.jsp> [accessed on 25 January 2007].

²⁶ For example, a five-metre-long wooden boat could not be located by SIVE because of its size. Kanaren Nachrichten (13 November 2006).

²⁷ Navigational Information over Telex.

²⁸ Bierdel (2006), p. 117.

²⁹ An indication of NATO activities extending to immigration control in the course of the Mediterranean counter-terrorism operation "Active Endeavour" can be found in the Small Request Regarding the Results of Operation Endeavour filed by the fraction DIE LINKE, German Bundestag (2006), BT Document 16/3238.

³⁰ See EU, European Commission, COM (2006) 773, para. 24; COM (2004) 65, paras. 1.1, 2.1.2, and 2.4.

³¹ Part 3(III)(1).

³² UNHCR (23 May 2007); The Independent (28 May 2007).

³³ Deutsche Welle (29 May 2007).

³⁴ The Independent (28 May 2007).

³⁵ See below, Part 3 (II).

cases this duty has been disregarded.³⁶ This may not only be because merchant vessels offering rescue at sea, or their ship masters, must fear that the rescue operation would lead to considerable delays; such delays for merchant vessels generally result in considerable financial burdens.³⁷ The introduction of criminal charges against the crews of vessels who have performed rescue at sea only to later find themselves accused of smuggling of migrants – such as the case of the *Cap Anamur* in 2004³⁸ or the indictment of Tunisian fishermen in Italy in 2007³⁹ – also sends a negative signal and reduces the willingness of private vessels to undertake rescues.⁴⁰ Additionally, disputes over the responsibility and the refusal of coastal states to permit vessels with rescued persons on board to dock contributes to a hesitance on the part of ship masters and a reduction in willingness to engage in a rescue operation.⁴¹

Rescue at sea also involves an inherent risk of accident. For example, there are reports of an incident in 2006 in which a refugee boat off of the Canary Islands collided with a vessel attempting sea rescue at sea, and sank.⁴²

3. Cases of death in border controls at sea

There also occur rights violations and cases of death in the practice of border controls at sea. For example, a report by Statewatch contains statements from survivors of a boat that sank off of the coast of Mauritania in August 2006, as they attempted to reach the Canary Islands from the coast of Senegal.⁴³ According to the statements, the accident occurred after the Spanish coast guard diverted the boat from its course.⁴⁴ Press reports, also based on the statements of survivors, tell of an incident in which Greek border patrol

agents supposedly dumped over 30 persons into the ocean in August 2006. It is reported that several persons drowned, whilst others were able to save themselves by reaching the Turkish mainland.⁴⁵ A spokesperson for the Turkish foreign ministry and Turkish border officials are quoted as saying that cases in which the Greek coast guard secretly brings migrants back into Turkish waters would become more frequent. There have also been deadly accidents in border controls along the Italian coast. Following a collision between an Italian navy vessel and a boat with migrants near Lampedusa, ten people reportedly died and 40 were missing.⁴⁶ A decision of the European Court of Human Rights (ECtHR) handled a similar case. In that case, an Italian military vessel collided with a refugee boat in the course of a sea blockade conducted by Italy and Albania.⁴⁷

II. Non-existent or inadequate examination of applications of persons needing protection

States along the external borders of the EU are confronted by mixed migration flows. That means that among the people arriving by land or sea, there are those in need of international protection, as well as those who have left their homes for other reasons. In practice the difficulty arises in identifying those in need of protection and those seeking protection, in order to enable their access to relevant procedures and protection. The following describes developments that, in practice, endanger the access of many to protection, or make it impossible.

³⁶ It happens that rescued migrants report that several vessels passed by their boats without stopping or offering assistance. See Van Selm/Cooper (2006), p. 28; Der Stern (18 August 2004).

³⁷ Regarding the costs of a rescue mission in 2001 off of the Australian coast, see Røsæg (2002), pp. 46–47. There is also a danger that insurance companies might no longer cover the costs of multiple rescue missions in the long term.

³⁸ The *Cap Anamur* picked up shipwrecked persons and had to wait 11 days for permission to dock in an Italian harbour. See also below, Part 1(II)(1). The trial of a part of the crew of the *Cap Anamur* began on 27 November 2006 in Italy; they are accused of smuggling migrants. For additional information on this trial, see the website of one of these crew members, Elias Bierdel: <http://www.elias-bierdel.de/> [accessed on 6 July 2007].

³⁹ Borderline–Europe News (31 August 2007).

⁴⁰ Also in this vein is the Council of Europe's fear that prohibitions or delays in the disembarkation of shipwrecked persons could reduce willingness to undertake rescue at sea. Council of Europe, Parliamentary Assembly (2006), Doc. No. 11053, para. 22.

⁴¹ On the consequences for the practice of shipping, see Deutschlandfunk (27 November 2006).

⁴² Milborn (2006), p. 47.

⁴³ Maccanico (2006).

⁴⁴ Maccanico (2006).

⁴⁵ Regarding this incident, see *Süddeutsche Zeitung* (28 September 2006), p. 1; *Der Tagesspiegel* (30 September 2006); *SWR online* (26 September 2006); *Die Presse* (28 September 2006).

⁴⁶ Maccanico (2006).

⁴⁷ ECtHR Admissibility Decision of 11 January 2001 (*Xhavara and Others v Italy and Albania*), Application No 39437/98. More details on this decision are discussed below in Part 4(III)(1.2.3).

1. Forbidding entry to ports following rescue operations at sea

In many cases, a coastal state has denied entry into coastal waters or into port for private vessels that have rescued persons from distress at sea and sought to bring those rescued to land. In Europe, this became known in connection with the case of the *Cap Anamur* in 2004.⁴⁸ After the *Cap Anamur* picked up 37 shipwrecked persons, it was denied docking at an Italian port for 11 days. Italy's argument for the denial was its claim that Malta, which had just joined the EU, held responsibility to take in the shipwrecked persons.⁴⁹

In July 2006, a Spanish fishing vessel that had picked up 51 shipwrecked persons had to wait for six days for permission to dock at a Maltese port. Malta initially denied entry to the port with the argument that the rescue operation was performed outside of its territorial sea, and that Libya held jurisdiction for accepting those rescued.⁵⁰ Only following the conclusion of an agreement between Spain, Malta and Andorra on the proportional admittance of the persons concerned could the boat enter.

A further report comes from Mauritania, which denied the entry of shipwrecked persons. The vessel in distress, the *Marine I*, with around 400 migrants on board, was towed by a rescue vessel of the Spanish coast guard to the coast of Mauritania, where it was supposed to be handed over to officials there.⁵¹ Mauritania rejected acceptance with a reference to the responsibility of the state from which the vessel had launched to sea. It was also claimed that Spain bore responsibility because according to Mauritania, the vessel had been intercepted in Spanish coastal waters.⁵² The rescue vessel was allowed entry to Mauritania several days

later only after negotiation of a compromise between Spain and Mauritania. In exchange for taking in the rescued persons, the compromise consisted of Spain's agreement to financial support for border security, and an agreement regarding future dealings with the shipwrecked persons.⁵³

These incidents occurred shortly after an amendment to the relevant International Conventions on the Safety of Life at Sea and Maritime Search and Rescue took effect, which will be discussed later in greater detail. At this point, it should only be noted that the amendment especially aimed at avoiding disputes over jurisdiction for the taking in of shipwrecked persons, and at putting into concrete terms and strengthening states' responsibilities regarding cooperation in distress at sea.⁵⁴

2. Collective expulsion without examination of an application for international protection

Where migrants have reached the territory of an EU state, in many cases, states have strived for their return as quickly as possible. In this context, irregular migrants have regularly been detained or kept in reception camps.⁵⁵ Reports of mass expulsions to third states from such reception camps are predominantly known from Italy.⁵⁶ The Organisation for Security and Cooperation in Europe (OSCE), relying on information from the Italian interior minister, reports that of 3,000 persons arriving in Lampedusa between September 2004 and March 2005, Italy sent 1,647 back to Libya and 126 back to Egypt on the basis of bilateral agreements. In part, this happened without the required inspection of asylum applications on an individual basis.⁵⁷ Both the European Parliament⁵⁸ and the United Nations

⁴⁸ Such cases do not only arise at the external borders of the EU. Also much discussed in academia is the so-called Tampa incident of 2001, in which Australia denied entry into its territorial sea of a Norwegian freighter that had picked up over 400 shipwrecked persons in international waters near the Australian Christmas Islands because Australia considered Singapore to have jurisdiction. The several-day-long delay resulted in high costs for the Norwegian shipping company. For the facts of the case, see UNHCR (2006), *The state of the world's refugees*, p. 41.

⁴⁹ For information regarding the *Cap Anamur*, see Bierdel (2006); for an extensive legal treatment of the incident, see Rah (2005), pp. 276–286, with further references.

⁵⁰ Regarding this incident, see Human Rights Watch (2007), p. 382; Maccanico (2006); BBC News (21 July 2006); Council of Europe, Parliamentary Assembly (2006), Doc. No. 11053, para. 22.

⁵¹ Der Standard (9 February 2007), BBC News (12 February 2007); CNN.com (7 February 2007).

⁵² The humanitarian news and analysis service of the UN Office for the Coordination of Humanitarian Affairs (IRIN) (9 February 2007).

⁵³ Der Standard (9 February 2007).

⁵⁴ See below, Part 3(III), para. 2.2.3.

⁵⁵ In Italy, these reception camps are called "temporary stay and assistance centres" or "identification centres". For more on the reception camps, see, among others: Amnesty International (2006), p. 226.

⁵⁶ For more detail, see Human Rights Watch (2006a); Andrijasevic (2006).

⁵⁷ OSCE (2006), p. 215.

⁵⁸ EU, European Parliament, Resolution, Doc. No. P6_TA(2005)0138.

High Commissioner for Refugees (UNHCR)⁵⁹ condemned the Italian expulsions to Libya due to the problematic human rights situation in Libya. According to a report by the Council of Europe's Commissioner for Human Rights, these expulsions were carried out without individual examination, were non-transparent, and were not subject to any independent control.⁶⁰ Reports of collective expulsions from Spain also exist.⁶¹

3. Forced return to insecure third states on the basis of readmission agreements or informal arrangements

Not only cases of collective expulsion, but also individual expulsions to countries of origin or transit on the basis of readmission agreements or informal arrangements with third states can be problematic from a human rights perspective, and for multiple reasons. This is especially true when the human rights situation in the target country is poor, and the target country does not have a developed system of refugee protection with adequate legal remedy.

Human rights organisations primarily have criticised returns from Italy to Libya⁶² and from Spain to Morocco. Libya has not ratified the Geneva Refugee Convention and does not have well-ordered asylum procedures. Additionally, UNHCR has no official status there. Representatives of the EU mission in Libya were notified in 2005 that Libya does not recognise the presence of refugees on its territory because migrants staying in Libya are supposedly exclusively economic migrants.⁶³ Expulsions from Libya are reported to have been carried out in part with Italy's financial support.⁶⁴ According to Human Rights Watch, the Italian government in

May 2006 reacted to the accusations and criticism by announcing that no longer would anyone be expelled to a state that had not ratified the Geneva Refugee Convention.⁶⁵

According to further reports from Human Rights Watch, there have been repeated human rights violations in Morocco, one of the target states for expulsions from Spain. Migrants were reported to have been arbitrarily arrested and brought to the Algerian border in December 2006.⁶⁶

Increasingly, readmission agreements are arranged informally. Such informal arrangements are usually neither made open to public nor are they subject to control by parliaments.⁶⁷ This practice has been criticised by human rights organisations as well as the Council of Europe's Parliamentary Assembly, the European Parliament, and UNHCR.⁶⁸ In practice, the conclusion of such arrangements is frequently coupled with approval of financial assistance for the receiving countries.⁶⁹

4. Interception: catching, turning back, diverting and escorting back vessels

The catching, turning back, diversion and escorting back of vessels before they reach coastal waters are all measures that can be subsumed under the term "interception".⁷⁰

When vessels on high seas are caught and forcefully diverted from their route, or even escorted back to the country of departure in order to prevent entry to an EU state, those on the vessel seeking protection are in

⁵⁹ UNHCR (18 March 2005).

⁶⁰ Council of Europe, Commissioner for Human Rights (2005), para. 171.

⁶¹ Amnesty International (2005) and (2006a).

⁶² Regarding the refugee situation at the southern border of Italy, see the report Gleitze/Schulz (2006).

⁶³ EU, Council of the European Union, Doc. No. 7753/05, p. 52.

⁶⁴ *Ibid.*, pp. 59, 61–62.

⁶⁵ Human Rights Watch (2007), p. 381.

⁶⁶ Human Rights Watch (2006b), p. 364; Open letter by Moroccan, African and European associations (2007).

⁶⁷ Regarding issues surrounding readmission agreements, see Cassarino (2007).

⁶⁸ Human Rights Watch (2006a), pp. 117–118; EU, European Parliament, Doc. No. P6_TA(2005)0138; Council of Europe, Parliamentary Assembly (2006), Doc. No. 11053, para. 29.

⁶⁹ See *Der Standard* (10 October 2006): "Spain is guaranteeing more development aid for African states that approve the return of illegal immigrants. This is provided for in two agreements that Madrid has concluded with the West African countries of The Gambia and Guinea. Accordingly, both countries are obligated to take in their citizens expelled from Spain."

⁷⁰ There is, however, no precise definition of the term "interception". In its documents, UNHCR uses the following definition: "For the purpose of this paper, interception is defined as encompassing all measures applied by a State outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination." UNHCR (2000), Doc. No. EC/50/SC/CPR.17, para.10.

practice refused access to asylum procedures and other procedures in which the need for protection is examined. Further, this action can have deadly consequences for those affected if they are forced to continue their journey in unseaworthy boats.

One of the practices covered by the EU migration strategy⁷¹ is the refusal of vessels' entry to coastal waters and/or their escorting back to ports of departure.⁷² According to a report from Human Rights Watch, an Italian decree issued in July 2003 enables the Italian navy to pick up vessels arriving with migrants and refugees and, where possible, force them back into the waters of the states of departure. This decree contains no instruction whatsoever regarding the identification of persons seeking protection.⁷³ On the basis of this decree in 2004, migrants were intercepted in international waters and then handed over to the Tunisian navy.⁷⁴

Not only in the various Member States are there regulations and guidelines regarding the picking up and intercepting of vessels. At European level, the 2003 programme of the Council anchored the interception of vessels as a method of immigration control to be strengthened.⁷⁵ These guidelines already have been implemented in the course of multiple operations. FRONTEX coordinated one such operation, Operation Hera II. This served the joint observation of the area between the West African coast and Canary Islands, and the diverting vessels on the migration route. The operation's goal was, "[...] to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure, thus reducing the number of lives lost at sea. During the course of the operation more than 3,500 migrants were stopped from this dangerous endeavour close to the African coast."⁷⁶ In future, operations at European level with the goal of intercepting

and escorting back migrants, often carried out in cooperation with third states, are to be carried out with greater frequency. In the course of enforcing border protection along the southern maritime borders, great value is attached to such operations. For example, with regard to the planned European coastal patrol network, a study contracted by FRONTEX states: *"The important issue for the network is to detect and intercept persons arriving to the Member States' territory thus ensuring the saving of lives at sea, additionally to have an overview of the flows of persons entering or leaving the area."*⁷⁷

5. Maltreatment

Reports of non-governmental organisations on the maltreatment of intercepted migrants are not isolated cases. Amnesty International's yearly reports for 2006 and 2007, among other abuses, tell of poor medical care and attacks on migrants in Italian detention centres.⁷⁸ Migrants interviewed in July 2007 told of torture at the hands of the Greek coast guard; these practices were reportedly used to extort statements about the travel route.⁷⁹ A report of the Council of Europe's Committee for the Prevention of Torture (CPT) in September 2007 following its visit to Malta offered clear criticism, especially of racist attacks by state officials and inadequate conditions of detention.⁸⁰

6. Common emigration controls in states of transit and origin

Migration controls in the Mediterranean and Atlantic start already along the coasts and in the ports – and Council's programme of 2003 explicitly foresaw this.⁸¹

⁷¹ See below, Part 2(II)(3).

⁷² Among others, Greece pursues this strategy. See EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL Study, pp. 37–38.

⁷³ Human Rights Watch (2006a), p. 113.

⁷⁴ BBC News (4 October 2004): "[...] an Italian warship intercepted a wooden boat crammed with some 150 people in international waters off Lampedusa and summoned the Tunisian navy to escort it back to the North African coast."

⁷⁵ EU, Council of the European Union, Doc. No. 15445/03, paras. 30, bullet point 4, 31. See also EU, European Commission, COM (2006) 733, para. 33. The head of the European border protection agency, Ilkka Laitinen, stated in an interview: "In August and September, we tracked down 2,300 people in their boats in time and escorted them back." Der Tagesspiegel (30 October 2006).

⁷⁶ FRONTEX (19 December 2006).

⁷⁷ EU, Council of the European Union, Doc. No. 12049/06, p. 3.

⁷⁸ Amnesty International (2006), p. 226, Amnesty International (2007), p. 203.

⁷⁹ Pro Asyl (2007).

⁸⁰ Council of Europe, CPT (2007).

⁸¹ EU, Council of the European Union, Doc. No. 15445/03, paras. 25 a), 31.

On the basis of bilateral agreements⁸² there are already joint patrols in these states involving officers from states of transit and origin together with those from EU Member States. In several cases, the joint patrols have been coordinated and organised by the EU border protection agency FRONTEX. Only a few examples of such joint operations will be listed here.⁸³

- Operation ATLANTIS, which was not coordinated by FRONTEX, furthered the common control of Spain and Mauritania over migration routes along the Mauritanian coast.⁸⁴ This was the first joint patrol operation with EU financing that was completely executed on the territory of a third state.⁸⁵
- Operation NAUTILUS⁸⁶ entailed patrols on the seas south of Sicily, Lampedusa and Malta between 5 and 10 October 2006 with the goal of containing migration to Italy and Malta, mostly from Libya. Another aspect of the operation was the use of experts from Member States to identify migrants in order to ease return to their states of origin.⁸⁷
- Operation Sea Horse⁸⁸ aimed to improve border control, the inter-state exchange on the control of migration streams, and a corresponding training of border agents, including those in states of transit and origin.⁸⁹
- In Operation Hera II, already discussed, Senegal and Mauritania were included. Cooperation with these third states rested on bilateral agreements with Spain.⁹⁰ One point of emphasis of the controls carried out at sea was the prevention of emigration from Mauritania.⁹¹
- Operation Hera I accompanied and prepared the way for Hera II; the operations took in summer and autumn 2006. Its aim was the improved identification of migrants in order to establish their countries of origin.⁹²
- Operation Hera III, which began in February 2007, is a continuation of its predecessor, Hera II. During this operation, joint air and sea patrols are to be carried out along the West African coast. Spain, Italy, Luxembourg and France are financing these measures. According to FRONTEX, the controls are to be implemented together with Senegal, aiming, "to stop migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives".⁹³ In advance of the operation measures, as in the preceding operation, a risk analysis is supposed to be carried out. In its course, aided by interviews conducted by experts from several Member States with migrants reaching the Canary Islands, migration routes are to be traced and smugglers tracked down.⁹⁴
- The first phase of Operation Nautilus II took place in June and July 2007. The operation primarily served the observation of the routes from Libya to Malta and Sicily. The first phase of the operation unexpectedly ended at the beginning of August.⁹⁵ One reason given was financial. But apparently playing a large role in the course of the operation were a missing willingness on the part of Libya to take back intercepted persons, and Malta's complaint of lacking support from other EU states.⁹⁶

Spanish authorities in particular use bilateral agreements as the basis for their cooperation with such states as Senegal⁹⁷ and Mauritania⁹⁸, and also undertake joint patrols in the territorial sea of these third states outside of EU operations. In similar fashion to readmission agreements or other agreements with provisions for the return of a state's own or foreign citizens, Spain has also created incentives here for the conclusion of an agreement on the prolongation of joint controls. For example, as Senegal's compensation,

⁸² Bilateral agreements between Spain and Mauritania and Senegal formed the basis for the participation of both third states in Operation Hera: FRONTEX (19 February 2006).

⁸³ For information on additional operations, see: <http://www.frontex.europa.eu/> [accessed on: 6 July 2007]. For more on this set of issues, see also Parkes (2006).

⁸⁴ Maccanico (2006).

⁸⁵ Rodier (2006), p. 13.

⁸⁶ FRONTEX (26 October 2006).

⁸⁷ FRONTEX (26 October 2006).

⁸⁸ Guardia Civil (1 March 2006).

⁸⁹ Maccanico (2006). Participants in the operation were Senegal, Mauritania, Morocco, Cape Verde, and six EU states: Spain, Italy, Germany, Portugal, France and Belgium.

⁹⁰ FRONTEX (19 December 2006).

⁹¹ EU, European Commission, COM(2006) 735, p. 18.

⁹² FRONTEX (19 December 2006).

⁹³ FRONTEX (15 February 2007).

⁹⁴ Ibid.

⁹⁵ FRONTEX (6 August 2007).

⁹⁶ See *timesofmalta* (25 June 2007); *Süddeutsche Zeitung* (5 July 2007); *Deutsche Welle* (4 August 2007).

⁹⁷ See *International Herald Tribune* (5 December 2006); *BBC News* (5 December 2006).

⁹⁸ Maccanico (2006).

a programme of temporary migration for around 4,000 Senegalese was approved.⁹⁹ Italy also reportedly has issued 60,000 seasonal work visas for Tunisians to secure Tunisia's border and coastal controls.¹⁰⁰ At the same time, financial and technical assistance for the enforcement of border protection is granted.¹⁰¹ Through these measures, third states are supported in tracking down migrants through observation measures and controls, and stopping them already at emigration. Amnesty International reports that in 2005 Libyan authorities claimed to have prevented 40,000 people from reaching other states from Libya.¹⁰²

99 See International Herald Tribune (5 December 2006); BBC News (5 December 2006). On the concept of temporary migration at EU level, see below, Part 2(II)(2.4). On the human rights requirements for programmes of temporary migration, see Follmar-Otto (2007).

100 EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL Study, pp. 38-39.

101 See, for example, with regard to Italy's technical support for Libya: EU, Council of the European Union, Doc. No. 7753/05, pp. 59-60.

102 Amnesty International (2006), p. 304.

Part 2:

Management of the EU's common external border: strategies and legal development

I. Fundamental elements of EU migration strategy

The development of the protection of the EU's external border stands in the context of the EU migration strategy, without whose consideration a human rights evaluation of the EU's border management is hardly possible. The efficiency of the protection of the EU's external borders did not first become a main focus of EU migration strategy with the spectacular arrival of refugee boats over the Mediterranean.¹⁰³ With the abolishment of internal borders between the Member States in the EU, the protection of its common external border had already become a fundamental main focus of EU migration strategy from the beginning of the 1990s.¹⁰⁴ A common migration strategy had become necessary because after the abolishment of internal borders in the EU, the co-existence of unique national regulations on refugee protection was no longer sensible. Henceforth, an application for asylum in the EU was only to be examined by one Member State, and at the same time, it was to be assured that every application for international protection would actually be examined somewhere in the EU. Additionally, it had to be guaranteed that protection at the EU's external border would compensate for the

security deficit resulting from the abolishment of internal borders.

Fundamental characteristics of the EU migration strategy, as they can be found in relevant Council documents¹⁰⁵ from the beginning of the 1990s until today, are:

- harmonising control of access to Member States' state territory, especially through a common visa regime and unified rules for controls at the EU's external border;
- the harmonisation of procedural and substantial refugee law within the EU, initially only through common regulations in some areas of asylum law, but since 1999 through an comprehensive Community legislation. Primarily worth mentioning in this context are the Dublin system for determining responsibility for examining an asylum application made in a Member State¹⁰⁶, the introduction of rules on safe countries of origin and safe third countries, as well as accelerated asylum procedures¹⁰⁷ and the directives on minimum standards in asylum procedures (Asylum Procedures Directive¹⁰⁸), minimum standards for the recognition and status of refugees and other persons requiring international protection (Qualification Directive¹⁰⁹) and minimum standards

¹⁰³ See, for example, EU, European Council (2006), pp. 6-ff., 10; German Federal Government (2007), "Europe Succeeds Together", 1 January – 30 June 2007 (Presidency Programme), p. 19.

¹⁰⁴ See the report of EU ministers responsible for immigration, accepted by the European Council in 1991, Doc. SN 4038/91.

¹⁰⁵ See, for example, EU, Report from the Ministers responsible for immigration from 3 December 1991, Doc. SN 4038/91; EU, European Council (1999); EU, European Council (2004): Hague Programme.

¹⁰⁶ EU, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990 (Dublin Convention) (OJ (1997) C 254, p.1) and EU, Council of the European Union Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation) (OJ (2003) L 50, p.1).

¹⁰⁷ See EU, Ministers responsible for immigration (1992), "London Resolutions" and Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive).

¹⁰⁸ Directive 2005/85/EC.

¹⁰⁹ Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) (OJ (2004) L 304, p.12).

on reception conditions for asylum seekers (Reception Directive¹¹⁰);

- the absence of a comprehensive system for the distribution of burdens that arise through the reception of persons seeking protection and the implementation of the protection of the EU's external border;
- and an emphasis on the external dimension of migration policy. The external dimension of migration policy is especially realised through cooperation with states of origin and transit with respect to the readmission of their own and foreign nationals (for example, by conclusion of a readmission agreements), and through fighting the causes of migration pressure.

II. Status of Developments

1. Control of access to state territory

1.1 Documents entitling entry

Control over access for third country nationals¹¹¹ to the EU has, by now, become extensively regulated through EU law. Citizens of practically all states that are countries of origin for migration and flight are subject to visa requirements regulated by EU directive for stays up to three months. Apart from a few exceptional regulations, Member States have not agreed on common regulations under EU law on access for citizens of third states to the EU for longer stays, for example to take up employment. Regulations only exist for such special groups as following family members¹¹² and stu-

dents.¹¹³ Overall, Member States have been extremely restrictive in handling access to the EU for longer-term stays.

1.2 Control and observation measures at the EU's external border, returns

Detailed, binding provisions under EU law regarding the carrying out of controls at border crossing posts and other observation along the EU's external border – including land and sea borders as well as airports – are laid out especially in the Schengen acquis¹¹⁴, as further developed through the Schengen Borders Code.¹¹⁵ Member States have obligated themselves as a rule to expel persons without a valid residence permit¹¹⁶; return policy is bound by common regulations and common implementation.¹¹⁷

1.3 Pre-border controls: immigration and emigration controls

Various measures also based on the Schengen acquis serve to prevent migrants without valid papers from arriving at the EU's external borders in the first place. Such measures are also called "non-arrival measures". Non-arrival measures dating back to the Schengen acquis include:

- the obligation of carrier companies to transport back passengers without valid travel documents;¹¹⁸
- the criminal penalising of carrier companies transporting passengers without valid travel documents;¹¹⁹
- the deployment of document advisors, coordinated among the Member States, to train EU foreign mis-

¹¹⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in Member States (Reception Conditions Directive) (OJ (2003) L 31, p. 18).

¹¹¹ These are persons without citizenship of an EU State.

¹¹² EU, Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive) (OJ (2003) L 31, p. 18).

¹¹³ See, for example, EU, European Commission, COM (2001) 386. The European Commission is planning further proposals on immigration of highly qualified persons, seasonal workers, those moved within a company, and paid trainees. See EU, European Commission, COM (2005) 669.

¹¹⁴ The Schengen Implementing Convention (SIC) was agreed in 1990 and came into force in 1993. In 1999 the Treaty of Amsterdam brought the Schengen acquis into Union law, and has since then undergone further development according to the rules of EU law.

¹¹⁵ EU, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ (2006) L 105, p.1).

¹¹⁶ Article 23 SIC.

¹¹⁷ See, for example, EU, Council of the European Union, Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ (2001) L 149, P.34); Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for returns from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ (2004) L 261, P.28); Article 23 of the Prüm Treaty.

¹¹⁸ Article 26(1) SIC. See also EU, Council of the European Union, Directive 2004/82/EC on the obligation of carriers to communicate passenger data (OJ (2004) L 261, p. 24).

¹¹⁹ Article 26(2) SIC.

sions, carrier companies, as well as border guard officials in countries of origin and transit on Schengen standards. Cooperation of EU Member States in this area can be intensified on the basis of new provisions in the Prüm Treaty, which will be included in EU law.¹²⁰

The aforementioned measures are of particular relevance for human rights and refugee law because – if one considers them together with the visa requirement for citizens of countries causing flight – they considerably impede access to asylum processes and other forms of international protection in EU states, and in many cases render it impossible.

2. The concept of integrated border management

Since the European Commission presented its Communication on the development of integrated management of the external borders of the Member States of the European Union¹²¹ on the request of the 2002 European Council, a concept of integrated border management has developed¹²² with the following characteristics:

2.1 Increasing coordination of operational cooperation among the Member States and more regulation under EU law: FRONTEX, etc.

The deepening of European cooperation in the area of border management occurs through the preparation of common strategies, and also through the enactment of legal provisions that are binding for all Member States. Both are leading to the point that the actions of Member States in border protection and border management are determined ultimately by EU law and guidelines, even when actions are conducted in national responsibility. However, the implementation of protection of the EU's external border is the duty of those states lying along the external border.

In addition to these European standards for national border guard authorities, in recent years, operational cooperation in the conduct of border protection measures has been increasingly coordinated. On 1 May 2005, the European border protection agency FRONTEX¹²³ took up its work; whilst it has no operational powers itself, it is tasked with supporting the operational cooperation of the Member States, both operationally and technically.

The 2007 regulation on Rapid Border Intervention Teams and amending the FRONTEX regulation represented a meaningful, qualitative step towards the Europeanization of protection of the common EU external border.¹²⁴ Namely, the regulation provides for the deployment of officials from an expert pool to other Member States for common border protection operations, pilot projects, and rapid intervention teams. In the framework of these mixed teams, officials are bound by the instructions and the law of the host Member State and by Community law. Through an application submitted by a Member State, the agency decides on a rapid intervention, not the Member States themselves. Portions of the financing and equipping are realised at Community level and during the operation, officers wear an armband with the EU insignia. This multiple interlocking of national and European levels in the implementation of border protection is an innovation, and a departure from the previous principle that implementation of border protection exclusively lies with the Member States. The consequences of this Europeanization for overall human rights responsibility will be discussed in greater detail below.¹²⁵

2.2 E-borders: the importance of information systems and biometrics

The use of modern information technology is of particular importance in the revamped border management strategy. Especially important in this regard are

¹²⁰ See Articles 20–22 of the Prüm Treaty. The international treaty of Prüm on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration was signed on 27 May 2005 by Belgium, Germany, Spain, France, Luxembourg, The Netherlands, and Austria. In the meantime, Finland, Italy, Portugal and Slovenia also have submitted their acts of accession to the treaty, which has been in force for Germany since 23 November 2006; by decision of the Justice and Home Affairs Council on 15 February 2007, the treaty will be included in EU law.

¹²¹ EU, European Commission, COM (2002) 233.

¹²² See, for example, EU, Council of the European Union, Doc. No. 13559/06; EU, European Commission, COM (2006) 735; EU, European Commission, COM (2006) 733; EU, Council of the European Union, Annex to Doc. 15801/06 (Press 341), Integrated Border Management; EU, Council of the European Union, Doc. No. 13926/06, Integrated Border Management. Strategy deliberations.

¹²³ EU, Council of the European Union, Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX Regulation). See Fischer-Lescano/Tohidipur (2007).

¹²⁴ Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (OJ (2007) L 199, p.30).

¹²⁵ See below, Part 5(I)(1).

the further development of the Visa Information System and the Schengen Information System II, as well as the uploading of biometric data into these systems, which is currently being implemented.¹²⁶

2.3 Border management as an interface with police, law enforcement agencies and secret services

Among the tasks of FRONTEX is carrying out general and special risk analyses. The agency is supposed to exchange information with the Member States and to cooperate with Europol and other relevant institutions.¹²⁷ The linkage of risk analysis, collection of criminal-political knowledge, investigation and prosecution of cross-border criminal acts, and cooperation with national intelligence agencies¹²⁸ forms a part of the concept of so-called "integrated border management".¹²⁹

2.4 The external dimension of border management

External aspects of the EU migration strategy initially focussed on approaches to fighting the causes of migration on the one hand, and the conclusion of readmission agreements with countries of origin and transit on the other. Meanwhile, measures in third states and cooperation with neighbouring countries are the first two of a four-step model for controlling access¹³⁰, and therefore of border management. This inclusion of the external dimension in the system of controlling access substantively means that protection of the material border is no longer in the foreground, but rather the goal of making the border unreachable for people without valid travel documents. Logically, existing non-arrival measures have been bolstered and a search for new non-arrival measures continues. These are aimed at protection of what the Council of the EU calls the "virtual border"¹³¹, which is shifting and can lie far beyond the material EU external border.

Among other things, this shift can be explained by the change in political circumstances brought about by the EU's eastern enlargement and the partial move in migration pressure to the southern maritime borders. In the 1990s it was still possible to declare the EU's

neighbours as safe third countries, even though already at that time it meant accepting deficiencies in refugee protection. This meant that asylum seekers, once they had arrived in an EU state or requested protection at the border, could be expelled or rejected to neighbouring states following a rudimentary examination of the asylum application, or none at all. Whilst the 2004 EU Asylum Procedures Directive¹³² on included the concept of safe third countries in two different variants, until now it has still not been possible to identify safe third countries that could be placed on the EU list foreseen in this directive. The Council has therefore abandoned indefinitely the goal of approving a list of safe third countries. Also significant is that relevant transit states to which refugees and other migrants could be returned have shown very limited willingness to conform to the wishes of the EU States regarding readmission and cooperation on border protection measures that conform to Schengen standards. Whilst central and eastern European accession states could be granted the lifting of visa requirements for their citizens and the prospect of accession as "compensation" for their willingness to cooperate, this is not the case for neighbouring Mediterranean states and African states. Correspondingly, the negotiation of readmission agreements has been extremely difficult for the EC and Member States, and even the observance of existing agreements becomes insecure as soon as the number of persons to be returned becomes too large. For this reason the EU and its Member States have recently relied on informal arrangements that awaken concerns about the rule of law and human rights because they usually are totally non-transparent and thus withdrawn from any democratic or legal control, or human rights scrutiny.¹³³

On the basis of a German-French initiative, in February 2007 the Council decided to further develop the concept of temporary migration¹³⁴ and open up the possibility of offering third states quotas for temporary worker migration of their own citizens as an incentive for cooperation.¹³⁵ Of note is that the EU's goal, as it has been for years, is the conclusion of readmission agreements with third states that obligate not only the

¹²⁶ See, for example, European Commission, COM (2006) 402.

¹²⁷ Articles 11, 13 of the FRONTEX Directive. On this topic, see also EU, Council of the European Union, Doc. No. 12304/06.

¹²⁸ See Holzberger (2006), pp. 59 ff.

¹²⁹ EU, Council of the European Union, Doc. No. 13926/06, p. 4.

¹³⁰ EU, Council of the European Union, Doc. No. 13926/06, p. 4.

¹³¹ EU, Council of the European Union, Doc. No. 15445/03, para. I(1).

¹³² Articles 27 and 26 of the Asylum Procedures Directive.

¹³³ See Cassarino (2007).

¹³⁴ On human rights requirements for temporary or circular migration, see Follmar-Otto (2007).

¹³⁵ EU, European Council (2007), p. 9; EU, Council of the European Union, Doc. No. 6193/1/07, p. 2.

readmission of their own citizens, but also of foreigners.¹³⁶ Such obligations place a considerable burden on transit states lying along migration routes to the EU. Exceeding a state's absorption capacity, also measured by economic strength, has negative consequences for the human rights protection of affected men, women and children – especially in states with poorly developed systems of refugee and human rights protection.

3. Developments concerning the EU's southern maritime external border, especially: "interception"

The reinforcement of border protection and management along the EU's southern maritime borders is a current focus of EU policy. In June 2003 the European Commission was presented with a feasibility study it had commissioned on the control of the EU's maritime borders, called the CIVIPOL study¹³⁷ after the contracting company that wrote it. Consequently, in November 2003, the Council agreed on a programme to combat illegal immigration at the maritime borders of EU Member States.¹³⁸ In October 2006, the Council adopted conclusions on the reinforcement of the external maritime border¹³⁹ and in November 2006 the European Commission presented a communication on the reinforcement of the management of the southern maritime border.¹⁴⁰ Multiple points of focus, with various weighting, arise from these documents.

First, a strengthening of FRONTEX is demanded. This is in regard to finances and the equipping of personnel, as well as the ability to respond in crisis situations. These are to be secured through the creation of adequate procedures.

Second, cooperation with third states at several levels should be strengthened and deepened. This should include implementation of technical and organisational

support for surveillance of third states' coasts through a strengthening of joint patrols and joint measures on the identification and return of persons.¹⁴¹

Third, it is planned to improve border surveillance through the establishment of a strong coastal patrol network – a kind of precursor to a real European coast guard – and the creation of European Surveillance System for Borders (EUROSUR). According to the Commission's intentions,¹⁴² in the medium-term EUROSUR should encompass, among other things, a combination of Europe-wide radar and satellite surveillance.

Fourth, guidelines should be worked out on dealing with vessels "carrying, or suspected of carrying, illegal immigrants bound for the European Union."¹⁴³ Behind this is the Council's goal¹⁴⁴ of intercepting such ships, where possible, already on high seas, inspecting them, and thus preventing entry to the EU of persons without entry papers. Insofar as possible, vessels should already be controlled in their ports of departure.¹⁴⁵

Intercepting and inspecting vessels on high seas would require an amendment of the international law of the sea. The Commission is currently working on a proposal¹⁴⁶ to amend the Palermo Protocol against the Smuggling of Migrants, supplementing the United Nations Convention against Transnational Organised Crime¹⁴⁷, as recommended by the CIVIPOL study.¹⁴⁸ Among other issues, questions of cooperation in border control and combating illegal immigration were topics in the high-level Euro-African meetings of Rabat¹⁴⁹ and Tripoli¹⁵⁰ during 2006.

In its communication on southern maritime borders of November 2006, the European Commission made very clear that in this matter there is still no unity on fundamental questions of human rights and refugee protection. One thing not clear is "the extent of the States'

¹³⁶ EU, Council of the European Union, Doc. No. 6193/1/07, p. 2.

¹³⁷ EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL study.

¹³⁸ EU, Council of the European Union, Doc. No. 15445/03.

¹³⁹ EU, Council of the European Union, Doc. No. 13559/06.

¹⁴⁰ EU, European Commission, COM (2006) 733.

¹⁴¹ EU, Council of the European Union, Doc. No. 15445/03, para. 30; EU, European Commission, COM (2006) 733, para. 45.

¹⁴² EU, European Commission, COM (2006) 733, para. 24.

¹⁴³ EU, European Commission, COM (2006) 733, para. 33.

¹⁴⁴ EU, Council of the European Union, Doc. No. 15445/03, paras. 14–22; Council, Doc. No. 13559/06, para. 5(2).

¹⁴⁵ EU, Council of the European Union, Doc. No. 15445/03.

¹⁴⁶ Written information from the European Commission of 27 February 2007.

¹⁴⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/55/383.

¹⁴⁸ EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL study, p. 75.

¹⁴⁹ Euro-African Ministerial Conference, Rabat, 10–11 July 2006, Action Plan, paras. 3–4.

¹⁵⁰ Joint Africa-EU Declaration on Migration and Development, Tripoli, 22–23 November 2006.

protection obligations flowing from the respect of the principle of non-refoulement, in the many different situations where State vessels implement interception or search and rescue measures. More specifically, it would be necessary to analyse the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim as a result of the application of international refugee law, in particular when engaged in joint operations or in operations taking place within the territorial waters of another State or in the high sea.”¹⁵¹ Additionally, it is unclear which EU Member States are responsible for the granting of international protection following rescue at sea or the interception of a vessel.¹⁵² The European Commission intends to raise the relevant legal issues in all appropriate ad hoc forums, especially of the Council.¹⁵³ With the publication of a contracted study in June 2007, the European Commission touched on human rights as well maritime-law questions in connection with border management¹⁵⁴, taking a first step towards clarification of the difficult legal situation. However, this study focuses on the international law of the sea and leaves open fundamental questions of human rights. Its results are currently being discussed in the Council.

4. Fora for the implementation of the external dimension of the migration and border-management strategy

For many years migration issues have been a firm component of EU foreign policy. Important fora for the external dimension of general EU migration policy, and specifically the external aspects of the border protection strategy, are: the EU Neighbourhood Policy, EUROMED¹⁵⁵, political dialogue with the African Union, the Euro-African conferences already mentioned, and political dialogue with individual states, in part on the basis of association and partnership agreements. Of increasing importance in future will be the position of the EU in the UN High Level Dialogue on Migration and Development.¹⁵⁶ Dialogue with third states also always includes the subjects of the connection between migration and development, human rights questions, as well as the raising of capacity for refugee protection.

¹⁵¹ EU, European Commission, COM (2006) 733, para. 34.

¹⁵² EU, European Commission, COM (2006) 733, para. 33.

¹⁵³ EU, European Commission, COM (2006) 733, para. 35.

¹⁵⁴ EU, European Commission, SEC (2007) 691.

¹⁵⁵ Euro-Mediterranean Partnership. For further information, see: http://ec.europa.eu/external_relations/euromed/index.htm.

¹⁵⁶ On all of these, see, for example, European Commission (2006) 735, para. 3(1).

Part 3: Legal obligations for border management stemming from the international law of the sea

Among the generally recognised principles of international law is that every state is allowed to control access of foreign citizens to its territory. However, this law, which is an expression of territorial sovereignty, does not apply in absolute terms.¹⁵⁷ State sovereignty is limited by the state's obligations arising from agreements under international law or international customary law. Further legal obligations arise from national constitutions and national law. Arising from jurisprudence of national highest courts¹⁵⁸ and also the Court of Justice of the European Communities (ECJ)¹⁵⁹, state actions regarding border protection and management are also, as a rule, bound by judicial control.

With regard to developments in EU border management strategy and the practice of Member States described above, this chapter will examine which guidelines for border management at the EU's maritime external border are contained in the international law of the sea.

below. The Flag State may not have territorial sovereignty over a vessel because the vessel is not part of a territory, but the Flag State does enjoy legal sovereignty over the vessel. The Flag State's jurisdiction is described as a bundle of international rights and duties.¹⁶¹ As a consequence, national law of the Flag State is valid for disputes relating to this vessel, and the state may grant this vessel diplomatic immunity.¹⁶² In accordance with article 94 of the UN Convention on the Law of the Sea (UNCLOS), the Flag State not only has the right to exercise its jurisdiction, but also the duty to effectively exert jurisdiction and control in managerial, technical and social matters. The Flag State's obligations in fundamental and human rights arise from national law, international human rights conventions, and where extant, from applicable EU law. Especially for the existence of obligations from international human rights treaties, the existence of legal sovereignty is a fundamental criterion.¹⁶³

I. The jurisdiction of a Flag State over a vessel

On high seas, a vessel travelling under a state's flag lies under the exclusive jurisdiction of this Flag State.¹⁶⁰ In the territorial sea and the contiguous zone, the jurisdiction of the Flag State is limited by the sovereign rights of the coastal state in these zones, described

II. The right to exercise coercive measures in the various maritime zones

In implementing border and migration controls, there is a question of the extent to which government ships are authorised to exercise coercive measures over other vessels. The international law of the sea undertakes a division of maritime waters into internal waters, the

¹⁵⁷ Grabitz (1992), p. 441.

¹⁵⁸ See German Federal Constitutional Court: Judgment of 14 May 1996, Reference No 2 BvR 1938, 2315/93 (third-country arrangements), paras. II and III(1)-III(2) and German Federal Constitutional Court: Decision of 24 October 2006, Reference No 2 BvR 1908/03 (denial of entry of a religious leader), in with the Federal Constitutional Court examined denials of entry against the measure of fundamental rights.

¹⁵⁹ See ECJ: Judgment of 25 July 2002, Case C-459/99 (MRAX/Belgium), in which the ECJ considers the deportation of a spouse of an EU citizen who is a citizen of a third state on the basis of secondary Community law.

¹⁶⁰ See Article 92 of UNCLOS.

¹⁶¹ Caron (2000), p. 401.

¹⁶² Caron (2000), pp. 400, 403-404.

¹⁶³ For more on this, see below, especially Part 4 (III)(1.2.3.2).

territorial sea, and the high seas. Special rules apply in parts of the sea like straits, archipelagic waters, and the contiguous zone. A different legal regime applies in each of these parts of the sea. This section will examine the extent to which, under international law, states may undertake migration controls in the various zones: internal waters, their own territorial sea, high seas, and the coastal waters of third states.

Waters landward of the baseline count as internal waters.¹⁶⁴ Ports also count as internal waters.¹⁶⁵ The territorial sea connects directly with internal waters, and in accordance with article 3 of UNCLOS, every coastal state may claim a territorial sea of up to 12 nautical miles¹⁶⁶ seaward of the baseline. The next zone, the so-called contiguous zone, stretches to a maximum distance of 24 nautical miles from the baseline.¹⁶⁷ The contiguous zone is a part of the high seas. The terms high seas or international waters denote the zone outside of internal waters and the territorial sea.¹⁶⁸

1. Internal waters

In internal waters, the coastal state enjoys full jurisdiction.¹⁶⁹ Thus the coastal state enjoys full rights of control over vessels that enter this zone. This means that migration and border patrol is completely permissible. Foreign vessels may be controlled in this area, and, if necessary, their arrival in ports prevented.

2. Territorial sea

In accordance with UNCLOS, the territorial sea also falls under state sovereignty. This is limited, however,

by the right of innocent passage in accordance with articles 2(3) and 17 of UNCLOS.¹⁷⁰ Independent of the exact legal qualification of the territorial sea,¹⁷¹ the state is entitled to consider the territorial sea as part of its territory.¹⁷² The border between territorial sea and high seas is the dividing line between the jurisdictional sphere of the coastal state's legal order and the jurisdictional sphere of the provisions of the international law of the sea that apply in the absence of a state's jurisdiction on the high seas.¹⁷³ Therefore the area of the territorial sea and the people on it are fundamentally subject to the coastal state's jurisdiction, which is only limited by the right of innocent passage.

The coastal state may not exercise any jurisdictional measures, including controls of a vessel or preventing the vessel's passage, if the vessel seeks innocent passage in the territorial sea outside of the internal waters. It may only do so if passage is non-innocent. The right of innocent passage as an important component of the freedom of navigation belongs to the Flag State. Vessels without a flag have no right of innocent passage.¹⁷⁴ Small boats with migrants and refugees seeking to reach the EU over the Mediterranean often sail without a flag. Without prejudice to considerations of human rights obligations, under the international law of the sea such boats can be stopped, controlled, and possibly diverted out of the territorial sea.¹⁷⁵

According to article 19 UNCLOS, passage is innocent when it does not prejudice the peace, order or security of the coastal state. Vessels that are sailing under a flag can have their passage denied when the traversing vessel is unloading persons in violation of the coastal state's entry laws. However, the international law of the sea does not stipulate which measures can be taken

164 Article 8 of UNCLOS. According to Article 5 of UNCLOS, the basis line is normally identical with the low-water line marked by the average low tide. Along coasts that have a very irregular line, the basis line is calculated in accordance with article 7 of UNCLOS by connecting two points jutting out from the coast line. Gloria (2004), para. 51(2).
165 Gloria (2004), para. 51(8).
166 One nautical mile is 1,852m. States have the right to claim a coastal zone of 12 nautical miles, but are not obligated to do so. Even within the EU the practice is not uniform. For example, Greece claims 6 nautical miles of territorial sea. EU, European Commission, SEC (2007) 691, p. 11, para. 4(2)(2), footnote 14.
167 This means that this zone may extend 12 nautical miles beyond the territorial sea (article 33(2) of UNCLOS). This is the case for most EU Member States, but also here there is no uniform practice. Heintschel von Heinegg/Unbehau (2002), appendix 16, p. 202.
168 See article 86 of UNCLOS.
169 Gloria (2004), para. 51(1).
170 For detail on the topic of the existence of innocent passage for vessels with migrants, refugees, and/or other persons in need of protection, see Rah (2005), p. 279; Pallis (2002), pp. 329-364; Jaguttis (2005), pp. 90-128; Barnes (2004), pp. 47-77; Goodwin-Gill/McAdam (2007), pp. 272-275.
171 On the dispute over whether the territorial sea comprises a part of territory, see: Graf Vitzthum (2006), chapter 2, paras. 106-115.
172 Sharma (2000), p. 819.
173 Kimminich/Hobe (2004), p. 440.
174 Article 17 of UNCLOS states that "ships of all States" enjoy the right of innocent passage.
175 If the boat is unseaworthy, there exists a duty of rescue at sea. See below, Part 3 (III).

against a vessel carrying on board persons in need of protection and/or voluntary migrants, who have no valid entry documents. As will be presented later¹⁷⁶ in detail, the EU Asylum Procedures Directive and the EU Qualification Directive are, however, applicable in the territorial sea. From this and the prohibitions of refoulement under international law, the coastal states are obligated to examine applications for protection made by people in territorial sea. For this purpose, coastal states must also allow the disembarkation of persons seeking protection.

The coastal state has sovereignty over its own territorial sea. Therefore, to the extent that the EU or individual EU Member States want to undertake monitoring measures and controls in the coastal waters of the southern Mediterranean neighbours, this is only possible on the basis of agreements under international law.¹⁷⁷ In practice, joint controls are currently being conducted with Mediterranean neighbours that are not Member States of the EU. Even if through such agreements under international law single rights of the coastal state's control can be transferred to EU Member States, this does not absolve the Member States of existing obligations arising from fundamental and human rights and the Geneva Refugee Convention so long as these human rights obligations do not violate the principle of innocent passage and thus restrict the coastal state's sovereignty.¹⁷⁸

3. Contiguous zone

The contiguous zone is part of the high seas in which the freedom of navigation applies.¹⁷⁹ Therefore, as a rule, the coastal state does not enjoy sovereignty in the contiguous zone. However, in accordance with article 33(1) of UNCLOS, it may exercise the controls necessary to enforce its customs, fiscal, immigration or sanitary laws, and to punish violations of these. In this, according to an explanation of the International

Law Commission, the term "immigration" in article 33(1) also incorporates "emigration".¹⁸⁰

Because a vessel in the contiguous zone is not yet in the territorial sea of a state, the allowable *necessary* controls must be restricted to approaching the vessel for examination and preventing its entry into the territorial sea. As a rule, the exercise of more extensive coercive measures, such as its detention or escorting to a harbour, are unnecessary in the sense of article 33 of UNCLOS and therefore disallowed.¹⁸¹ Also of note is that controls in the contiguous zone that do not serve to prevent entry into the adjacent territorial sea, but rather to prevent leaving the territorial sea into the contiguous zone and the high seas beyond, could represent a violation of the human right to leave.¹⁸² Further, there exist for the states conducting the controls duties arising from the principle of non-refoulement under international law.¹⁸³

4. High seas

In international waters, on high seas, the freedom of navigation reigns.¹⁸⁴ This principle is a component of freedom of the high seas and means that every state has the right to sail vessels under its flag on the high seas. With this, navigation should be equally accessible to all states. Coercive measures against vessels are, as a rule, forbidden. Vessels on high seas are subject solely to the Flag State's jurisdiction.¹⁸⁵ Freedom of navigation, however, only applies to vessels under a flag, which is, as already mentioned, not the case for many small refugee boats.

On high seas, migration and immigration controls may not be conducted against vessels sailing under a flag. This means that vessels also generally may not be stopped, boarded, forced to turn around, or escorted. Ships without a flag may also be stopped and controlled on high seas.¹⁸⁶

¹⁷⁶ Part 4(II).

¹⁷⁷ EU, European Commission, SEC (2007) 691, p. 14.

¹⁷⁸ For greater detail, see below, Part 4(III).

¹⁷⁹ Articles 86 and 87 of UNCLOS.

¹⁸⁰ Nordquist (1993), p. 274, para. 33.8(d). The International Law Commission (ILC) consists of 34 formally independent international law experts. The UN General Assembly tasked it with developing draft treaties, and with them the further development of international law, including the law of the sea. Heintschel von Heinegg (2004), para. 16(50).

¹⁸¹ EU, European Commission, SEC (2007) 691, p. 15. On the authority to conduct controls in the contiguous zone, see also: Graf Vitzthum (2006), chapter 2, paras. 188-193; Pallis (2002), pp. 353-354.

¹⁸² See below, Part 4 (III)(1.2.5).

¹⁸³ See below, Part 4 (III).

¹⁸⁴ The freedom of navigation is anchored in international customary law and in article 87, 90 and 92 of UNCLOS.

¹⁸⁵ For detail on the freedom of navigation, see Wolfrum (2006), chapter 4, paras. 10-15 and 25-29.

¹⁸⁶ See article 110(1)(d) of UNCLOS.

Article 110(1) of UNCLOS provides that in the exceptional case of a treaty between the interfering state and the Flag State, a ship of the Flag State may be stopped and boarded. In such treaties, the Flag State confers authority to the controlling state to take measures against its vessels.

The multilateral Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime of 2000 (Palermo Protocol) contains, for example, provisions allowing stopping and boarding, however only following the Flag State's individual approval, and this, naturally, only if the Flag State also has ratified the protocol.¹⁸⁷ The direct exercise of coercive measures against vessels transporting illegal immigrants without individual approval of the Flag State is not allowed under the international law of the sea.¹⁸⁸ The European Commission is currently developing recommendations for amending the international law of the sea in order to allow the direct exercise of coercive measures for purposes of combating illegal immigration.¹⁸⁹

A further exception to freedom of navigation is the right of hot pursuit, as provided for in article 111 of UNCLOS. Accordingly, coastal states may pursue vessels until reaching high seas. Hot pursuit is only allowed, however, if there is reason to believe that the vessel has breached the laws of the coastal state. Because hot pursuit must begin whilst the vessel is in the internal waters, the territorial sea or contiguous zone, the only cases imaginable, in which hot pursuit can serve as justification for coercive measures in combating illegal immigration are those, in which the aim of a measure is to prevent leaving. Yet human rights limitations on emigration controls, as already discussed, must be observed.¹⁹⁰

These exceptions represent the set of circumstances under which coercive measures may be exercised against foreign vessels on high seas: necessary controls in the contiguous zone; a vessel's lack of nationality or doubts about its nationality; the consent of the Flag State, for example in the form of a treaty; and hot pursuit.

However, in the case of distress at sea, international law provides not only a right, but a duty to intervene.¹⁹¹ There have been many reports in which either rescue at sea has been used as a pretext to escort vessels back to their ports of departure, or in which ship masters of unseaworthy vessels have refused rescue by government vessels of certain nationality, whose rigid handling of refugees is known.

The existence of mixed migratory movements¹⁹² raises the question in regard to human and refugee rights of how it can be guaranteed that persons in need of protection are not brought back to states in which they are susceptible to the danger of persecution or chain deportation. The relevant obligations under EU and human rights law will be discussed later.¹⁹³

III. Rescue at Sea

1. Surveillance of sea, search and rescue services

States have a further duty to establish and maintain search and rescue facilities in designated regions in order to guarantee safety at sea.¹⁹⁴ The relevant conventions provide that a state must undertake necessary monitoring, communication and operational measures¹⁹⁵ and reach agreements to guarantee¹⁹⁶ rescue at

¹⁸⁷ Except for Morocco, all North African Mediterranean neighbours are treaty parties. Of the coastal states of north-western Africa, Guinea-Bissau has not ratified the protocol.

¹⁸⁸ EU, European Commission, SEC (2007) 691, p. 20.

¹⁸⁹ Written information from the European Commission of 27 February 2007. See EU, European Council, Doc. No. 11490/1/03, CIVIPOL study, pp. 60, 72. In the framework of a communication from 2006, the Commission called on all Member States to ratify this protocol, as well as all African states. EU, European Commission, COM (2006) 733, para. 32. Ratification of the supplementary protocol is a prerequisite for its possible amendment.

¹⁹⁰ See in greater detail below Part 4 (III)(1.2.5).

¹⁹¹ Part 3(III).

¹⁹² On the handling of mixed migratory movements, see UNHCR (2007b): *Addressing Mixed Migratory Movements: A 10-Point Plan of Action*.

¹⁹³ See below, Part 4.

¹⁹⁴ Article 98(2) of UNCLOS; International Convention on Maritime Search and Rescue, 1979 (SAR), annex, chapter 2; International Convention for the Safety of Life at Sea (SOLAS), annex, chapter V, regulation 7(1).

¹⁹⁵ The most recent amendment of the SOLAS Convention established a detailed definition of distress location and rescue services: "The performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, ships, vessels and other craft and installations." SOLAS, annex, chapter V, regulation 2(5).

¹⁹⁶ For detail on the extent of this obligation, see Pallis (2002), pp. 330f.

sea "around its coasts".¹⁹⁷ This duty is not limited to the states' territorial sea, but extends beyond.¹⁹⁸ However, the arrangement and form of the search and rescue obligations in its search and rescue zones is left to the discretion of each state.¹⁹⁹ The division of the world's oceans in search and rescue zones was conducted within the framework of the International Maritime Organization (IMO).²⁰⁰ In this, the responsible states each determined themselves how far their own "area of responsibility"²⁰¹ extends.

The duty to undertake rescue services also does not contain a legal obligation to conduct one particular form of monitoring. This means that there is no explicit duty, for example, to conduct patrols. How rescue actions are shaped is up to the state's discretion. The limit on discretion is the goal of protection in the SAR. If a state receives knowledge of distress at sea within its SAR-zone, then in any case it is obligated to launch a rescue mission.²⁰²

Of importance in this context is that, according to experts, the Mediterranean is extensively surveilled not only by radar, but also by satellites that can deliver high-resolution images, which also make recognisable small refugee boats in distress. Practitioners report repeatedly receiving NAVTEX communications that serve to prevent collisions containing the exact positions also of small refugee boats.²⁰³ Information on the position of vessels in distress across the entire Medi-

terranean, made possible by extensive radar and satellite surveillance, can provide a starting point for duties to rescue, which are grounded in the law of the sea and human rights law. Apparently there is no publicly accessible information on which and to what extent Member States conduct satellite-supported surveillance of the Mediterranean, the extent to which surveillance takes place in the NATO framework, and how additional information paths work. In order to concretely define protection and rescue obligations arising from the law of the sea and human rights law, first the monitoring structures would have to be made public.

2. Duty to rescue at sea

The duty of rescue at sea is expressly anchored in international law of the sea.²⁰⁴ The UNCLOS provides that every state must obligate the master of each vessel flying its flag to assist every person encountered in distress at sea and help them to safety as quickly as possible.²⁰⁵ On the one hand, this duty relates to the states whose duty it is to ensure that rescue at sea is carried out. But the masters of private vessels and government ships who must conduct rescue at sea are also especially obligated. These duties are also anchored in additional international treaties, especially the SOLAS Convention²⁰⁶, the SAR Convention²⁰⁷ and the International Convention on Salvage.²⁰⁸ Additionally, guidelines are provided by the

¹⁹⁷ SOLAS, annex, chapter V, regulation 7(1).

¹⁹⁸ The following formulation in the SAR convention argues in favour of this: "The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between states." SAR, annex, chapter 2, para. 2.1.7.; see also Pallis (2002), p. 335.

¹⁹⁹ See Barnes (2004), p. 54.

²⁰⁰ See the IMO website: "Following the adoption of the 1979 SAR Convention, IMO's Maritime Safety Committee divided the world's oceans into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible." http://www.imo.org/conventions/contents.asp?doc_id=653&topic_id=257#3 [accessed on 20 February 2007].

²⁰¹ SOLAS, annex, chapter V, regulation 7(1): "Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall so far as possible provide adequate means of locating and rescuing such persons." [emphasis added by the authors].

²⁰² SAR, annex, chapter II, para. 2.1.1.: "On receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.

²⁰³ Bierdel (2006), p. 117.

²⁰⁴ See article 98 of UNCLOS. This duty is also a matter of international customary law. See Pallis (2002), pp. 333-334.

²⁰⁵ Article 98(1) of UNCLOS:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

²⁰⁶ SOLAS, annex, chapter V, regulations 7 and 33.

²⁰⁷ SAR, annex, chapters 1.3.2. and 2.1.10.

²⁰⁸ Article 10 of the International Convention on Salvage.

IMO²⁰⁹ regarding the handling of shipwrecked persons that further detail the obligations of states and private persons.²¹⁰ The UNHCR has also formulated resolutions and recommendations, especially with regard to the rescue at sea of refugees and other persons in need of protection.²¹¹

Problems existing in practice in connection with rescue at sea have already been presented above.²¹² The failure of private vessels and government ships to undertake rescue at sea and the coastal states' denial of permission to enter safe harbours are problems based on poor implementation of unambiguously existing obligations under the law of the sea, not on a lack of clarity about legal obligations.

2.1 Prerequisites of the duty to engage in rescue at sea

The duty of rescue exists in instances of distress at sea. The SAR Convention defines the term distress as “[a] situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.”²¹³ If there is no distress, there exists no duty to rescue, but also no right to board or escort a vessel, or take up other

measures.²¹⁴ As a rule it violates international law to seize a vessel on high seas that is not in distress. The UNHCR Executive Committee also differentiates clearly between rescue at sea and the interception of vessels, affirming in one Conclusion that vessels responding to persons in distress at sea are not engaged in interception.²¹⁵

In cases of distress, all vessels – whether private or public – in all maritime zones²¹⁶ are obligated to rescue if they receive knowledge of a vessel's distress and rescue can reasonably be expected of them. This means that the ship master's duty to engage in rescue at sea is far-reaching and fundamentally unconditional, although its limit exists where the rescue vessel and crew themselves are endangered by the rescue.²¹⁷

2.2 Substance of the duty to engage in rescue at sea

2.2.1 Guaranteeing provision of basic needs

If a vessel is in distress, rescue measures must be undertaken. Rescue is defined as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.”²¹⁸ Initially, rescuers are supposed to provide first aid and

209 The International Maritime Organisation is a specialised agency of the United Nations seated in London that took up its work in 1959. The organisation is responsible for determining a legal framework including the areas of vessel safety, maritime safety, and sea pollution, and creating technical regulations in these regards. Conventions or regulations, including those for maritime safety, are developed in a specialised committee structure. 167 Member States are represented in the organisation. For detailed information, see: www.imo.org.

210 IMO (2004), Maritime Safety Committee, Resolution MSC 167(78), annex 34. These guidelines were developed and passed by the Maritime Safety Committee (MSC), the most important technical committee of the IMO, in the course of the amendment process of the convention. Substantively, the MSC deals with questions of maritime safety, including search and rescue of shipwrecked persons. The MSC is responsible for the development of guidelines in the area of vessel security. Further, on the basis of resolutions of the IMO Assembly, an expanded committee passes amendments to conventions on vessel security, for example the SOLAS Convention or the SAR Convention. In such cases, membership is expanded to include the parties to each convention, even if these are not IMO Member States. The committee is a collection of government representatives, mostly experts in maritime issues, from all 167 IMO member stateMember States. Therefore, accepted guidelines can be taken as indications of the treaty parties' *opinio iuris*.

211 On the special situation of persons in need of protection and refugees at sea, see the documents of the UNHCR, which has dealt with the issue since the 1980s, especially in reaction to refugee movements in the South China Sea at the time. In multiple resolutions, the Executive Committee has emphasised the obligation to conduct rescue at sea and simultaneously pointed to the special requirements of persons in distress at sea who are also in need of protection. See: Conclusions of the UNHCR Executive Committee: (1980), Conclusion No 20 (XXXI); (1981) Conclusion No 23 (XXXII); (1982) Conclusion No 26 (XXXIII); (1983), Conclusion No 31 (XXXIV); (1984), Conclusion No 34 (XXXV); (1985), Conclusion No 38 (XXXVI); (2003), Conclusion No 97 (LIV). See also UNHCR (19 March 2002); Additionally, the UNHCR together with the IMO developed joint guidelines for rescue at sea of migrants and refugees: UNHCR/IMO (2006). The Executive Committee is also planning conclusions on rescue at sea that likewise go into the problem of persons at sea in need of protection, and which could sensibly complement the conclusion of 2003: UNHCR (16 January 2007).

212 See above, Part 1, paras. (I)(1), (I)(2), and (II)(1).

213 SAR, annex, chapter 1, para. 1.3.13. This definition corresponds to the meaning of distress under international customary law. See von Gadow-Stephani (2006), p. 343.

214 The CIVIPOL study contracted by the Council recommends adopting a more expansive interpretation of the provisions of international law on rescue at sea, so that they are applicable not only in cases of acute distress, but also with regard to the mere existence of an unseaworthy boat. EU, CouncilEU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL study, p. 57.

215 UNHCR (2003), Executive Committee, Conclusion No 97 (LIV).

216 On the dispute over whether the duty to rescue at sea also applies in the territorial sea, see: Pallis (2002), pp. 335-338.

217 Article 98(1)(a) of UNCLOS.

218 SAR, annex, chapter 1, para. 1.3.2.

basic needs.²¹⁹ It should be emphasised that rescue should be guaranteed to *all* people in distress. This was underscored through the incorporation into the treaties of an explicit prohibition of discrimination. In accordance with these, the treaty parties are obligated to guarantee assistance to all people, without regard to nationality, their status, or the circumstances in which they are found.²²⁰ This means that it is not allowable to differentiate whether shipwrecked persons come from a country of origin of flight and migration, or whether they are presumed to have entry papers or not.

2.2.2 Transit to a place of safety

The duty to rescue includes transit to a place of safety. The term "place of safety", however, is not defined in the treaties. According to the definition of the IMO's Maritime Safety Committee (MSC), a place of safety is where the rescue action ends, meaning where the life of the affected person is no longer in danger. Such a place should also be where the rescued person's basic needs are met, including nourishment and medical care.²²¹ The place of safety can be a place in the Flag State, the rescuing vessel's next regular port of call, or the port most quickly reachable.²²² In multiple Conclusions, the UNHCR Executive Committee has taken up the question of which criteria should be used to determine a place of safety. Normally the next regular port of call should be seen as a place of safety.²²³ If refugees and others in need of protection are among the rescued, it must be avoided that shipwrecked persons needing protection are brought to a country in which

they face a danger of human rights violations or chain deportation. Thus the MSC guidelines of the IMO regarding the choice of the place of safety state:

*"The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."*²²⁴

Further, the UNHCR and IMO give the ships' masters practical information that should be noted as soon as a shipwrecked person applies for asylum. Accordingly, the ships' masters should not only inform the next Rescue Coordination Center, but also contact the UNHCR. Additionally, the ships' masters should not take these shipwrecked persons to the country of origin from which they have fled, and not transmit any personal information about the affected persons to this state, or to persons who could pass along this information.²²⁵

2.2.2.1 Private vessels

If persons seeking protection are among the shipwrecked on board a private vessel, the master of the ship as a private person is neither competent nor responsible for the processing of applications for protection. The master of a ship is solely obligated to bring these people to a place of safety in the sense of the law of the sea. It can not be expected of a ship master that he takes additional responsibility for those saved beyond the rescue.²²⁶

²¹⁹ SOLAS, annex, chapter V, regulation 33(1).

²²⁰ "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found." [emphasis added by the authors]. This prohibition of discrimination has been explicitly in place since the latest amendment of the SAR and the SOLAS. SAR, annex, chapter 2, para. 2.10.; SOLAS, annex, chapter V, regulation 33(1). [Emphasis added by the authors].

²²¹ For the definition, see: IMO (2004), Maritime Safety Committee, Resolution MSC.167(78), annex 34, para. 6.12.

²²² The rescuing vessel can not be seen as a place of safety. See: IMO (2004), Maritime Safety Committee, Resolution MSC.167(78), annex 34, No. 6.13.: "An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made."

²²³ In this sense, the UNHCR Executive Committee already concluded in 1981: "In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers at sea. In cases of large scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis." UNHCR (1981), Executive Committee, Conclusion No 23 (XXXII).

²²⁴ IMO (2004), Maritime Safety Committee, Resolution MSC. 167(78), annex 34, para. 6.12.

²²⁵ UNHCR / IMO (2006): Rescue at Sea, A guide to principles and practice as applied to migrants and refugees, p. 10. See also: UNHCR (2002): Background note on the protection of asylum-seekers and refugees rescued at sea, para. 31.

²²⁶ See likewise: UNHCR (2002): Background note on the protection of asylum-seekers and refugees rescued at sea, para. 17: "The master will not have to be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue. The identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task."

Even if there is no duty of the ship master under the law of the sea to incorporate the threat of persecution for an individual at such a place into his decision, in a current information brochure on the practical implementation of rescue at sea, the UNHCR and IMO recommend: “While the ship master is not responsible to determine the status of the people on board, he needs to be aware of these principles.”²²⁷ In the IMO guidelines already cited above, this statement is even clearer: “The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees at sea.”²²⁸

2.2.2.2 Government ships

Even though the duty to conduct rescue at sea equally applies to government ships and private vessels, the legal situation for rescue by government ships diverges from that of rescue by private vessels. The master of a government ship also lacks the competence and responsibility to decide on applications for international protection.²²⁹ However, as soon as government ships²³⁰ rescue shipwrecked persons, they assume sovereign tasks and in addition to the duty to rescue at sea, they are subject to obligations arising from human rights and refugee law. From a human rights perspective, which is laid out in detail below²³¹, taking rescued persons to a place of safety is an action that must be measured against the principle of non-refoulement under international law.

2.2.3 Duty of coastal states to allow entry into the territorial sea and ports

The coastal state's sovereignty over its territorial sea is limited by its humanitarian obligations. Among these obligations grounded in international customary law belongs allowing entry to port for a vessel that is in distress and sailing through the territorial sea trying to find assistance.²³²

If a private or government ship has picked up shipwrecked persons in accordance with its obligations under the law of the sea, then the possibility for the rescuing vessel to enter a port and disembark the rescued persons is a necessary prerequisite to successfully ending the rescue. Allowing entry to the port and the disembarkation of those rescued has the important purpose of unburdening ship masters of primary responsibility as soon as possible. This is especially important for the ship masters' efficient and actual exercise of the rescue obligation because the rescued persons are normally in need of quick medical assistance and care, and fear of delay and financial loss lowers the willingness to rescue.

The international law of the sea and relevant conventions still have not produced a clear duty to tolerate disembarkation of a vessel that has picked up shipwrecked persons except in the case of an emergency for the rescuers themselves.²³³ Whether in this regard homogenous state practice and *opinio iuris* exist is disputed.²³⁴ The latest amendment of the SOLAS and SAR conventions created greater legal clarity regarding the states' duties. In both conventions the following regulation used the same wording:

“Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these

²²⁷ UNHCR/IMO (2006)

²²⁸ IMO (2004), Maritime Safety Committee, Resolution MSC. 167(78), Anlage 34, Ziff. 6.17.

²²⁹ With regard to the commander of a German warship, see: Heintschel von Heinegg (2006), chapter 7, para. 78.

²³⁰ This can include vessels for border guards as well as state rescue vessels.

²³¹ See below, Part 4.

²³² EU, European Commission, SEC (2007) 691, p. 12.

²³³ On this, with additional references, see: Graf Vitzthum (2006), chapter 2, para. 49. Even though the UNCLOS itself provides no mention of access to ports in cases of distress, the right of access for ships in distress is a matter of international customary law. However, the right to an emergency port is not unlimited. If the coastal state is in serious danger, it is possible to suspend it. These exceptions affect, for example, nuclear-powered vessels in distress.

²³⁴ Against the assumption of an homogenous state practice, see: Røsæg (2002), pp. 58-59; For another view: von Brevern/Bopp (2002), p. 842: “The duty of port states to tolerate the disembarkation of persons rescued from distress at sea is implicitly contained in the regulations substantiating the duty of ship masters and states to rescue. At least, however, this regulation has been substantiated at the latest through constant, widespread state practice.” This duty is surely in reference to the next planned port of call. von Brevern/Bopp (2002), p. 849.

cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable."²³⁵

Beyond the SOLAS and SAR conventions, the Convention on Facilitation of International Maritime Traffic of 9 April 1965 (FAL)²³⁶ was also correspondingly amended and now codifies an obligation on the simplification of disembarking shipwrecked persons.²³⁷

With the SOLAS and SAR amendments, several concrete duties²³⁸ were codified:

- There now exists a legal obligation to co-ordinate and co-operate with the goal of finding a place of safety with the least possible diversion from the planned route.
- The primary responsibility of the states in the search and rescue zone and the goal of disembarkation as quickly as possible is explicitly established. This means that states in a search and rescue region are obligated to agree on a port of call as quickly as possible for the benefit of the shipwrecked persons. Of note here is that the state duty to undertake rescue at sea expands along with increasing monitoring of the zone.
- The duty exists to guarantee disembarkation "as soon as possible".
- States are obligated to observe guidelines developed in the framework of the IMO.²³⁹

The aforementioned legal changes still do not make possible an unambiguous definition of a "place of safety"

in a particular case, and the final permission to disembark still lies at the discretion of coastal states. This discretion, however, is clearly limited. An holistic view of these obligations provides a clear and relatively narrow legal framework for states' discretion.²⁴⁰ The UNHCR therefore especially welcomed the amendment of the SOLAS and SAR conventions. The UNHCR interprets the amendment in such a way that states should be obligated to allow mooring by their captains without delay.²⁴¹

This result also naturally applies to refugees and other shipwrecked persons in need of protection. In practice, however, there is a danger that shipwrecked persons who are not refugees are more likely to receive permission for disembarkation because coastal states shrink from their burden to examine the desire for protection.²⁴² However, such a refusal or delay in disembarkation due to the (refugee) status of the persons rescued would not be compatible with the new, explicit prohibition of discrimination²⁴³ inserted into the relevant conventions. If a vessel with rescued persons seeking protection is at the maritime border or in the territorial sea in order to seek protection in the coastal state, a duty to allow entry arises from the Geneva Refugee Convention and the human rights treaties.²⁴⁴

2.3 Securing the duties of private persons to undertake rescue at sea

State duties extend beyond a guarantee of rescue at sea by vessels in the service of the state. It is additionally demanded of states that they enforce the private persons' duty to rescue. However, the UNCLOS itself

²³⁵ SOLAS, annex, chapter V, regulation 33(1-1); SAR, annex, chapter 3, para. 3.1.9 [emphasis added by the authors]. The amendments to the SOLAS and SAR conventions were accepted in May 2004 and took effect on 1 July 2006.

²³⁶ Convention on Facilitation of International Maritime Traffic of 9 April 1965 (FAL) (BGBl. 1967 II, p. 2434) The amendment to the convention was approved on 7 July 2005 and took effect on 1 November 2006.

²³⁷ "The amendment will require public authorities to facilitate the arrival and departure of ships engaged in the rescue of persons in distress at sea in order to provide a place of safety for such persons." www.imo.org It should also be mentioned here that the IMO is preparing additional guidelines, an "Explanatory Manual" on the FAL convention, which should, among other things, serve to ease disembarkation. Note also developments and plans at the EU level: EU, Council of the European Union, Doc No 7045/07.

²³⁸ The term "shall" is used in the annex to the SAR convention, "to indicate a provision, the uniform application of which by all Parties is required in the interest of safety of life at sea." SAR, annex, chapter 1, para. 1.1. [emphasis added by the authors].

²³⁹ As already mentioned elsewhere, the MSC passed corresponding guidelines simultaneously to the amendments of the conventions: IMO (2004), Maritime Safety Committee, Resolution MSC. 167(78), annex 34.

²⁴⁰ Arguing against an obligation: von Gadow-Stephani (2006), p. 360, who speaks against an obligation of the parties to the convention. See also: IMO (2004): Persons rescued at sea – more guidance to be developed. In: IMO News 2004, No 3, p. 11: "While the Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for providing a place of safety OR ensuring that a place of safety is provided, the meeting agreed with the views of the majority of Member States who spoke at MSC that this does not oblige that Government to disembark the persons rescued in its territory."; Also critically: Rah (2005), p. 278, footnote 12.

²⁴¹ UNHCR (30 June 2006), press release.

²⁴² The assumption is put forward in Røsæg (2002), p. 66.

²⁴³ SAR, annex, chapter 2, para. 2.10., SOLAS, annex, chapter V, regulation 33(1).

²⁴⁴ See below, Part 4.

contains no guidelines or modalities for the enforcement of the duty to rescue at sea.

Fundamental to the enforcement of private persons' duty to rescue would be that the crews of vessels engaging in rescue do not have to reckon with criminal consequences, as this has a deterrent effect. In this regard, it has been suggested²⁴⁵ that EU law should codify that aiding and abetting entry is not of relevance to criminal law when it serves to protect the life and limb of migrants.

Additionally, there are various proposals on how one could better implement the duty to rescue. Among these, it has been pointed out that control instruments similar to flight data recorders in aeroplanes could be installed in vessels, so that a case of intentional failure to rescue could be more easily proved.²⁴⁶ Practitioners support the idea of financial support for vessel owners and insurance companies who carry the burden of rescue at sea. They point to the UNHCR programmes as practiced in the 1980s. In the course of these programmes, the master of the rescue vessel was paid a monetary sum for each rescued person.²⁴⁷

245 Doris Peschke, Churches Commission for Migrants in Europe (CCME) during a panel discussion at the 7th Berlin symposium on refugee protection, June 18th 2007.

246 Røsæg (2002), p. 51.

247 UNHCR (1983), EC/SCP/30; See also Pallis (2002), p. 340. The idea of financial support and covering the costs of successful rescue measures is also based on the provisions of the International Convention on Salvage. Chapter III, which regulates the rights of the salvagers, and article 12(1) explicitly state that successful salvage operations justify a claim to a salvage reward. According to article 13(1) of the Convention on Salvage, this reward should create an incentive to undertake salvage operations.

Part 4: The demands of human and EU fundamental rights for the management of the European Union's External Borders

The examination of demands of human and EU fundamental rights for the EU and its Member States will be conducted in three steps. First, chapter I will explain the criteria. Chapter II will examine which obligations exist directly at the land or maritime border and within the territorial sea, which counts as state territory.

Against the background of current developments in the area of EU border management strategy, including the planned movement toward pre-border controls beyond state frontiers, chapter III deals with the human rights obligations of EU states in actions at sea beyond the EU's external border. On one hand, this section discusses the human rights obligations that apply on high seas, where the freedom of navigation applies. On the other hand, it discusses obligations in dealing with persons encountered in the course of migration controls with EU participation who are in the territorial sea of third states, namely the southern Mediterranean neighbours and North African states. The obligations of the EU and its Member States from EU fundamental and human rights pertaining to persons encountered beyond the EU's maritime borders are independent of the question of whether a migration control measure is even admissible on high seas under the law of the sea.²⁴⁸ The human rights obligations for migration-control measures conducted on the dry land of a third state will not be addressed.

Each of the chapters will begin by examining which relevant provisions for human rights protection are contained in existing EU secondary law. Then it will examine which obligations arise from international human rights law and EU fundamental rights. Possible discrepancies between the obligations stemming from EU fundamental rights and EU secondary law will be

taken as the basis for the following part 5 of the study, in order to answer the question of whether there exists a need for regulation under EU law.

I. Criteria

In the management of the EU's external border, the actions of Member States tightly intertwine vertically and horizontally with the actions of the European Community (EC). Member States thus carry out border control in accordance with the Schengen Borders Code²⁴⁹ and the rest of the Schengen acquis that is binding under EU law. They are supported in this by the EU border-protection agency FRONTEX.²⁵⁰ The planned transformation of the FRONTEX regulation on the formation of Rapid Border Intervention Teams further entwines vertically the national and EU levels. This is because the decision on deployment of the Rapid Border Intervention Teams, as well as portions of their financing and equipping, will be realised at the Community level. Additionally, deployments are to be based on a mission plan agreed by FRONTEX and a host Member State. National officials are to be provided with a special FRONTEX badge and an armband with the insignia of the European Union. The amendment to the FRONTEX regulation foresees the delegation of sovereign powers among Member States. Officers in action are to be bound by Community law and the law and instructions of a host Member State, but remain under the disciplinary law of their home Member State.²⁵¹

Therefore criteria for human rights must consider EU fundamental rights as well as the obligations of Mem-

²⁴⁸ See above, Part 3 (II)(4).

²⁴⁹ Regulation (EC) 562/2006 (Schengen Borders Code).

²⁵⁰ European Agency for the Management of Operational Cooperation at the External Borders, see above Part 2 (II)(2).

²⁵¹ See Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (OJ (2007) L 199, p.30).

ber States deriving from national fundamental rights and international human rights conventions. The question of whether national or EU fundamental rights apply is thus not of purely academic consequence, because this determines whether judicial control is exercised through national courts or through the Court of Justice of the European Communities (ECJ). In problematic cases, supra-national judicial control through the ECJ can indeed lead to different results than those reached by national judicial control, which to a greater extent can be influenced by the political situation – for example in an overburdened state along the EU's external border. In addition, according to the views presented here, EU fundamental rights can obligate the EU legislator to clearly regulate human rights requirements.²⁵² The extent to which EU fundamental rights are decisive depends on two factors. The first factor pertains to the answer to the question of who is implementing the action being judged and which law the action is based on. As a second factor, the answer to the legal question of the circumstances under which EU fundamental rights are also binding on Member States is decisive.

International human rights obligations deriving from UN human rights conventions²⁵³ and the European Convention on Human Rights (ECHR) are clearly of significance. This is both because the Member States are bound by these treaties, and because the UN human rights conventions and the ECHR²⁵⁴ serve as a legal reference for the European Court of Justice in the determination of EU fundamental rights as general legal principles of EU law. The European Court of Human Rights (ECtHR) also draws on the UN human rights conventions in the interpretation of the ECHR. Additionally, through primary law, EU Member States as well as the Union are bound by the Geneva Convention Relating to the Status of Refugees (Refugee Convention).²⁵⁵ This chapter will therefore first use as criteria the human rights treaties under international law, especially the ECHR as well as the Refugee Conven-

tion. Simultaneously, it will deal with the corresponding development of EU fundamental rights.

The relevant parts of EU secondary law that contain provisions on the protection of human and refugee rights will be presented and measured against the criteria for fundamental and human rights discussed above.

II. The examination of applications for international protection made in the territorial sea or at land or maritime borders

As presented above²⁵⁶, the territorial sea falls under state sovereignty and therefore the jurisdiction of the coastal state. Insofar as coastal states claim this sovereignty, they are entitled to treat the territorial sea as part of their state territory. The territorial sea of Spain²⁵⁷, France, Italy, Malta, Cyprus, and for the most part those of Germany, is twelve nautical miles wide, while that of Greece is six nautical miles wide.²⁵⁸ Jurisdiction in this zone is only restricted by the right of innocent passage.²⁵⁹ The right of innocent passage serves to enable peaceful sea travel and ultimately provides room for international customary law's provision that jurisdiction on a ship derives from its flag. The obligations of legislation or human rights in this zone are not limited, unless this is specifically provided for, or there is a collision with the jurisdiction of the Flag State.

1. Duty to accept and examine applications for international protection in accordance with the Asylum Procedures Directive

Persons seeking international protection in the territorial sea or at maritime borders, independent of the situation and the form of protection sought, are there-

²⁵² See above Main Findings, point II (4) and below Part 5(I).

²⁵³ See especially International Covenant on Civil and Political Rights (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Rights of the Child (CRC).

²⁵⁴ One need only see Court of Justice: ECJ: Judgement of 27 June 2006, Case C-540/03, in which the Court expressly takes into account not only the ECHR, but also the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child.

²⁵⁵ Article 63, EC. Note also the reference to the Refugee Convention in Article 18 of the EU Charter of Fundamental Rights.

²⁵⁶ Part 3(I)(2).

²⁵⁷ With exception of the Straits of Gibraltar.

²⁵⁸ EU, European Commission, SEC (2007) 691, p. 11, footnote 14; Heintschel von Heinegg/Unbehau (2002), p. 13.

²⁵⁹ Articles 2(3) and 17 of UNCLOS.

fore to be handled the same as persons who apply for protection on land. Article three of the Asylum Procedures Directive²⁶⁰ obligates Member States to accept "applications for asylum made in the territory, including at the border or in the transit zones of the Member States."²⁶¹ A study commissioned by the European Commission has confirmed the applicability of the Asylum Procedures Directive, the Qualification Directive and the Dublin II-regulation²⁶² in the territorial sea.²⁶³ From this applicability of EU asylum law follows a duty to give persons intercepted or rescued the possibility to apply for international protection. The applicability of the Dublin II-regulation results in the responsibility of the coastal state through whose territorial sea the person seeking protection has entered, as long as there are no grounds for the responsibility of another EU state. This regulation of EU law corresponds to a conclusion of the UNHCR Executive Committee from 2003, according to which the main responsibility for consideration of all protection needs for persons in distress intercepted by ships lies with the state in whose territorial sea the interception occurs.²⁶⁴

According to the Asylum Procedures Directive, every request for international protection is considered an application for asylum, as long as the person concerned does not expressly request another form of protection that can be applied for separately.²⁶⁵ Of particular note, subsidiary protection in accordance with Articles 2(e), 2(f), 15, and 18 of the Qualification Directive is considered another form of protection.²⁶⁶ An individual right to subsidiary protection arises if the person concerned is threatened by serious harm through the death penalty or execution; through torture or inhuman or degrading treatment or punishment; or through serious and individual threat to life or person by reason of indiscriminate violence in situations of international or internal armed conflict. If national law does not provide its own procedure for granting subsidiary protection, then the application for protection must be

seen as an application for asylum, and the existence of the relevant threats to the applicant must be judged in those terms.

2. Duty to accept and examine applications for international protection in accordance with the non-refoulement principle

The obligation also to accept and examine applications for protection at the border deriving from the Asylum Procedures Directive is the expression of international law's non-refoulement principle. It is valid whether land or maritime border, and without regard to whether the person seeking protection is in possession of entry papers. The lack of papers entitling entry is the normal case for people in need of protection; that lies in the nature of the flight for citizens requiring visas coming from states that cause them to flee.

The principle of non-refoulement forbids the expulsion, deportation, rejection or extradition of a person to a state in which he or she would face threats of elementary human rights violations. Different prohibitions of refoulement derive from international customary law, EU fundamental rights²⁶⁷, the European Convention on Human Rights (ECHR), Article 33(1) of the Refugee Convention, Article 3(1) of the UN Convention against Torture (CAT)²⁶⁸ and from Article 6²⁶⁹ and 7 of the International Covenant on Civil and Political Rights (ICCPR). Differences among these prohibitions of refoulement exist with regard to the human rights violations against which they aim to protect (e.g. protection against torture or protection of the right to life), and with regard to the personal scope of application. Complementing these, Article 4 of the ECHR's Fourth Optional Protocol forbids the collective expulsion of aliens and therefore requires individual examination of each decision on expulsion.

²⁶⁰ Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

²⁶¹ Article 3, paragraph 1 of the Asylum Procedures Directive.

²⁶² EU, Council of the European Union Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ (2003) L 50, p.1.

²⁶³ EU, European Commission, SEC (2007) 691, pp. 13 ff.

²⁶⁴ UNHCR, Executive Committee, Conclusion No 97 (2003).

²⁶⁵ Second sentence of Article 2(b) of the Asylum Procedures Directive.

²⁶⁶ Council Directive 2004/83/EC (Qualification Directive).

²⁶⁷ See Art. 19 (1) of the EU Charter of Fundamental Rights.

²⁶⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²⁶⁹ UN, HRC CCPR/C/78/D/829/1998 (2003): No. 829/98 (Judge / Canada). See Schäfer (2004).

Because the protection of fundamental human rights counts among the peremptory norms of international law,²⁷⁰ the prohibition of expulsion or rejection in the case of a threat to such elementary human rights can be seen also as part of the *ius cogens*.²⁷¹ Of note for the development of international law is the further development of prohibitions of refoulement in the UN human rights conventions by their treaty bodies²⁷² and the European Court of Human Rights (ECtHR).²⁷³ Increasingly from the beginning of the 1990s, states have expressly recognised the validity of prohibitions of refoulement from the human rights conventions.²⁷⁴ Thus the prohibitions of refoulement set forth in Article 3(1) of the UN Convention against Torture and Article 3 of the ECHR especially have gained importance. Among other places, this development has found its expression in the conclusions of the UNHCR Executive Committee.²⁷⁵ It is accompanied by the anchoring of forms of subsidiary protection in the national law of States Parties to the Refugee Convention and in the law of the European Union.

The practice of European states, as unanimously determined in the literature,²⁷⁶ points to the application of the non-refoulement principle not only for persons in a country's interior, but also for those at its borders. According to overwhelming scholarly opinion, this

practice establishes – at least in the circle of EU states – an agreement regarding the fact that the non-refoulement-principle is valid at the border and includes a prohibition of chain deportation.²⁷⁷ This legal view has found expression in Article 3(b) of the Schengen Borders Code that took effect in 2006, which specifies that immigration controls are to be conducted “without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.”²⁷⁸ Of relevance beyond the circle of EU states, this legal view emerges from the decisions, commentaries and conclusions of the UN human rights conventions' treaty bodies²⁷⁹ and those of the UNCHR Executive Committee.²⁸⁰ Insofar there is unanimity that while the principle of non-refoulement does not entail a general right to admission, it at least includes a basic duty to temporarily admit the person concerned for the purpose of examining his or her protection needs and status.²⁸¹

UNHCR, the Council of Europe's Human Rights Commissioner and non-governmental organisations criticise, however, that access to a state's territory – and with it to protection – is in practice often hindered by measures aimed at fighting illegal immigration that are used without differentiation for all migrants,

270 Frowein (1992), p. 67.

271 Doehring (1999), p. 211. In this regard see also UNHCR, Executive Committee, Conclusion No 22 (1981); further references are found in Goodwin-Gill/McAdam (2007), pp. 216 and 218, footnote 86.

272 Human Rights Committee (HRC) for the International Covenant on Civil and Political Rights (ICCPR); Committee against Torture (CAT) for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Committee on Economic, Social and Cultural Rights (CESCR) for the International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Committee on the Rights of the Child (CRC) for the Convention on the Rights of the Child (CRC).

273 Discussed in greater detail below, II 3.

274 For further information and citations on this development, see Goodwin-Gill/McAdam (2007), pp. 217, 220-221.

275 UNHCR, Executive Committee Conclusion No 103 (2005)(m) and 99 (2004).

276 See Hailbronner (1989), p. 39; Hailbronner (1995), pp. 371-372; Hofmann (1987), p. 2039; Hailbronner (2000), p. 439; Maassen (1997), pp. 66-70; Meierhofer (1998), p. 62; Zimmermann (1994), pp. 56-74; beyond Europe, see Goodwin-Gill (1996), pp. 123-124.; Noll (2000), p. 432; Coleman (2003), p. 43.

277 Hailbronner (1989), p. 39; Hailbronner (1995), pp. 371-372; Hailbronner (2000), p. 439; Henkel (1996), p. 152; Kälin/Künzli (2005), pp. 490-491.; Meierhofer (1998), p. 62; for other views, see Kokott (1996) and Maassen (1997), pp. 74-75, both of which reference Article 33 of the Refugee Convention. For the validity of the non-refoulement principle at the border stemming from Article 33 of the Refugee Convention, see also German Federal Constitutional Court: Judgement of 14 April 1992, Reference Number 1 C 48/89 (Carrier Sanctions), margin note 14 and Federal Constitutional Court: Judgement of 14 May 1996, 2 BvR 1938, 2315/93 (Third-Country Arrangements), para. C I 5 d and e, in which the act of denying entry is measured against the criteria of Articles 2 and 3 of the ECHR.

278 Article 3(b) of the Schengen Borders Code.

279 With regard to the UN Convention against Torture: UN, Committee against Torture (1999), Doc. A/53/44, Nos. 137-148; UN, Committee against Torture (2006), Doc. A/61/44, p. 26. With regard to the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): UN, Committee on the Elimination of Racial Discrimination (2003), Doc. A/58/18 69 para. 408. In relation to the ICCPR: Human Rights Committee, General Comment No 15 (1986), No 5.

280 UNHCR, Executive Committee, Conclusion No 6(c) (XXVIII) (1977); Conclusion Nos. 15(b) and 15(c) (1979); Conclusion No 85 (1998), Conclusion No 99 (2004).

281 See Goodwin-Gill/McAdam (2007), pp. 215-216 and Hathaway (2005), pp. 279 ff., each with further references. Exceptions to this principle can only arise if a safe third country is available in which the application for protection of the person concerned can be examined.

including refugees.²⁸² For this reason UNHCR has recommended to the Portuguese European Union Presidency (July through December 2007) that it take up the issue of guaranteeing elementary rights, including the right to access asylum procedures.²⁸³

3. Especially: Implicit prohibitions of refoulement in accordance with the ECHR

The jurisprudence of the ECtHR²⁸⁴ has significantly bolstered the principle of non-refoulement, especially on the basis of Article 3 of the ECHR, the prohibition of torture and inhuman or degrading treatment or punishment. The ECHR grants individual rights, which after exhaustion of local remedies remain open to legal recourse at the ECtHR through individual application in accordance with Article 34 of the ECHR. As a human rights treaty, the ECHR standardises not just the mutual obligations of states, but also the rights of the individual. According to Article 1 of the ECHR, the Contracting parties shall secure "to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." This clear reference to the individual and to the protection of individual human rights as the primary purpose and objective²⁸⁵ of the treaty has implications for the interpretation of the ECHR. This is because according to the rules of international law, purpose and objective fundamentally determine the interpretation of international treaties.²⁸⁶ The treaty parties to the ECHR are bound by the ECHR as it has been given concrete effect through the jurisprudence of the ECtHR.²⁸⁷ Article 32(1) of the ECHR empowers the ECtHR to authoritative and authentic interpretation and further development of the ECHR.²⁸⁸

The ECtHR derives an implicit non-refoulement principle especially from Article 3 of the ECHR:²⁸⁹

*"However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of the State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Art. 3 implies the obligation not to expel the person in question to that country."*²⁹⁰

With this jurisprudence the ECtHR does not rely on an assumption that the expelling or returning state is responsible for the violation of rights in the receiving country. Rather, the non-refoulement principle is derived from the danger to a certain legally protected interest, in regard to which a duty to protect falls to the state in question.²⁹¹ The point of departure for the legal judgement is therefore the action directly attributable to the state that exposes the person concerned to the danger of a violation of the legally protected interest, and is thus an action that incurs liability in accordance with the ECHR.²⁹² The ECtHR has derived a duty to protect from especially grave infringements of fundamental rights through deportation, expulsion or extradition not only from Article 3 of the ECHR, but also from Article 2 (right to life) and Article 6 (right to a fair trial²⁹³). Prohibitions of expulsion can also arise from Article 8 of the ECHR (right to respect for family and private life²⁹⁴) and from Article 34 of the ECHR (right of individual application to the

²⁸² Most recently, see UNHCR, Note on International Protection from 13 September 2001, A/AC.96/951; Thomas Hammarberg, "Seeking asylum is a human right, not a crime", speech delivered on 30 October 2006.

²⁸³ UNHCR's recommendations for Portugal's 2007 European Union Presidency, July-December 2007 from 15 June 2007, No 2.

²⁸⁴ For a comprehensive study on the relevant case law of the ECtHR see Mole (2007).

²⁸⁵ See para. 2 of the preamble of the ECHR and Article 1 of the ECHR.

²⁸⁶ Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

²⁸⁷ Grabenwarter (2005), p. 98; Ress (2004), p. 630.

²⁸⁸ See Papier (2006), p. 1.

²⁸⁹ ECtHR: Judgement of 7 July 1989 (Soering/United Kingdom), Application No 14038/88, para. 91; Judgement of 30 October 1991 (Vilvarajah and Others/United Kingdom), Application Nos 13163/87, 13165/89, 13447/87, 13448/87, para. 103; Judgement of 17 December 1996 (Ahmed/Austria), Application No 25964/94; Admissibility Decision of 7 March 2000 (T. I./United Kingdom), Application No 43844/98.

²⁹⁰ ECtHR: Judgement of 11 July 2000 (Jabari/Turkey), Application No 40035/98, para. 38 with further references.

²⁹¹ Alleweldt (1996), p. 15; Frowein/Peukert-Frowein (1996), Article 3, para. 18; Grabenwarter (2005), p. 139; Mole (1997), p. 13.

²⁹² ECtHR: Judgement of 7 July 1989 (Soering/United Kingdom), Application No 14038/88, paras. 89-91; Judgement of 4 February 2005 (Mamatkulov and Askarov/Turkey), Application Nos 46827/99, 46951/99, para. 67: "In so far as any liability under the Convention is or may be incurred, it is a liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

²⁹³ ECtHR: Judgement of 7 July 1989 (Soering/United Kingdom), Application No 14038/88, para. 113.

²⁹⁴ ECtHR: Judgement of 18 February 1991 (Moustaquim/Belgium), Application No 12313/86; Judgement of 2 August 2001 (Boutif/Switzerland), Application No 54273/00; Judgement of 10 July 2003 (Benhebba/France), Application No 53441/99; Judgement of the Great Chamber of 9 October 2003 (Slivenko and Others/Latvia), Application No 48321/99. On the jurisprudence of the ECtHR, see Thym (2006).

ECtHR²⁹⁵). In accordance with the jurisprudence of the ECtHR, the prohibition of extradition or expulsion in the face of threatening danger in the sense of Article 3 of the ECHR arises from joint consideration of Articles 3 and 1 of the ECHR. The duty to protect therefore applies to all persons subject to the jurisdiction of a State Party.²⁹⁶ Although it has not yet been expressly decided by the ECtHR, legal scholars assume that the principle of non-refoulement deriving from Article 3 of the ECHR also applies at the border.²⁹⁷ The activity of border guards in securing the border is clearly the fulfilment of a public task. In addition, according to the logic of the ECtHR in starting from the action through which the person concerned is exposed to a danger, there should be no difference if a person is exposed to torture because he or she has been deported from a country following illegal entry, or because he or she has been turned back at the border.²⁹⁸

From the ECtHR's interpretation of the ECHR that takes as its starting point the individual's need for protection, three pronounced lines of jurisprudence at the court regarding the principle of non-refoulement can be explained.

First, the ECtHR's jurisprudence considers immaterial whether the danger threatening the person concerned directly or indirectly triggers the liability of state authorities in the receiving country.²⁹⁹ Article 3 of the ECHR also offers protection from the dangers of civil war, endangerment from private persons or groups not attributable to the state,³⁰⁰ or grave health risks independent of existing responsibility of government

authorities for these.³⁰¹ Jurisprudence that the ECtHR³⁰² justifies with a requirement for the dynamic interpretation of the ECHR has been assessed in different ways in literature and in German jurisprudence, including sharp criticism.³⁰³ However, the ECtHR has not deviated from this jurisprudence. Through Article 19(2) of the EU Charter of Fundamental Rights, ECtHR jurisprudence for the EU is to be subsumed, so this argument has come to be regarded as trivial.³⁰⁴

Second, the liability of a State Party of the ECHR for the consequences of expulsion, deportation, or extradition also extends to the danger of chain deportation. This means that prior to deportation, expulsion, or extradition, it must first be examined whether the receiving country will pass along the person to another state in which he or she would be threatened by the dangers described. Even in the case of deportation to another signatory state of the ECHR, the deporting or expelling state must establish that the further transfer will not subject the person concerned to danger from an act that violates Article 3 of the ECHR. In view of planned or existing readmission agreements and informal arrangements³⁰⁵ on the readmission of third country nationals or the interception of shipwrecked persons, it should be noted that according to the jurisprudence, ECHR-states cannot extricate themselves from their duty of examination, even through the conclusion of international agreements on the distribution of responsibility for asylum procedures. This is also true even with regard to agreements arranged only among ECHR-states.³⁰⁶ In isolation, the fact that a state is willing to take back a person and formally fulfils the

295 ECtHR: Judgement of the Grand Chamber of 4 February 2005 (Mamatkulov and Askarov/Turkey), Application No 46827/99, 46951/99, paras. 128, 129 – Violation of Article 34 of the ECHR through extradition during an active procedure before the ECtHR contrary to the recommendation of a provisional measure in accordance with Article 39 of the procedural code of the ECtHR.

296 ECtHR: Judgement of 17 December 1996 (Ahmed/Austria), Application No 25964/94, para. 39–40; ECtHR, Admissibility Decision of 7 March 2000 (T.I./United Kingdom), Application No 43844/98, para. B8

297 Coleman (2003), p. 44; Hailbronner, (1999), pp. 617, 623; Maassen (1998), p. 108; Noll (2000), pp. 441–446; Ulmer (1996), p. 73, sees the issue as already having been settled by the ECtHR's ruling in the Vilvarajah case; Vermeulen (2006), p. 427; Wiederin (2003), p. 43; and Ermacora (1994), p. 163.

298 Hailbronner, (1999), pp. 617, 623; Noll (2000), pp. 442–443.

299 ECtHR: Admissibility Decision of 7 March 2000 (T. I./United Kingdom), Application No 43844/98, in reference to ECtHR: Judgement of the Grand Chamber of 29 April 1997 (H.L.R./France), Application No 24573/94, paras. 39, 40.

300 ECtHR Judgement of 29 April 1997 (H.L.R./France), Application No 24573/94, p. 163, para. 40; ECtHR Judgement of 17 December 1996 (Ahmed/Austria), Application No 25964/94, paras. 43 ff.

301 ECtHR Judgement of 2 May 1997 (D./United Kingdom), Application No 30240/96, para. 49.

302 In this regard, for example: ECtHR Judgement of 2 May 1997 (D./United Kingdom), Application No 30240/96, para. 49 with reference to older Judgements.

303 In favour: Kälin (1999), pp. 51–72; Frowein/Peukert-Frowein (1996), Article 3 of the ECHR, para. 23; Noll (2000), pp. 73 ff.; Zimmer (1998), pp. 115, 125; critical: Maassen (1997), pp. 117–124 and (1998), p. 115; German Federal Administrative Court, 9 C 38.96. For criticism of the open deviation of the German Federal Administrative Court from ECtHR jurisprudence, see Frowein (2002).

304 Rengeling/Szczekalla (2004), para. 859.

305 See Cassarino (2007).

306 ECtHR, Admissibility Decision of 7 March 2000 (T.I./United Kingdom), Application No 43844/98.

requirements for protection from elementary violations of human rights, is not sufficient to negate the liability of the expelling or extraditing state under the ECHR. Some draw the conclusion from this jurisprudence that safe third-country arrangements, absent a rebuttable presumption of the safety of the third country, violate the ECHR.³⁰⁷

Third, the absoluteness of the prohibition of torture or inhuman or degrading treatment or punishment from Article 3 of the ECHR also extends to the implicit non-refoulement principle of the standard. As a result, weighing this against the possible threat to public security and order posed by the presence of a person in a given country is inadmissible.³⁰⁸ Accordingly, the danger of the looming overburdening of a state in the case of a mass wave of refugees also cannot serve to justify an expulsion, extradition, or deportation. Scholars' isolated instances of doubt about the absolute validity of the principle of non-refoulement at the border stemming from Article 3 of the ECHR, with a view to derived rights of access to territory and rights to remain,³⁰⁹ have no grounding whatsoever in ECtHR jurisdiction.

4. Duty to grant a right to remain pending the examination of the application

From the validity of the principle of non-refoulement at the border, as a rule, a basic obligation arises to allow entry to the person concerned, at least for the purpose of examining his or her application, and to guarantee his or her right to remain. A right to remain

that protects the applicant's elementary human rights in effectively can only be guaranteed within the state's territory. This is also the assumption of the Asylum Procedures Directive, which, as a rule, grants applicants the right to remain in the Member State, at its border, or in its transit zone pending the examination of the application.³¹⁰

5. Exceptions to the duty to grant a right to remain pending an examination of the application in the case where a safe third country exists?

Against the background of the principle of non-refoulement, other approaches would be theoretically conceivable only where and insofar as a country exists that accepts the applicant, and in which none of the discussed elementary violations of human rights threaten the applicant. This constellation corresponds to the safe third-country concept in the variant of so-called "super-safe countries", which, taking the German example of a third-country arrangement as a model, has found entry into the Asylum Procedures Directive.³¹¹ Article 36(3) of the Asylum Procedures Directive establishes high requirements for the safety of the third country. Thus the third country must have ratified the ECHR and observe the legal provisions it contains, including the standards relating to effective legal remedies.³¹² The representatives of the Member States in the Council have not yet succeeded in assembling a binding list of such super-safe third countries as foreseen by the Asylum Procedures Directive because currently no states outside the EU exist that fulfil the requirements and are not already attached to the Dub-

307 For example, see the presentation of the Viennese Provincial Government before the Austrian Constitutional Court, described in the judgement of the Constitutional Court on the Austrian asylum amendment of 15 October 2004, Reference No G 237, 238/03-35, p. 45.

308 ECtHR Judgement of 15 November 1996 (Chalal / United Kingdom), Application No 22414/93, para. 80: *"The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees [...]"*.

309 Hailbronner (2007), Commentary on Article 18 of the German Asylum Procedures Law, para. 38.

310 Article 7(1) and 35(3)(a) of the Asylum Procedures Directive. It appears problematic insofar as Article 7(2) of the Directive holds open the possibility for Member States to make exceptions to this principle in the case of subsequent applications for asylum. In this regard, see, for example UNHCR (2005), p.10.

311 Article 36 of the Asylum Procedures Directive.

312 Article 36(2) of the Asylum Procedures Directive states:

"A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
b) it has in place an asylum procedure prescribed by law;
c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and
d) it has been so designated by the Council in accordance with paragraph 3."

lin system.³¹³ Therefore, on no account is return or rejection to a third country outside of the EU without any examination of the application currently under consideration. With a view to the Mediterranean neighbours and West African states, this also will not change in the medium-term.

Safe third-country arrangements without a rebuttable presumption of the safety of the third country enable rejection at the border without any examination of the application. Due to a dearth of current practical relevance, the human rights conformity of such arrangements will not be investigated here in detail. However, it should be noted that UNHCR took the position before the German Federal Constitutional Court that the corresponding provision in Article 16(a) of the Basic Law is in violation of international law,³¹⁴ and it has never retracted this position. At the beginning of the EU harmonisation process in 2000 the European Commission recommended, largely with a view to EU enlargement, that in the longer term the concept of safe third countries be reformed or abolished.³¹⁵ The German Federal Constitutional Court considers a third-country arrangement without a rebuttable presumption of the safety of the third country to be permissible so long as the adopted assessment of safety in the third country is accurate and exceptions are made for exceptional circumstances.³¹⁶ Nevertheless, the international literature in the field remains very critical of the conformity of such third-country arrangements with international law³¹⁷ – especially against the backdrop of ECtHR jurisprudence that requires an individual examination.³¹⁸

Yet some take the view that there is evidence for state practice in the fact that the third-country arrangement has become established in the EU Asylum Procedures Directive. In this opinion, according to the rules of international law, this state practice, in turn, must be drawn upon for the interpretation of the Refugee Con-

vention, which is unclear on the point.³¹⁹ However, this view is unconvincing alone because the model of a third-country arrangement contained in the Asylum Procedures Directive has not been implemented for the legal reason that no safe third countries exist. Also weighing against this view is that according to Article 6(2) of the EU Treaty, the EU is bound by EU fundamental rights, and Article 63 of the EC Treaty contains an obligation to enact EU secondary law in accordance with the Refugee Convention. It would be circular argumentation if one assumed that the shaping of EU secondary law could change or define the substantive legal criteria to which it is bound by EU primary law. In the scope of monitoring EU secondary law, the ECJ must consider the Geneva Refugee Convention. Thus, in future interpretation of the Refugee Convention binding for the EC is the ECJ's responsibility. But neither the EU organs involved in legislating, nor the ECJ in its jurisprudence, have the right to develop their own, regional EU interpretation. Rather than a regional interpretation, as a minimum standard the EU must orientate itself to the international interpretation of the Refugee Convention and to the works of UNHCR.

Here it must be considered that according to the Vienna Convention on the Law of Treaties (VCLT) state practice can only be enlisted in the interpretation of a convention if a unified practice of the States Parties can be determined, and which establishes the agreement of the parties regarding its interpretation.³²⁰ For the VCLT's requirement of a uniform and common³²¹ practice of the parties to the Refugee Convention, and of those to the ECHR, unity of practice among EU states would not alone suffice because the circle of States Parties is much broader for both. This is all the more so the case because a uniform and common use and practice of third-country arrangements among EU states would in effect mean a retreat of the EU states from burden sharing in the protection of refugees as

313 For example, Switzerland and Norway.

314 See the comments of UNHCR representative Koisser during the hearing in the German Bundestag on constitutional amendment, German Bundestag (1993), p. 30. UNHCR represented the view that the absence of the ability to rebut the presumption of the safety of a third country is not in line with the Geneva Refugee Convention also in the case on the amendment of the German Constitution before the Federal Constitutional Court. This fact is not revealed by the judgment of the Federal Constitutional Court, but rather by a later representation in Hailbronner (2000), p. 448, footnote 453.

315 EU, European Commission, COM (2000) 755, p. 8.

316 German Federal Constitutional Court: Judgement of 14 May 1996 (third-country arrangements), Reference No 2 BvR 1938, 2315/93.

317 Zimmermann (1994), pp. 177–184; Wiederin (2003), p. 43; Goodwin-Gill/McAdam (2007), p. 400; Hathaway (2005), pp. 328, 329; Costello (2005), pp. 61 ff.

318 ECtHR: Admissibility Decision of 7 March 2000 (T. I./United Kingdom), Application No 43844/98.

319 Hailbronner (2006), p. 724.

320 Article 31(3)(b).

321 Ipsen (1999), p. 119.

intended by the Refugee Convention.³²² That this retreat would necessarily lead to a greater burden on other States Parties that do not belong to the EU, rather argues against the assumption of a uniform and common practice.

As regards a possible violation posed by rules on safe third states against Article 3 of the ECHR in the form it has taken through the ECtHR, it should admittedly be considered that the ECJ does not rely on the ECHR as a source of law, but as a legal reference for EU fundamental rights, because the EU has not yet acceded to the ECHR. However, in its jurisprudence the ECJ has come to orientate itself directly to the jurisprudence of the ECtHR. In future, the jurisprudential coherence between the ECJ and the ECtHR will only be strengthened³²³ through a change in primary law, agreed in principle in June 2007.³²⁴ This anticipates the EU's accession to the ECHR and legal force for the EU Charter of Fundamental Rights, including its clause guaranteeing consonance with the ECHR as a minimum level of protection.³²⁵ In this respect, too, there is no room here for a "special interpretation" of the ECHR by the EU and its Member States.

6. Procedural guarantees and the right to effective legal remedy

The question of which procedural guarantees and legal redress must be granted when it comes to applications for international protection is of deciding practical importance for the implementation of border and migration controls, as well as for state operations of rescue at sea. For practical reasons, on a ship there can neither be special procedural guarantees, nor guarantees implemented for legal remedies through independent courts or other independent instances. If such obligations must be observed, the persons who are rendering an application for international protection in the territorial sea or at the sea border must there-

fore be allowed disembarkation and residence on dry land pending a decision on legal remedy.

According to the Asylum Procedures Directive, applications for international protection are to be examined individually,³²⁶ and in principle by a specialised asylum agency that offers a guarantee of competent and thorough investigation of the application for international protection through the collection of relevant information and the qualifications of its employees.³²⁷ In addition the Asylum Procedures Directive provides for other procedural guarantees, including: a personal interview, the use of an interpreter, the right of representation through an attorney or other legal adviser,³²⁸ and the right to contact UNHCR.

Beyond this, Article 39 of the Asylum Procedures Directive contains the principle that applicants have effective legal remedy before a court or tribunal. The directive leaves to national provisions of the Member States the form of legal remedy, including its suspensive effect and concomitant right to stay in the territory until a decision has been reached on the legal remedy.³²⁹

These and other procedural guarantees named in the Asylum Procedures Directive serve the implementation of the individual's right to examination of the asylum application, contained in the Asylum Procedures Directive, as well as his or her right to protection from refoulement. Because they are necessary in assisting the person seeking protection in the implementation of his or her rights, they are in the first place an expression of the general principle of the rule of law, which is a founding constitutional principle of all EU Member States and also that of the EU.³³⁰ Additionally the procedural guarantees are an expression of the procedural dimension of the protection of fundamental rights. The individual examination of applications is also prescribed by Article 4 of the ECHR's Fourth Optional Protocol, which forbids collective expulsion, and whose content also has been included in the EU Charter of

³²² See para. 4 of the preamble of the Refugee Convention: "[...] considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation."

³²³ Heselhaus/Nowak-Heselhaus (2006), § 2, No 24.

³²⁴ EU, European Council (2007), Annex 1, para. 5. See also Articles I-9(2) and II-112(3) of the draft Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004.

³²⁵ Article 52 paragraph 3 of the EU Charter of Fundamental Rights.

³²⁶ Article 4(3) of the Qualification Directive.

³²⁷ Article 4(1) and 4(2) of the Asylum Procedures Directive.

³²⁸ Articles 10 and 12 of the Asylum Procedures Directive.

³²⁹ Regarding the conformity of this provision of the directive (Article 39(3) of the Asylum Procedures Directive) with fundamental rights, see the discussion in greater detail below, IV.1.2.2.

³³⁰ See Article 6(1) of the EU Treaty.

Fundamental Rights through Article 19(1). Inherent to every fundamental and human right is that the state that has a positive obligation to adopt appropriate measures, especially on procedural guarantees, to enforce the substance of the right. The more severe the threatening human rights violation, the greater is the state's duty to create appropriate procedural guarantees. The examination of applications for asylum and other applications for international protection also always serve protection from refoulement, and therefore from such severe human rights violations as infringement of life and freedom³³¹ and torture or cruel, inhuman or degrading treatment or punishment.³³² Because these are the stakes, here there must be high standards for the form of procedural protection. These human rights requirements find their expression in the works of the UNHCR,³³³ multiple recommendations of the Parliamentary Assembly,³³⁴ the Committee of Ministers³³⁵ and the Human Rights Commissioner³³⁶ of the Council of Europe. Of crucial importance next to the procedural guarantees regarding the first-instance examination of an application for protection by the competent administrative agencies is the right to effective legal remedy that guarantees residence in the state territory until there is a decision on the legal remedy. This is underscored by the fact that in several EU states, 30-60 per cent of all asylum seekers are recognised as refugees only after examination of an initially negative decision.³³⁷

In the case *Jabari/Turkey*, in which a violation of Article 3 of the ECHR by expulsion and deportation was at issue, the European Court of Human Rights found:

"In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance

*which attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned."*³³⁸

Article 13 of the Convention guarantees the availability at national level of a remedy before a court or other independent and impartial body to enforce the substance of the Convention rights and freedoms.³³⁹ The authority whose decision is being reviewed may not decide in the procedure of review.³⁴⁰ The remedy must be effective in law and in practice. It has to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.³⁴¹ An examination for violation of concepts of national law like irrationality, unlawfulness the law or inadmissibility does not suffice.³⁴² In connection with appeals of extraditions or expulsions in which a violation of Article 3 of the ECHR is alleged, the ECtHR requires an extremely thorough review.³⁴³ Furthermore, in isolated cases, the ECtHR has ruled in favour of the appellant on the question of the existence of an internal protection alternative. Also with regard to the credibility of the applicant's allegation, it has come to a different conclusion than that of the respondent state.³⁴⁴ As far as the violation of such fundamental guarantees as the right to life from Article 2 and the prohibition of torture or inhuman or degrading treatment or punishment, the ECtHR has regarded particular deadline or form requirements for the remedy as violating the Convention.³⁴⁵

Of particular importance is that in these cases the ECtHR has regarded the implementation of deportation as violating the Convention, and thus views as

³³¹ Article 33 of the Refugee Convention, Art. 6 ICCPR.

³³² Article 3 of the ECHR, Article 7 of the ICCPR, Article 3 of the CAT, Article 19(2) of the EU Charter of Fundamental Rights.

³³³ See especially: UNHCR (1979), Handbook on Procedures and Criteria for Determining Refugee Status, Executive Committee, Conclusion No 8 (XXVIII), Determination of Refugee Status (1977), and Conclusion No 30 (XXXIV) The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (1983); UNHCR (2003), Aide Memoire; UNHCR (2005).

³³⁴ For example: European Council, Parliamentary Assembly, Recommendations 1163 (1991); 1309 (1996); 1327 (1997); 1440 (2000).

³³⁵ Council of Europe, Committee of Ministers, Recommendation No R (94) 5; No R (98) 13; No R (98) 15.

³³⁶ See, for example: Thomas Hammarberg (30.01.2006): Viewpoint – Seeking asylum is human right, not a crime.

³³⁷ UNHCR (30.04.2004). UNHCR regrets missed opportunity to adopt high EU asylum standards.

³³⁸ ECtHR: Judgement of 11 July 2000 (*Jabari/Turkey*), Application No 40035/98, para. 50.

³³⁹ ECtHR: Judgement of 12 May 2000 (*Khan/United Kingdom*), Application No 35394/97 para. 44 ff.; Judgement of 5 February 2002 (*Conka/Belgium*), Application No 51564/99, para. 75. For further detail and analysis, see Grabenwarter (2005), pp. 350 ff.

³⁴⁰ ECtHR: Judgement of 3 September 2004 (*Bati and Others/Turkey*), Application No 33097/96 and 57834/00, para. 135.

³⁴¹ ECtHR: Judgement of 5 February 2002 (*Conka/Belgium*), Application No 51564/99, para. 75.

³⁴² ECtHR: Judgement of 8 July 2003 (*Hatton and Others/United Kingdom*), Application No 36022/97, para. 141-142.

³⁴³ See Wiederin (2003), pp. 39-43.

³⁴⁴ ECtHR: Judgement of 6 March 2001 (*Hilal/United Kingdom*), Application No 45276/99, para. 67-68.

³⁴⁵ ECtHR: Judgement of 11 July 2000 (*Jabari/Turkey*), Application No 40035/98, para. 40.

compulsory the opportunity of suspensive effect of the legal remedy.³⁴⁶

The right to an effective remedy in accordance with Article 13 of the ECHR presupposes an arguable complaint. This precondition excludes appeals that are not adequately substantiated or improper. The ECtHR has not yet defined the requirement in the abstract³⁴⁷ and in the implementation of the obligation of Article 13 of the ECHR has afforded ECHR states some discretion as to the manner in which they conform to their obligations.³⁴⁸ But, also in a case where national law qualifies an application for asylum or appeal as "manifestly unfounded", an "arguable complaint" in the sense of Article 13 of the ECHR can apply, which must be examined on the merits. The ECtHR examines on the basis of each of possible ECHR right individually whether an appeal can be considered an "arguable complaint".³⁴⁹

In their "Twenty Guidelines on Forced Return", in 2005 the Committee of Ministers of the Council of Europe also confirmed the right to an effective legal remedy with a suspensive effect on a removal order.³⁵⁰

As a rule, expulsion without the guarantee of legal remedy with suspensive effect is not effective in practice and moreover makes it impossible for the person concerned realize the right to individual petition with the ECHR or a treaty body of the UN human rights treaties, especially if the danger of torture and inhuman or degrading treatment or punishment is realised following expulsion. Both the ECtHR and the UN Committee against Torture have determined that the absence of suspensive effect of a legal remedy can simultaneously amount to a violation of the individual right to file an application or petition with the ECtHR (Article 34 of the ECHR) or the UN Committee against Torture (Article 22 of the UN Convention against Torture).³⁵¹

There exists at EU level an EU fundamental right to an effective remedy before a tribunal³⁵² that is also binding on Member States when they are implementing EU Law. Since the 1980s this has developed in the ECJ's jurisprudence and also has been established in Article 47(1) of the EU Charter of Fundamental Rights. The ECJ has just recently confirmed again its jurisprudence, according to which, "*it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.*"³⁵³

Against the backdrop of ECtHR jurisprudence, the works of the UN Committee against Torture and the EU fundamental right to effective remedy, it is highly disturbing that Article 39 of the Asylum Procedures Directive leaves to the national arrangements of Member States the form of the prescribed legal remedy, including its suspensive effect and attendant right to stay in the territory until a decision has been reached on the legal remedy. Because the legal appeal of the rejection of applications for asylum lies in the scope of application of EU fundamental rights, the Member States are bound by European as well as international law to construe their discretion in the arrangement of the legal remedy in such a way that national law enables remedies with suspensive effect in conformity with fundamental rights, as described.³⁵⁴ National arrangements that envisage a legal remedy without the possibility of creating suspensive effect are in any case irreconcilable with EU fundamental rights, the ECHR and the Convention against Torture. On the question of whether Article 39(3) of the Asylum Procedures Directive itself violates EU fundamental rights and what consequences this has, see below.³⁵⁵

³⁴⁶ See the Admissibility Decision of the ECtHR already cited above: Judgement of 11 July 2000 (Jabari/Turkey), Application No 40035/98, para. 50, and most recently: Judgement of 11 January 2007 (Salah Sheek/Netherlands), Application No 1948/04, para. 153, ECtHR: Judgement of 26 April 2007 (Gebremedhin [Geberamadhién]/France), Application No 25389/05, para. 66.

³⁴⁷ Grabenwarter (2005), p. 355.

³⁴⁸ ECtHR: Judgement of 5 February 2002 (Čonka/Belgium), Application No 51564/99, para. 79.

³⁴⁹ ECtHR: Judgement of 20.6.2002 (Al-Nashif/Bulgaria), Application No 50963/99, para. 131-132.

³⁵⁰ Council of Europe, Committee of Ministers (2005), Twenty Guidelines of the Committee of Ministers of Europe on forced return, guidelines 2 and 5.

³⁵¹ See ECtHR: Judgement of 4 February 2005 (Mamatkulov and Askarov/Turkey), Application Nos 46827/99 and 46951/99, para. 102; UN, CAT (2006), Doc. A/61/44, p. 36.

³⁵² For more detail, see Heselerhaus/Nowak-Nowak (2006), para. 51; Brouwer (2005), pp. 221-222.

³⁵³ ECtHR: Judgement of 27 February 2007, Case C-354/04 P, para. 56.

³⁵⁴ On the obligation to carry out discretionary leeway in compliance with fundamental rights: ECJ: Judgement of 27 June 2006, Case C-540/03, paras. 22-23 and 105.

³⁵⁵ See below, Part 5(1)(2). For the application of the provision at the border see next chapter, (7).

7. Admissibility of reducing procedural guarantees and legal remedies in border procedures?

As a result of political compromise at the end of nearly five years of negotiations in the Justice and Home Affairs Council (JHA), the Asylum Procedures Directive contains a provision on special procedures for deciding on asylum applications at the border or in transit zones.³⁵⁶ Special border procedures introduced after 1 December 2005 must adhere to the essential procedural guarantees that are contained in the general Chapter II of the Directive. But in such procedures, the application does not have to be examined by a specialised Asylum authority. According to the Directive, it suffices if the personnel of the competent authority have appropriate knowledge or necessary training that allows them to fulfil their duties in the implementation of the directive.³⁵⁷ The provision apparently intends to enable border guard authorities to examine asylum applications. In contrast to the otherwise responsible specialised asylum authorities, the authorities responsible for the border procedure are not required to collect and have available accurate and current information from various sources, such as the UNHCR, about states of origin or transit. Rather, it suffices for these authorities to access general information needed to fulfil their task, through the asylum authority or in other ways.³⁵⁸

According to the Directive, the Member States may also maintain border procedures for deciding on permission of entry.³⁵⁹ Also in these procedures, no specialised asylum authority must make the decision. Additionally, the Directive only prescribes rudimentary procedural guarantees (remaining in-country until the decision on the application, informing about rights and duties, use of an interpreter, interview by a person "with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law",³⁶⁰ and consultation with an attorney). According to its wording, in these cases the Directive grants no right

to individual, objective and impartial examination of the application, no right to take up contact with the UNHCR, no right to legal representation, and no right to a written decision with advice on applicable legal remedies with regard to the denial of the application or refusal of admittance.³⁶¹ The Directive prescribes only that the authority give (orally and in any language) the factual and legal grounds for which it considers the asylum application to be unfounded or inadmissible.³⁶² In border procedures, too, it lies with the Member States to regulate the suspensive effect of the appeal against such rejections.

As presented above, the principle of non-refoulement is also valid at the border. That permission of entry is to be decided in the border procedures maintained by Member States does not mean that in these cases the applicant finds himself or herself outside of the territory of the state in question. Also in border procedures, the Directive guarantees applicants a safe stay at the border or in a transit zone until there has been a decision on the application.³⁶³ This directly presupposes a stay in the state territory. Even if the respective national legal structure only envisages the stay at the border or in the transit zone for the determination on approval of entry, this does not affect the obligations of Member States arising from the Refugee Convention and the human rights treaties to guarantee the persons in these areas the treaty rights to which they are entitled. Neither the transit zone of an airport nor other international zones are facilities in which a legal no-man's land exists.³⁶⁴ In their decisions on airport procedures both the ECtHR and the German Federal Constitutional Court measure detention in the transit area against the ECHR and Constitution, respectively.³⁶⁵ In April 2004 the ECtHR explicitly confirmed, that Art. 13 of the ECHR requires a remedy with automatic suspensive effect also in cases concerning the rejection of requests for leave to enter a country and asylum applications at the border³⁶⁶. In this case the ECtHR held that there had been a violation of Article 13 ECHR despite the fact,

³⁵⁶ Article 35 of the Asylum Procedures Directive.

³⁵⁷ Article 35(1) taken together with Article 4(1), 4(2)(e) and 4(3) of the Asylum Procedures Directive.

³⁵⁸ Article 8(3) of the Asylum Procedures Directive.

³⁵⁹ Article 35(2) of the Asylum Procedures Directive.

³⁶⁰ Article 35(3)(d) of the Asylum Procedures Directive.

³⁶¹ For "normal" procedures, these guarantees are found in Articles 8(2)(a), 10(1)(c), 15(3) and 15(10)(e) in connection with Article 9(2) of the Asylum Procedures Directive.

³⁶² Article 35(3) (at the end) of the Asylum Procedures Directive.

³⁶³ Article 35(3)(a) of the Asylum Procedures Directive.

³⁶⁴ Kokott (1996), p. 570.

³⁶⁵ ECtHR: Judgement of 25 June 1996 (*Amuur/France*), Application No 19776/92; German Federal Constitutional Court: Judgement of 14.05.1996, Reference No 2 BvR 1516/93.

³⁶⁶ ECtHR: Judgement of 26 April 2007 (*Gebremedhin [Geberamadhien]/France*), Application No 25389/05, para. 66.

that, following to an interim measure pursuant to Rule 39 of the Rules of the ECtHR, the applicant had been granted leave to enter and refugee status later on.

The UN Committee against Torture also has taken the express position that Article 3 of the UN Convention against Torture requires the suspensive effect of legal remedies.³⁶⁷ Additionally, the UN Human Rights Committee has confirmed that asylum applicants who are only in the country for the purpose of having their asylum applications examined, also have a right to an effective appeal in accordance with Article 13 of the ICCPR.³⁶⁸

The lack of clearly regulated guarantees of legal remedy in EU law with regard to denials of entry has been frequently criticised.³⁶⁹ Boeles, Brouwer, Woltjer and Alfenaar have presented a recommendation for a European legal arrangement for legal remedy, which goes far beyond refugee protection in its meaning.³⁷⁰

The procedural guarantees named above, which according to the Directive are not to be binding – for instance a decision by a specialised authority, the possibility of representation by an attorney, or contact with the UNHCR – are of critical importance for the realization of the right to international protection. The refusal of contact with the UNHCR also violates Article 35 of the Refugee Convention, which obligates the States Parties to cooperate with the UNHCR, and to ease its task of overseeing the implementation of the Convention. Especially grave is the absence of a duty to issue written decisions on the applications for protection, and to accompany these with advice on applicable legal remedies. This not only in effect makes it impossible to seek legal remedy in the Member State in question, but also thwarts the rights to individual

petition contained in the ECHR and several UN human rights treaties.

In conclusion, human rights do not allow a downgrading of guarantees of procedure and legal remedy in border procedures. In this respect, very substantial doubts exist concerning the conformity of Articles 35 and 39 of the Asylum Procedures Directive with EU fundamental rights. Next to the question of the suspensive effect of the legal remedy it is especially dubious that the Directive allows the Member States to maintain border procedures that from a human rights perspective have completely inadequate procedural guarantees. It is in any case impermissible both according to international law, and, with regard to EU fundamental rights, according to EU law, if the Member States actually reduce procedural guarantees in border procedures to the minimum intended in the Directive, and do not provide for the suspensive effect of a legal remedy. The question of the conformity with EU Fundamental Rights of the Directive's provisions themselves will be dealt with later.³⁷¹ The form of procedural safeguards and legal remedies for applications for international protection that are submitted at the border is naturally not only of importance at maritime borders, but also for applications for international protection that are submitted at land borders or at airports.

8. Conclusion for the examination of applications for international protection at land or maritime borders, or in the territorial sea

As shown, the non-refoulement principle must also be respected at the border. International human and EU fundamental rights require that the enforceability of

367 See in the commentary to the French country report: "While noting that, following the entry into force of the Act of 30 June 2000, a decision on the refoulement of a person (refusal of admission) may be the subject of an interim suspension order or an interim injunction, the Committee is concerned that these procedures are non-suspensive, in that the decision to refuse entry may be enforced ex officio by the administration after the appeal has been filed but before the judge has taken a decision on the suspension of the removal order (art. 3). The Committee reiterates its recommendation (A/53/44, para. 145) that a refoulement decision (refusal of admission) that entails a removal order should be open to a suspensive appeal that takes effect the moment the appeal is filed. The Committee also recommends that the State party should take the necessary measures to ensure that individuals subject to a removal order have access to all existing remedies, including referral of their case to the Committee against Torture under article 22 of the Convention." (UN, Committee against Torture (2006), Doc. A/61/44, p. 36).

368 Article 13 of the ICCPR states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

369 See Brouwer (2005); Cholewinski (2005).

370 Boeles/Brouwer/Woltjer/Alfenaar (2005).

371 See below, Part 5(1)(2).

the non-refoulement principle be secured through procedural law and rights to effective legal remedy. Especially required then, are a thorough, individual, and substantive examination of the application; the right to legal representation; the right to contact with the UNHCR; and an effective legal remedy with suspensive effect that enables a stay in-country pending a decision on the appeal. Because from a human rights perspective the severity and potentially irreversible nature of the harms through expulsion are decisive, there is no room for a limitation of the guarantees of procedure and legal remedy at the border.

For practical reasons, the discussed requirements for procedures and legal remedy can not be observed on a ship. For that reason, if applications for international protection are submitted at the maritime border or in the territorial sea of a coastal state, the applicants are to be allowed disembarkation and a stay on dry land pending a decision on legal remedy.

III. Human rights obligations beyond EU maritime borders (high seas and the territorial sea of third states)

This chapter will examine the obligations of EU Member States in cases where vessels beyond EU maritime borders operate in border patrols or search and rescue missions carried out by the state, or on behalf of the state. This examination is prompted by the following current developments: first, the development of elements of EU border management strategy that are directed toward pre-border controls;³⁷² second, reports and evidence proving that individual Member States are already undertaking such pre-border controls, which are also being coordinated by FRONTEX;³⁷³ and third, the fact that Member States apparently do not uniformly assess the question of human rights obligations in these situations, especially the existence of obligations stemming from the principle of non-refoulement.³⁷⁴

The operations whose conformity with human rights is especially in question are so-called interception

measures, meaning the catching, turning back, diversion, or escorting back of ships. Additionally, in connection with pre-border controls, the general question arises whether beyond their state borders the Member States are bound by other fundamental and human rights in the implementation of border controls, for example the right to life and physical integrity.

The examination of human rights obligations in the implementation of migration-control measures on high seas, including the contiguous zone, does not touch on the question of the admissibility of such controls in accordance with international sea and maritime law. Any human rights obligations are binding on Member States regardless of the admissibility of those measures under international sea and maritime law. The exercise of coercive measures against ships under foreign flag in connection with border or migration controls on high seas is not compatible with current international sea and maritime law. In this respect, exceptions exist only for the contiguous zone, in which the coastal state may carry out limited rights of control in order to enforce observance of its immigration laws or to punish infringements of these.³⁷⁵

The examination assumes that in practice there is a mixed group of migrants on ships, so refugees and other persons in need of international protection, as well as other migrants who upon return to their country of origin would not face the danger of persecution or severe human rights violations. The examination also assumes that, in accord with current political reality and legal situation, states outside of the EU that could be enlisted are not safe third countries in the sense of Article 36 of the Asylum Procedures Directive.

1. Duty to examine an application for international protection

1.1 Contiguous zone of an EU state

The contiguous zone is part of the high sea, in which in principle of freedom of navigation applies.³⁷⁶ According to Article 33(1) of the UN Convention on the Law of the Sea from 1982 (UNCLOS), the coastal state may

³⁷² See EU, Council of the European Union, Doc. No 15445/03, paras. 14–22; Council, Doc. No 13559/06, para. 5 No 2; EU, Council of the European Union, Doc. No. 11490/1/03, CIVIPOL study, p. 75. See above Part 2 (II) (3).

³⁷³ See above Part 1 (II) (4) and (6).

³⁷⁴ EU, European Commission, COM (2006) 733, para. 34. See above Part 1 (II) (3).

³⁷⁵ EU, European Commission, SEC (2007) 691, p. 20. See above Part 3 (II) (3) and (4).

³⁷⁶ See above Part 3 (II)(3).

exercise the control necessary in the contiguous zone to enforce observance of its customs, fiscal, immigration or sanitary laws, or to punish infringement of these.

According to Article 3 of the Asylum Procedures Directive, all applications for asylum that are made "in the territory, including at the border or in the transit zones",³⁷⁷ are to be examined. At the same time, all applications for international protection are to be considered applications for asylum, unless the applicant explicitly requests another kind of protection for which a separate procedure is available.³⁷⁸ For the examination of applications for international protection made in the contiguous zone or on high seas, the Directive does not contain clear guidelines. In this regard, the question is raised of whether the formulation "at the border" also incorporates such applications for international protection that are made at pre-border controls. The linkage of the provision on the Directive's scope of application with the term "territory" suggests a conclusion that in principle the Directive does not obligate Member States to examine applications for international protection on high seas or in the territory of third countries. Because, however, the Member States' immigration controls, in accordance with their control rights in the contiguous zone, regularly take place along the maritime border – both in the territorial sea and the contiguous zone – it must be assumed that the term "at the border" also includes the patrols of border protection ships or government ships involved in rescue at sea when they are in the contiguous zone. Therefore, according to the Asylum Procedures Directive, applications for international protection made in the contiguous zone are to be examined by the Member States. In case the criteria for a right to international protection, especially those provided for in the Qualification Directive, are fulfilled, this protection is to be granted for applications made in the contiguous zone just as for applications made on the state territory or in the territorial sea.

In conclusion, the Asylum Procedures Directive obligates the Member States to examine applications for international protection made along the maritime borders, in the territorial sea and in the contiguous zone.

These applications are to be examined and weighed according to the same criteria as applications made in-country or at a land border.

1.2 Remaining high seas and foreign territorial sea

This chapter will examine the obligations that exist for an act on high seas, including the contiguous zones and the territorial sea of southern Mediterranean neighbours and West African states.

1.2.1 Obligations arising from EU secondary law

The Asylum Procedures Directive has no application beyond state borders, with exception of the contiguous zone.³⁷⁹ The Schengen Borders Code³⁸⁰, however, is also applicable to immigration controls that take place beyond the territorial sea and contiguous zone, on high seas or in the territory of third states.

The Schengen Borders Code applies to all persons who cross the external border of a Member State. According to the Code, immigration controls are to be carried out without prejudice to the rights of refugees and persons seeking international protection, especially with regard to non-refoulement.³⁸¹ At the same time, while the Borders Code anticipates that a right of appeal against denials of entry must be guaranteed, it determines that such a right of appeal has no suspensive effect.³⁸²

The reference to the rights of refugees and persons seeking international protection represents a reference to the legal acts of EU law on asylum and refugee matters, for example the Asylum Procedures Directive, as well as to an obligation of the Member States under EU law to protect other human rights obligations, especially the principle of non-refoulement. Despite the absence of detailed guidelines in the Schengen Borders Code, both are encapsulated by the scope of EU fundamental rights, and therefore, subject to judicial control by the ECJ.

As arises from the annexes to the Schengen Borders Code, the scope of application of the Borders Code includes controls of persons that are conducted beyond the state border. For example, to ease high-speed pas-

³⁷⁷ Article 3 of the Asylum Procedures Directive.

³⁷⁸ Article 2(b) of the Asylum Procedures Directive.

³⁷⁹ See previous chapter.

³⁸⁰ EU, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ (2006) L 105, p.1).

³⁸¹ Article 3(b) of the Schengen Borders Code.

³⁸² Article 13(3) of the Schengen Borders Code. On the non-conformity of this provision with fundamental rights, see below, Part 5.

senger train travel, the explicit possibility of conducting border controls in agreement with a third country, at train stations of that third country, is foreseen.³⁸³ With regard to controls at maritime borders, the Borders Code does not stand in the way of the conducting of border controls and the applicability of the Borders Code.

Annex VI of the Schengen Borders Code states:

*"3.1. General checking procedures on maritime traffic
3.1.1. Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country."*

The provision is very open and at first glance not precisely formulated. From the placement of the commas in the first sentence (also present in the German and French versions) it arises, however, that the carrying out of border controls on board ship is not limited to the area of the port of arrival or departure. Rather, according to the wording, it is independent of the positioning of the ship in a certain maritime zone. A border guard ship could also be subsumed under the "area" (which is described as "Anlage" in the German version and "zone" in the French version) foreseen for the border controls in the first sentence. The second sentence, however, binds border controls during crossings or in the territory of a third country to "agreements reached on the matter," by which it can be assumed is meant the international agreements on the law of the sea as well as bilateral agreements with coastal states outside of the EU.

The Schengen Borders Code is therefore also applicable to immigration controls that take place beyond the territorial sea and contiguous zone, on high seas or in the territory of third states. But it makes the admissibility of such border controls dependent on compatibility with the provisions of international law. The provisions of the Schengen Borders Code with which human rights obligations at border controls are concerned³⁸⁴ are not differentiated according to where the border controls take place. Therefore the obligations of

Member States under EU law, arising from the Schengen Borders Code, to protect the rights of refugees and persons seeking international protection, especially with regard to non-refoulement, also extend to border controls conducted on high seas and the territorial sea of third states.

The reference in the Schengen Borders Code to obligations stemming from the principle of non-refoulement does not substantiate a new obligation, but rather simply refers to existing human rights commitments. Of decisive importance therefore is what content the principle of non-refoulement, anchored in international law and in EU fundamental rights, has, and whether its desired effect is displayed on high seas, as well as in the contiguous zones and the territorial sea of third countries if officials of the EU Member States are active there in the course of border protection or rescue at sea.

1.2.2 Obligations arising from the prohibition of refoulement in the Geneva Refugee Convention

Article 33(1) of the Refugee Convention states:

*"Prohibition of expulsion or return ('refoulement')
1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*

Whether the principle of non-refoulement in the Refugee Convention is also binding beyond state borders is controversial. In any case, the extra-territorial validity does not unambiguously emerge from the wording of the provision. However, the provision's wording favours a broad interpretation, in that it not only forbids an expulsion, but also a "return", and indeed "in any manner whatsoever". A broad interpretation also includes, among other things, the set of circumstances of a rejection through an operation taken beyond the border.³⁸⁵ Also supporting an application independent of the place where the return is ordered is the fact that the formulation chosen refers to the forbidden return "to the frontiers of the territories" where dangers threaten, and not to the borders of the States Parties over which a return will occur.

³⁸³ Annex IV, No 1.2.2. of the Schengen Borders Code.

³⁸⁴ Articles 3 and 6 of the Schengen Borders Code.

³⁸⁵ Goodwin-Gill/McAdam (2007), p. 246; Hathaway (2005), p. 335 ff.; Lauterpacht/Bethlehem (2003), p. 110-111; for other views, see, for example Maassen (1997), p. 97 who even denies any applicability of the principle of non-refoulement stemming from the Refugee Convention at the border.

Next to the ordinary meaning a determination inherits from its context, an international treaty, according to the VCLT, is to be interpreted in light of its object and purpose.³⁸⁶ Independent of whether one views Article 33 of the Refugee Convention with the antiquated view as a mere duty of the state, through which a legal reflex of individual protection is triggered, or one takes a newer view along with UNHCR that Article 33(1) of the Refugee Convention attaches directly the character of individual protection, the purpose of the provision is the protection from severe human rights violations of the circle of persons concerned. An interpretation in accordance with the treaty's purpose of refugee protection in general, and Article 33 of the Refugee Convention in particular, would therefore suggest a choice of permissible interpretation within the confines of the wording that best enables the guarantee of protection.

Accordingly, an extra-territorial applicability would be especially presumed if the classic state function of border control is consciously and purposefully pre-placed beyond the maritime borders. In this context, the argument gains in importance that with the interpretation of a treaty in view of its objective and purpose, a purposeful shift in state activity beyond state borders does not lead to a release from treaty duties.³⁸⁷

At most, alternatives could be valid if other international law, for example rules of international customary law on state sovereignty, opposed the extra-territorial application of the principle of non-refoulement. This could be the case were the grant of protection by a State Party of the Refugee Convention practiced in the territorial sea, and therefore in the territory, of another state without its approval. Such situations are discussed in older works on international law in connection with the granting of asylum to toppled dictators on foreign warships. These result in establishing that the particular Flag State has no right to grant asylum in foreign the territorial sea because the granting of protection there conflicts with the sovereign rights and interests of the coastal state.³⁸⁸

The set of circumstances in question today, however, is quite different in nature. Today, patrols, migration controls and operations of rescue at sea take place on high seas. In these cases, no foreign sovereign rights whatsoever conflict with application of the non-refoulement principle because these don't exist on high seas. Therefore there is no cause at all for restricted application of Article 33 of the Refugee Convention.³⁸⁹ The second relevant set of circumstances in today's practice is the following: one or more EU States, partly in the framework of FRONTEX operations and in conformity with EU strategy on border protection, carry out border controls in the territorial sea of the neighbouring southern Mediterranean countries or West African states. Such patrols or migration-control measures are neither legally nor practically possible without the consent of the coastal state. As a rule, this consent is based on formal or informal arrangements under international law in the granting of privileges in return for the interception, control and rescue measures of EU states.³⁹⁰ Due to these agreements under international law, there exists, however no collision with the sovereign rights of the coastal state. Moreover, the granting of protection by EU-states also does not lie in opposition to the interests of neighbouring southern Mediterranean countries or West African states, but is rather in the interest of these states that are relatively poor in comparison to the EU, and in the best case have at their disposal a weakly developed system of refugee protection. Also in this regard there exists no cause for a restrictive interpretation of the Geneva Refugee Convention. In these situations the Refugee Convention is not applicable, however, to citizens of the coastal state. This arises from the definition of the term "refugee" according to Article 1(A) of the Refugee Convention, according to which the person in question must have left his or her country to fall into the Convention's scope of application. In this respect, it is important to note that the prohibitions on refoulement stemming from the human rights treaties³⁹¹ are also applicable if the person concerned has not (yet) left his or her country.³⁹²

386 Article 31 of the VCLT.

387 See, for example, Lauterpacht/Bethlehem (2003), pp. 159-160.

388 See, for example, the case of toppled Argentinean dictator Peron, who fled to a foreign warship off Buenos Aires in 1956. For details on the whole episode, see Kimminich (1962), pp. 111 ff.

389 In this regard, see also Noll (2005), p. 552.

390 Senior employees of FRONTEX report that patrols in Libyan territorial sea have not been able to be carried out for lack of Libyan agreement. The patrols of border guard ships under the flag of an EU State in the course of a FRONTEX operation then had to take place outside of the Libyan territorial sea.

391 See below Part 4 (III)(1.2.3) and (III)(1.2.4).

392 Goodwin-Gill/McAdam (2007), p. 385.

In opposition to an application of the principle of non-refoulement beyond state borders, an historical argument is most commonly raised: that the acceptance of the validity of the principle of non-refoulement beyond state borders amounts to the imposition of a duty to admit refugees, which – verifiable by way of the travaux préparatoire of the Refugee Convention – is precisely not that which was supposed to have been agreed. In 1993 the US Supreme Court found in the case of *Sale v. Haitian Centers Council* that national law and the Refugee Convention do not commit the States Parties to the granting of protection from refoulement on high seas.³⁹³ The issue at hand in this case was the picking up of persons seeking protection in international waters and their return to Haiti. The interpretation of the history of origins of the Convention that lies at the base of this argumentation can be accepted, but not the argument itself. To be considered in this regard is first, that according to Article 32 of the VCLT, the preparatory work and the circumstances surrounding the conclusion of a treaty can be called on only then and in complement to the interpretation: if they confirm an interpretation reached by other methods; if the interpretation by other methods leaves the meaning ambiguous or obscured; or if the interpretation leads to obviously nonsensical or unreasonable results (which can not be approved of here). In any case, a reference to the history of the treaty's origins does not create an unambiguously clarifying indication that extra-territorial applicability is ruled out. It may be correct that agreement could not be reached on the standardisation of a individual right to asylum and access to territory. However, the travaux préparatoires simultaneously substantiate the primary humanitarian goal of the Refugee Convention: to forbid actions and omissions that lead to a refoulement to areas in which the life or the freedom of a person is endangered.³⁹⁴

This US Supreme Court decision, in any case, has no influence on existing obligations under international

law. Both underlying American law as well as high-level American officials have always confirmed the validity of the principle of non-refoulement, also in cases where persons are picked up on high seas.³⁹⁵ The Inter-American Commission on Human Rights found that the US practice of repatriating Haitian boat refugees violates Article 33(1) of the Refugee Convention.³⁹⁶

The validity of the principle of non-refoulement stemming from Article 33(1) of the Refugee Convention on high seas beyond the state borders, has found broad approval in newer works of international law³⁹⁷ and from the UNHCR,³⁹⁸ based on the argument from the wording of this provision, which forbids expulsion and return. According to Hathaway, that Article 33 of the Refugee Convention does not explicitly include extra-territorial actions can be explained by the empirical reality at the time the Convention was drafted, when no state was trying to turn back refugees through control measures beyond state borders.³⁹⁹ Moreover, the Refugee Convention is to be interpreted according to its purpose, so that this intended purpose of refugee protection can be effective. The Council of Europe's Parliamentary Assembly, too, has expressed itself in this vein several times.⁴⁰⁰

From a Communication of the European Commission of November 2006, it emerges that disunity currently exists regarding the extent of obligations arising, especially from the principle of non-refoulement, in relation to interception and search and rescue measures on high seas.⁴⁰¹ On the other hand, the UNHCR Executive Committee – currently comprised of 72, and at the time of the 2003 decision, 64 state representatives – has recommended that independent of the place they are picked up, the principle of non-refoulement is to be respected and the rights to protection under international law to be enforced for persons seeking protection on ships.⁴⁰² Older Conclusions of the UNHCR Executive Committee stress the importance of the

³⁹³ US Supreme Court: Judgment from 21 January 1993, Reference No 509, US 155.

³⁹⁴ See UNHCR, Advisory Opinion (2007), para. 30 with further references.

³⁹⁵ Goodwin-Gill/McAdam (2007), p. 248.

³⁹⁶ Inter-American Commission on Human Rights: Case 10.675, *Haitian Center for Human Rights v. United States*, Report No 51/96, Inter-Am. CHR Doc. OEA/Ser.LV/II.95 Doc. 7 re. (13 March 1997), paras. 156–158.

³⁹⁷ Goodwin-Gill/McAdam (2007); pp. 244–253 ff.; Hathaway (2005), pp. 335–342; Lauterpacht/Bethlehem (2003), para. 242.

³⁹⁸ See, for example, UNHCR (1994); UNHCR (2000), para. 23; UNHCR, Advisory Opinion (2007).

³⁹⁹ Hathaway (2005), p. 337.

⁴⁰⁰ Council of Europe, Parliamentary Assembly (2003), Doc. No 10011, Point No II, 3.3. In this regard, see also Access to Assistance and Protection of Asylum-seekers at European Seaports and Coastal Areas: Council of Europe, Parliamentary Assembly, Recommendation 1645 (2004); Resolution 1521 (2006).

⁴⁰¹ EU, European Commission, COM (2006) 733, paras. 31–35. See above Part 2 (II)(3).

⁴⁰² UNHCR, Executive Committee, Conclusion No 97 (2003).

principle of non-refoulement, likewise independent of the question of whether the refugee is on the territory of the particular State Party.⁴⁰³

In accordance with the VCLT, the interpretation of international treaties must also consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".⁴⁰⁴ In the interpretation of human rights treaties, however, the practice of the States Parties can only be invoked with consideration of the treaty's purpose: the protection of individual rights. Namely, it would contradict the common purpose of individual protection in the human rights treaties if human rights were simply limitable through the practice of the obligated States Parties. In the circle of EU states a common practice and legal view does not seem to currently exist. However, from the UNHCR Executive Committee decision of 2003, noted above, one can conclude that in 2003, the then-16 EU states represented in the UNHCR Executive Committee⁴⁰⁵ supported the validity of the principle of non-refoulement on high seas, or in any case did not deny it. Reports of non-compliance with the principle of non-refoulement on high seas and occasionally expressed doubts of single EU states about the applicability of the principle of non-refoulement on high seas are not relevant indications under international law for the interpretation of the Refugee Convention. Even if this were established as common practice and an agreement on the interpretation of the EU states, for two reasons this would not be suitable for displaying decisive influence in interpretation of the Refugee Convention. First, because the common practice and legal conviction relevant for interpretation under international law must be established in the entire group of Parties to the Refugee Convention, not just in the group of EU states. Second, because the organs and Member States of the EC are obligated by Article 63 of the Treaty Establishing the European Community (ECT) to enact immigration and asylum law in conformity with the Geneva Refugee Convention. An interpretation of the Geneva Refugee Convention only in accordance with the ideas of EU states would leave this obligation empty and therefore also violate EU law.

It can be ascertained that the Geneva Refugee Convention does not unambiguously regulate the extra-territorial validity of the principle of non-refoulement, but that weighty arguments for the acceptance of the extra-territorial validity of the principle of non-refoulement exist in its wording, as well as the Refugee Convention's object and purpose. As the international organisation for the defence and promotion of the Refugee Convention, the UNHCR also supports this argumentation. There is no legally relevant common practice and legal view among States Parties and no unambiguous historical interpretation that would lead to the exclusion of extra-territorial validity.

However, the prohibition of refoulement found in the Refugee Convention is not applicable for persons who are still in the territorial sea of their state. But in this respect, prohibitions of refoulement stemming from the human rights treaties can be applied.

The principle of non-refoulement found in Article 33 of the Refugee Convention forbids the act of expulsion or return, and with these, state actions through which a person could be exposed to the dangers named in Article 33. But a general duty to grant asylum to every person encountered at sea does not follow from the Refugee Convention – even with extra-territorial application. It is therefore to be assumed that the mere omission to pick up refugees encountered at sea does not violate the Refugee Convention. In practice, it is important that when state ships engage in rescue at sea – in accordance with their obligations stemming from international law of the sea⁴⁰⁶ – the requirement of the law of the sea to bring those shipwrecked to a place of safety represents an action that must be measured against Article 33 of the Refugee Convention.

1.2.3 Obligations stemming from the prohibitions of refoulement in the European Convention on Human Rights

In light of the ECHR's special meaning for the EU and its Member States, it will now be examined whether obligations arise from Article 3 of the ECHR for measures of migration control and rescue at sea beyond the

⁴⁰³ See also UNHCR (2007), para. 33 with further references to UNHCR Executive Committee Conclusions.

⁴⁰⁴ Article 31(3)(b) of the VCLT.

⁴⁰⁵ Cyprus is counted here, which only joined the EU in 2004.

⁴⁰⁶ Article 98 of UNCLOS (1982), and international customary law.

territorial sea. Included in the examination are the contiguous zones of the EU states, the territorial sea and contiguous zones of third states, as well as the remaining high seas.

1.2.3.1 The principle of non-refoulement as expression of a duty to protect

The validity of the principle of non-refoulement in border controls on high seas at first seems particularly suggestive because – as presented above⁴⁰⁷ – ECHR jurisprudence assumes that the principle of non-refoulement stems from states' duty to protect.⁴⁰⁸ Thus it is not decisive whether the States Parties to the Convention have obligated themselves to pick up certain persons, but rather whether through certain actions they seriously endanger the individual rights of these persons. In this respect, the assessment of rejection on high seas seems not to differ from that of rejection at the state border, or to a state with the potential to persecute.

1.2.3.2 The extra-territorial applicability of the ECHR

However, in answering the question of the validity of the principle of non-refoulement in border controls beyond state borders, ECtHR jurisprudence on the extra-territorial applicability of the ECHR must be considered. This is fundamentally a question of the interpretation of Article 1 of the ECHR, which states:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

ECtHR jurisprudence on the question of the extra-territorial applicability of the ECHR – as its jurisprudence on other questions, too – is characterised by strong casuistry. As of yet there have not been ECtHR or ECJ judgements in which the validity of the principle of non-refoulement beyond state borders has been expressis verbis recognised or rejected.

That such cases have not yet reached the courts by way of individual appeal (ECtHR) or preliminary rulings procedure (ECJ) can be explained by the precarious situation of the persons concerned, who as a rule do not have the possibility to pursue their rights in the courts. However, from the many ECHR judgements in which the question of extra-territorial applicability has played a role, fundamental baselines of jurisprudence can be developed.⁴⁰⁹ Of particular interest here are judgements concerning wartime or peace-keeping measures. However, these judgements are characterised by two aspects that play no role in the ECHR's extra-territorial application to measures of migration control. For migration control carried out by the EU and its Member States, it is first of all irrelevant whether and to what extent the ECHR is applicable to war or post-conflict situations. Also irrelevant is the extent to which a State Party is liable before the ECtHR when it is acting in the framework of an international mandate in which the group of international participants goes beyond the Parties to the ECHR.⁴¹⁰ Of fundamental importance, in contrast, is the question of the circumstances under which the ECHR has extra-territorial applicability.

The principles of interpreting international law that are codified in Article 31 of the VCLT also apply for the interpretation of the ECHR by the ECtHR and national courts. Accordingly, a regulation's wording, purpose and object, as well as its connection with later agreements and later practice are of importance. The travaux préparatoires are only to be invoked in complement. The ECtHR stresses the protection of the individual as the purpose and object of the Convention. From this arise two special emphases in the ECtHR's interpretation of the ECHR⁴¹¹ whose effects on the jurisprudence on prohibitions of refoulement in the ECHR were already presented above.⁴¹² The first emphasis is on the ECtHR's dynamic-teleological interpretation – its interpretation of the Convention as a "living instrument"⁴¹³ that considers a provision's current purpose and object, which can have changed since the ECHR's signing.⁴¹⁴

⁴⁰⁷ See above, Part 4 (II)(3).

⁴⁰⁸ In this vein, see also Noll/Fagerlund/Liebaut (2002), p. 45.

⁴⁰⁹ See also the analyses of Gondek (2005) and Lawson (2004).

⁴¹⁰ In this regard, see recent ECtHR, Admissibility Decision of the Grand Chamber of 2 May 2007 (Saramati and Others/France, Germany and Norway), Application Nos 71412/01 and 78166/01.

⁴¹¹ See Peters (2003), p. 18 ff.

⁴¹² Above, Part 4(II)(3).

⁴¹³ See, for example, ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (Banković/Belgium and Others), Application No 52207/99, para. 64; Judgement of 7 July 1989 (Soering/United Kingdom), Application No 14038/88, para. 102; Judgement of the Grand Chamber of 18.02.1999 (Matthews/United Kingdom), Application No 24833/94, para. 39.

⁴¹⁴ An example for this is the jurisprudence of the Court on the rights of transsexuals, which has changed dramatically over time.

Of importance here is that the ECtHR also explicitly considers international trends on the recognition of certain rights even when a common European consensus is still absent.⁴¹⁵ This is justified with the argument that the ECHR without a dynamic and evolutionary interpretation would become an instrument in need of reform and improvement.⁴¹⁶ The second special emphasis lies in securing effectiveness through interpretation, which has manifested itself in jurisprudence on procedural rights and legal remedy,⁴¹⁷ and on the right of access to individual application before the ECtHR.⁴¹⁸

Decisive in assessing the extra-territorial validity is the interpretation of the phrase "everyone within their jurisdiction" in Article 1 of the ECHR. In its oft-quoted *Banković* decision, in which the matter at hand was the bombing of Yugoslavia by 16 NATO States, the ECtHR stressed that the obligations arising from the ECHR are as a rule territorial in nature, and that exceptions to this principle require special justification in light of special circumstances of an individual case.⁴¹⁹ With regard to the exceptions, in which jurisdiction is derived from elements other than territoriality, the ECtHR's jurisprudence before *Banković*, as well as its more recent jurisprudence, is of importance. The elements that can form the basis for jurisdiction and thus also elicit a liability of the States Parties for actions carried out beyond state borders will be briefly presented in the following.

1.2.3.2.1 Effective control over a territory as an element forming the basis for jurisdiction

An element forming the basis for jurisdiction can first be the effective control over a territory beyond the state borders of the State Party. This control can exist through occupation or with agreement of the govern-

ment in the area concerned.⁴²⁰ However, as a rule with (forward placement of) measures of border or migration control, no effective control over the territory on which the relevant measures are being carried out exists. Thus, in this context no jurisdiction in the sense of Article 1 of the ECHR can be derived from this element.

1.2.3.2.2 Nationality of a ship as an element forming the basis for jurisdiction

It is of importance for the management of the southern maritime borders that the ECtHR, in consistent rulings, has explicitly recognised the nationality of a ship as an element forming the basis for jurisdiction. According to its jurisprudence, for actions "on board craft and vessels registered in, or flying the flag of, that State",⁴²¹ the ECHR is also applicable beyond state borders. "In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State."⁴²²

For actions in the area of migration control and border protection this means that the ECHR's applicability on government ships for border protection or search and rescue services is based on the jurisdiction of ships, which is determined by international law. For lack of territory, the Flag State's jurisdiction is not territorial jurisdiction, but rather a legal jurisdiction,⁴²³ with the result that for disagreements relating to the ship, the Flag State's law applies. As a consequence, ships with the nationality of a State Party to the ECHR are subject to its jurisdiction in the sense of Article 1 of the ECHR, and therefore the prohibitions of refoulement found in Articles 2 and 3 of the ECHR are also applicable. The reason for possible liability of the States Parties according to the principle of non-refoulement derived from the ECHR is the obligation of the States

⁴¹⁵ ECtHR: Judgement of the Grand Chamber of 11 July 2002 (*Goodwin/United Kingdom – rights of trans-sexuals*), Application No 28957/95, para. 85.

⁴¹⁶ ECtHR: Judgement of the Grand Chamber of 11 July 2002 (*Goodwin/United Kingdom – rights of trans-sexuals*), Application No 28957/95, para. 74.

⁴¹⁷ See, for example, ECtHR: Judgement of the Grand Chamber of 23 March 1995 – preliminary objections (*Loizidou/Turkey*), Application No 15318/89 para. 72; Judgement of 11 July 2000 (*Jabari/Turkey*), Application No 40035/98, para. 50. On the jurisprudence concerning procedural guarantees and the right to effective legal remedy, see above, II.6. and II.7.

⁴¹⁸ See above, II.6.

⁴¹⁹ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 59.

⁴²⁰ ECtHR: Judgement of the Grand Chamber of 10 May 2001 (*Cyprus/Turkey*), Application No 25781/94, para. 77; Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, paras. 70–71.

⁴²¹ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 73.

⁴²² ECtHR: *ibid.* See also, ECtHR: Judgement of the Grand Chamber of 12 May 2005 (*Öcalan/Turkey*), Application No 46221/99, para. 91, in which one issue among others was detention by Turkish officials in an airplane of Turkish nationality, in Kenyan territory.

⁴²³ *Kimminich/Hobe* (2004), p. 441; *Noll/Fagerlund/Liebaut* (2002), pp. 43–44. See above Part 3(I).

Parties not to subject the person concerned to the danger of grave rights violations through actions of expulsion or return.⁴²⁴

This has as one consequence that a violation against the state duty to protect, as described, can exist both where the person seeking protection is on a ship of the State Party's nationality and also where only the officials who are carrying out the return, rejection or refoulement are on this ship. This can be the case, for example, if ships engaged in border protection or official rescue at sea do not take on board people from refugee boats, but rather stop the refugee boats, accompany them back to the harbours of non-EU states, or deny them entry into the territorial sea and a safe harbour despite these vessels' visually ascertained unseaworthiness. The limiting of the protective effect of the principle of non-refoulement arising from the ECHR to persons on the ship would not be appropriate because, according to ECtHR jurisprudence, the reason for the liability lies in the responsibility for the action of return. Thus in such cases, liability attaches to the legal jurisdiction over the officials on the ship.⁴²⁵ That the Flag State is also responsible for human rights violations caused by a vessel to persons not on board, also arises from ECtHR jurisprudence in the case of *Xhavara and Others vs. Italy and Albania*, in which people on a refugee boat drowned after colliding with a state guard ship.⁴²⁶

One consequence of this is that the actions of private persons on ships which, for example, are putting persons down in their human-rights-abusing country of origin, in principle do not create a foundation for liability of the Flag State before the ECtHR. At the outside, this could differ for private ships officially commissioned for such sovereign tasks as rescue at sea or border protection, because then these actions would be attributable to a State Party.⁴²⁷

The Flag State's jurisdiction is determined and restricted by other affected states' rights of control.⁴²⁸ This restriction serves the demarcation of state spheres under international law.⁴²⁹ The restriction therefore corresponds with, but does not exceed, the rights of coastal states in the various maritime zones. Because, however, these rights of control do not contradict the obligations arising from the ECHR, there are no grounds for the assumption of a restriction on ECHR obligations.

It should be noted that the ECHR and the prohibitions of refoulement derived from it also apply on ships that have the nationality of a State Party under whose flag they are sailing, or in which they are registered. As a consequence, the ECHR state is especially liable for the actions of officials who expose people on board a ship or elsewhere, perhaps in refugee boats, to the danger of cruel or inhuman or degrading treatment or punishment (Article 3 of the ECHR) or of endangerment to life (Article 2 of the ECHR). The actions of private persons on ships with the nationality of a State Party can also lead to liability in accordance with the ECHR when the private persons exercise such sovereign authorities as rescue at sea in an official capacity.

1.2.3.2.3 Acts of officials attributable to the State Party as an element forming the basis for jurisdiction

The responsibility for the actions of border guard officials and government sea-rescue employees can, however, also arise independently of whether the person in action is on a ship. In the case of *Drozd and Janousek*⁴³⁰ the ECtHR, with reference to a series of older decisions by the European Commission of Human Rights, accepted that the responsibility of Contracting Parties could, in principle, be engaged because of acts of their authorities which produced effects or were performed outside their own territory, if the action can be attributed to the State Party.⁴³¹ This was last confirmed by the

⁴²⁴ See above II.3.

⁴²⁵ The carrying out of patrols alone does not constitute jurisdiction at sea. In this regard, see also Eick (2006), p. 121.

⁴²⁶ ECtHR: Admissibility Decision of 11 January 2001 (*Xhavara and Others v Italy and Albania*), Application No 39473/98. The complaint was dismissed as inadmissible for the reason that the ECtHR found no grounds to believe that there had been a willing causation of the collision, and was of the view that Italy had fulfilled its duty to protect by introducing regular criminal proceedings against the commander.

⁴²⁷ See Article 5 of the International Law Commission's draft "Responsibility of States for internationally wrongful acts", contained in Resolution No 56/83 of the United Nations General Assembly of 12 December 2001.

⁴²⁸ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković / Belgium and Others*), Application No 52207/99, para. 59.

⁴²⁹ Gondek (2005), p. 365.

⁴³⁰ ECtHR: Judgement of 26 June 1992 (*Drozd and Janousek / France and Spain*), Application No 12747/87, para. 91.

⁴³¹ In this case the actions of the persons concerned were not attributable to the States because at issue were independent judges, who in the exercise of their office were not bound by instructions of the respondent States.

ECtHR in its *Banković* Decision.⁴³² The attribution to the State Party can be assumed in cases, in which officials or other government employees act in the context of authorities transferred to them.

1.2.3.2.4 Effective control over a person as an element forming the basis for jurisdiction

In the case of such extra-territorial actions as the accompanying back or escorting of refugee boats to harbours of non-EU states, under some circumstances the effective control over the persons concerned can also form the basis for jurisdiction of the liable state, and therefore also the applicability of the ECHR. The ECtHR confirmed this in recent decisions *Öcalan vs. Turkey* and *Hussein vs. Albania* and others: all cases in which at issue was detention on foreign territory.⁴³³ It can come to such an effective control over persons in connection with control measures at sea, for example when small refugee boats cannot oppose the instructions of border guard or sea-rescue ships without risking a critical collision with these ships.

1.2.3.2.5 Prohibition on the circumvention of human rights obligations as an element forming the basis for jurisdiction

At the border, the commitments of ECHR states arising from the ECHR are indisputable. At the same time, on the basis of EU border management strategy, border controls are being shifted to areas beyond state borders. The targeted shifting of actions beyond state borders does not, however, release states from their ECHR obligations. In this vein, the ECtHR has decided that extra-territorial validity of the ECHR can arise from the prohibition on the circumvention of human rights:

*"Accountability in such situation stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."*⁴³⁴

From this prohibition of circumvention results the obligation to apply the same standards for the protection of human rights at pre-border controls as for those controls carried out directly on the state border. The political argument occasionally put forward, that for practical reasons the granting of procedural guarantees and legal remedies in accordance with the usual ECHR criteria or EU law cannot be demanded for pre-border and migration controls, must be rejected in light of this circumvention prohibition. Because the forward placement of immigration controls is targeted and systematic to prevent arrival at the state borders, the States Parties cannot appeal to the practical impossibility of granting adequate procedural guarantees and legal remedies. On the contrary, from this practical impossibility of granting adequate procedural guarantees and legal remedies, the conclusion must be drawn that the persons concerned must be granted just the same access to state territory and procedures as if they had sought international protection on the border. As already presented above, a ship is not part of the state territory, and the procedural guarantees and legal remedies, required by human rights, cannot be ensured on a ship.

One passage in the ECtHR's *Banković* Decision, according to which the meaning of the ECHR as an instrument of a regional European *ordre public* in the *espace juridique* of the States Parties was emphasised, has led to discussions in the literature.⁴³⁵ From this, some drew the conclusion that an exceptional extra-territorial application of the ECHR can in any case only be given on the territory of ECHR states. If this interpretation were accurate, the ECHR's applicability on high seas and in the territorial sea of non-ECHR states could be restricted. However, at the latest, such an interpretation was refuted in the case *Issa vs. Turkey*, in which the ECtHR examined whether Turkey had jurisdiction over areas in Iraq that substantiated Turkey's liability under the ECHR,⁴³⁶ meaning: jurisdiction in the meaning of Article 1 of the ECHR can be derived from the existence of effective control over a partial area of the territory of a non-ECHR state and defines the extent of

⁴³² ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 69. See also ECtHR: Judgement of the Grand Chamber of 23 March 1995 – preliminary objections (*Loizidou/Turkey*), Application No 15318/89, para. 62.

⁴³³ ECtHR: Judgement of the Grand Chamber of 12 May 2005 (*Öcalan/Turkey*), Application No 46221/99, para. 91; Admissibility Decision of 14 March 2006, Application No 23276/04 (*Hussein/Albania and Others*). See also ECtHR: Judgement of 16 November 2004 (*Issa/Turkey*), Application No 31821/96, para. 71; Gondek (2005), p. 358; German Federal Government (2006): Observations of the Federal Republic of Germany concerning Application No 78166/01 (*Saramati and Others/France, Germany and Norway*), paras. 19, 20.

⁴³⁴ ECtHR: Judgement of 16 November 2004 (*Issa/Turkey*), Application No 31821/96, para. 71.

⁴³⁵ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 80.

⁴³⁶ ECtHR: Judgement of 16 November 2004 (*Issa/Turkey*), Application No 31821/96, para. 74.

legal space in which the ECHR can be applied. The ECHR's *espace juridique* can therefore absolutely extend beyond the territory of ECHR states.⁴³⁷

1.2.3.3 Conclusion

It should be noted that the EU and its Member States, in pre-border control or sea-rescue measures, are obligated to observe the prohibitions of *refoulement* from Articles 2 and 3 of the ECHR, as well as all other ECHR rights.⁴³⁸

This liability of ECHR states is grounded in the action that causes the danger of human rights violation. Therefore not every omission triggers liability under the ECHR. As explained in connection with the extra-territorial applicability of the Refugee Convention, the ECHR also does not give rise to a general duty to provide every person encountered at sea access to state territory for the examination of their applications for international protection. However, the ECHR prohibits exposing people to grave violations of human rights through actions beyond state borders. Return to a country in which torture, inhuman or degrading punishment or treatment, or mortal danger threaten, is thus forbidden. In this, ECHR states are bound by the previously described standards for procedural guarantees and legal remedies,⁴³⁹ just as these apply at the border. Because these cannot be ensured on a ship, boats may not be diverted or escorted back to states outside the EU for the reason that in a mixed group of migrants on such a boat there can also be found persons seeking protection. This is because, in practice, there are no adequately safe third countries.⁴⁴⁰

When government ships carry out rescues at sea in accordance with their commitments stemming from the international law of the sea, they are bound by the obligation of the law of the sea to bring those shipwrecked to a place of safety.⁴⁴¹ The bringing of those shipwrecked to a place of safety is an action that also must be measured against the ECHR. This means that rescued persons, too, may not be brought to third

countries without first having their applications for international protection examined in an EU state.

1.2.4 Obligations stemming from the prohibitions of *refoulement* in the UN human rights treaties

As already presented above, prohibitions of *refoulement* also arise from Article 3 of the CAT and Articles 6 and 7 of the ICCPR. The UN human rights treaties belong to the relevant rules of international law applicable in the relations between the parties, which the ECtHR – in application of the VCLT⁴⁴² – takes into account when interpreting the ECHR. The UN human rights treaties serve as a legal reference for the ECJ. With regard to extra-territorial applicability, it is of importance that both the UN Committee against Torture as the treaty body of the Convention against Torture and the Human Rights Committee as the treaty body of the ICCPR have clearly advocated for the extra-territorial applicability of each Convention.

The UN Committee against Torture, on the one hand, has expressly confirmed the applicability of the explicit principle of non-*refoulement* in Article 3 of the CAT at the border, and additionally derived from this the requirement of appeals for denials of entry, with suspensive effect.⁴⁴³ The explicit principle of non-*refoulement* in Article 3 of the CAT takes as its starting point the forbidden actions of expulsion, deportation or extradition, not the notion of jurisdiction.⁴⁴⁴ Article 1(1) of the CAT, which includes a definition of torture, takes as its starting point an official's action. Both speak for the applicability of the principle of non-*refoulement* in Article 3 of the CAT independent of the location of the forbidden action. In regard to the prison camp in Guantánamo, the UN Committee against Torture's conclusions and recommendations to the USA's July 2006 state report emphasised that not only the principle of non-*refoulement*, but also other provisions of the Convention – which, as opposed to Article 3, explicitly take as their starting points the concepts of jurisdiction and territory⁴⁴⁵ – have extra-territorial

⁴³⁷ Similarly, see also Coomans/Kamminga (2004), p. 5; Gondek (2005), pp. 375 ff.; Lawson (2004), S. 114, Schäfer (2006), S. 33 f.

⁴³⁸ Similarly: EU, European Commission, SEC (2007), p. 4.

⁴³⁹ See above, II.6. and II.7.

⁴⁴⁰ See above, II.5.

⁴⁴¹ Article 98 of UNCLOS, and international customary law.

⁴⁴² Article 31(3)(c) of the VCLT.

⁴⁴³ UN, CAT (2006), p. 36, see above II.6. and II.7.

⁴⁴⁴ Article 3(1) of the CAT states: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

⁴⁴⁵ See, for example, Article 2(1) of the CAT: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

applicability. In so doing, the Committee began partly with the control over a territorially definable area,⁴⁴⁶ partly with the de facto existing control over a detained person,⁴⁴⁷ and explicitly confirmed the applicability of the principle of non-refoulement beyond state borders.⁴⁴⁸ In the case of pre-border or migration controls at sea, sovereign authorities in many cases and circumstances exercise de facto control over persons. It can therefore be concluded that both the principle of non-refoulement as well as other provisions of the CAT are also valid for in these cases.

The ICCPR obligates a State Party to guarantee rights recognised in the Covenant "to all individuals within its territory and subject to its jurisdiction".⁴⁴⁹ The treaty body of the Covenant, the UN Human Rights Committee, confirmed the extra-territorial applicability of the ICCPR for certain cases early on. Thus in its decisions in the cases *López Burgos vs. Uruguay*⁴⁵⁰ and *Montero vs. Uruguay*⁴⁵¹ it measured against the ICCPR the legality of a detention conducted by Uruguayan sovereign authorities in Brazil and the confiscation of a passport by the Uruguayan consulate in Germany, respectively. In its General Comment No. 31, directed at the States Parties in accordance with Article 40(4) ICCPR, in 2004 the Committee summarised its stance on extra-territorial application of the ICCPR:

"States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the terri-

*tory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."*⁴⁵²

Admittedly, in its *Banković* Decision in 2001, the ECtHR was not convinced that the ICCPR was extra-territorially applicable. In any case, according to the ECtHR's argumentation at the time, the applicants had not given enough examples of relevant jurisprudence for the interpretation of "jurisdiction" in the sense of Article 2 of the ICCPR.⁴⁵³ Future ECtHR jurisprudence, however, will have to consider the clear statements of the Human Rights Committee's General Comment from 2004.

As aids in the interpretation of the ICCPR, the General Comments have special importance because they are thoroughly discussed and adopted by consensus in the ICCPR's treaty body (the Human Rights Committee), which is composed of independent experts.⁴⁵⁴ Of special importance when looking at border protection is that in its General Comment, the Committee primarily applies the ICCPR depending on whether, "anyone [is] within the power or effective control, [...] regardless of the circumstances in which such power or effective control was obtained"⁴⁵⁵ of that State Party. The starting point is not the concept of State territory, but the control over persons. Professor Martin Scheinin, a member of the Human Rights Committee until 2004, sees as an essential criterion for deciding on the extra-territorial application the state's factual control over the consequences of its actions.⁴⁵⁶ If one applies the criteria of effective control over a person and control over the consequences of actions to measures of border and migration control at sea, then the ICCPR's applicability must be assumed. It follows that in conducting such measures, States Parties must comply with both the principle of non-refoulement from Arti-

⁴⁴⁶ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Para. 14.

⁴⁴⁷ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Paras. 17, 20.

⁴⁴⁸ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Para. 20.

⁴⁴⁹ Article 2(1) of the ICCPR.

⁴⁵⁰ UN, HRC, Communication No 52/1979.

⁴⁵¹ UN, HRC, Communication No 106/1981.

⁴⁵² UN, HRC (2004), General Comment No 31, para. 10.

⁴⁵³ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 78.

⁴⁵⁴ Eick (2006), p. 119.

⁴⁵⁵ See quotation above in the text.

⁴⁵⁶ Scheinin (2004), p. 76.

cles 6 and 7, as well as the human rights guaranteed in the rest of the ICCPR.

1.2.5 The right to leave, the right to seek asylum, and the principle of good faith

Article 12(2) of the ICCPR, Article 2(2) of the ECHR's Fourth Optional Protocol, Article 8(1) of the Convention on Migrant Workers,⁴⁵⁷ Article 5 of the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 10 of the Convention on the Rights of the Child, and Article 13(2) of the Universal Declaration of Human Rights all contain a right to leave from one's own or a foreign country, or refer to this. Due to the socialist states' strong restrictions on the right to leave, during the 1970s and 1980s the right to leave was an important issue in the framework of the CSCE.⁴⁵⁸ Here the examination will focus on the ICCPR and the ECHR's Fourth Optional Protocol.

In accordance with the ICCPR and the ECHR's Fourth Optional Protocol, every person is entitled to the right to leave, independent of citizenship and the legality of their stay⁴⁵⁹ and this may be restricted only under certain pre-conditions that will be explained later. The right serves the free development of a person⁴⁶⁰ and is grounded in the understanding that migration is a normal aspect of human history.⁴⁶¹ The right to leave does not simultaneously include the right to enter a certain other state.⁴⁶²

According to Article 12(3) of the ICCPR, the right to leave may only be restricted if the restrictions are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and the restrictions are consistent with the other rights recognised

in the Covenant. In a General Comment, the Human Rights Committee has stressed the requirements of a concrete legal basis, the necessity in a democratic society for the protection of the mentioned purposes and the observance of the principle of proportionality.⁴⁶³ Beyond this, it has pointed out that restrictions may not be discriminatory, and thus distinctions such as those on the basis of race, language, religion, political or other opinion, national origin, birth or other legal status are impermissible.⁴⁶⁴ Restrictive measures are only admissible as an exception. Measures that systematically and regularly impair exit are inadmissible.⁴⁶⁵

With the fall of the Iron Curtain, the restrictions of socialist states on the freedom to leave also almost entirely disappeared. Meanwhile, changing migration policies – especially among West European states – brought about restrictions not through those states in which those wanting to travel were located, but rather through the potential target states of the migration. These restrictions were and are realised, for example, through the introduction of so-called non-arrival measures⁴⁶⁶ and the export of Schengen standards of border and migration control to states outside the EU, which can lead to the implementation of immigration and emigration controls by third countries.⁴⁶⁷ The General Comments of the UN Human Rights Committee have also confronted the fact that today the right to leave a country is often not restricted by the migration's countries of origin, but rather by the countries of destination. For example, in its General Comment No 27 on the right to freedom of movement arising from Article 12 of the ICCPR, the Committee calls on the States Parties to include, "*information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.*"⁴⁶⁸ It is appa-

⁴⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/RES/45/158; in this regard, see Spieß (2007).

⁴⁵⁸ See, among other things, the 1975 Final Act of the CSCE in Helsinki and the "Strasbourg Declaration on the Right to Leave and Return" of 26 November 1986. Further references in Nowak (2005), Article 12 CCPR para. 16, footnote 50.

⁴⁵⁹ Article 12(2) of the ICCPR: "Everyone shall be free to leave any country, including his own." On independence from citizenship and the legality of the stay, see also UN, HRC (1999), General Comment No 27, para. 8.

⁴⁶⁰ UN, HRC (1999), General Comment No 27, para. 1.

⁴⁶¹ Similarly, see Juss (2004), p. 292.

⁴⁶² Juss (2004), p. 293.

⁴⁶³ UN, HRC (1999), General Comment No 27, paras. 11–17.

⁴⁶⁴ UN, HRC (1999), General Comment No 27, para. 18.

⁴⁶⁵ Hofmann (1988), p. 184; UN, HRC (1999), General Comment No 27, para. 13.

⁴⁶⁶ Like for example visa regimes and carrier sanctions. See above Part 2(II)(1.3).

⁴⁶⁷ Harvey/Barnidge (2007), p. 2. On the export of European migration policy concepts, including the Schengen Standards, to the countries of Central and Eastern Europe since the beginning of the 1990s in the so-called Budapest Process and through the process of eastern enlargement, see Weinzierl (2005), Parts 3 and 4.

⁴⁶⁸ UN, HRC (1999), General Comment No 27, para. 10.

rent from this that violations of the ICCPR's right to leave can not only be committed by those states that are to be left, but also by potential countries of destination. When measures are carried out jointly, there can exist also a joint liability of the countries of departure and destination – determined specifically by the principles of state responsibility presented below.⁴⁶⁹

If a country prevents a person from leaving because he or she has no entry papers for the state that he or she would like to enter, then the right to leave takes on an international dimension that touches on the obligations of the country of destination that stem from the principle of non-refoulement and the right to seek asylum.⁴⁷⁰ What is more, when measures systematically impair access of refugees to asylum procedures, a violation of the principle of good faith under international law with regard to the Refugee Convention can exist.⁴⁷¹ In this respect it is important that restrictions on the right to leave a country are only then permissible under the ICCPR when they are compatible with the other rights anchored in the ICCPR, including the non-refoulement principle in Article 7 of the ICCPR. If EU Member States conduct joint patrols with third countries, in the territorial sea and contiguous zones of these, then they are bound – independent of the admissibility of the control measures according to the international law of the sea – both by obligations from the right to leave and those from the principle of non-refoulement. However, ECtHR jurisprudence and the Human Rights Committee have not clarified in detail when a violation against the right to leave exists.

For two reasons the cliché-ridden expression used by the ECtHR, that 2(2) of the ECHR's Fourth Optional Protocol "implies a right to leave for such a country of the person's choice to which he may be admitted"⁴⁷² contributes little to clarification. First, with an exit by sea it is not clearly determinable in which country entry will be achieved. Second, at issue in the relevant decisions of the ECtHR was the restriction on the free-

dom to exit through the denial of a passport, so that neither the later country of destination could be determined, nor a theoretical impossibility of entry could play a role in the decision. Thus the decisions provide no information about the reasons for which the ECtHR made the restriction on the right to leave although it does not arise from the text of the Fourth Optional Protocol.⁴⁷³

There is one indication that, in any case, the ECtHR does not view all pre-border control measures as simultaneously constituting exit controls in the sense of the Fourth Optional Protocol. This indication lies in the relatively brief Decision in the *Xhavara* case⁴⁷⁴, which does not divulge the exact details of the case, especially the exact location where the controls were carried out.

The right to leave – in any case, to the extent it is derived from Article 12(2) of the ICCPR – can also be injured through so-called non-arrival measures of the potential destination countries. Even if rulings to date give no information on details, core principles can be derived from the Decisions and General Comments of the Human Rights Committee. It should be assumed that, above all, violations of the right to leave occur where emigration restrictions are conducted through tight controls, the emigration control is discriminatory, or when this serves the illegitimate purpose of preventing applications for international protection. The Protocol against the Smuggling of Migrants by Land, Sea and Air⁴⁷⁵ cannot be introduced as legitimising such migration-control measures, because these provisions are only valid subject to human rights.⁴⁷⁶ At the same time, the countries of destination must comply with obligations arising from the principle of non-refoulement and the obligation of good faith, not to act against the sense and purpose of the Refugee Convention. Good faith would conflict with a systematic thwarting of efforts to seek protection.

⁴⁶⁹ Hathaway (2005), p. 310. See below Part 5(II).

⁴⁷⁰ Goodwin-Gill/McAdam (2007), p. 382.

⁴⁷¹ Goodwin-Gill/McAdam (2007), p. 387 ff.

⁴⁷² ECtHR: Admissibility decision of 20 February 1995 (*Peltonen/Finland*), Application No 19583/92; Admissibility decision of 24 May 1995 (*KS/Finland*), Application No 21228/93.

⁴⁷³ In this vein, see also Goodwin-Gill/McAdam (2007), p. 381.

⁴⁷⁴ ECtHR, Admissibility decision of 11 January 2001 (*Xhavara u.a./Italien und Albanien*), Application No 39473/98, para. 3.

⁴⁷⁵ Additional Protocol to the United Nations Convention against Transnational Organised Crime.

⁴⁷⁶ See the reservation clause in Article 19 of the Protocol.

2. Implementation of border controls in conformity with human rights

Article 6 of the Schengen Borders Code⁴⁷⁷ includes an obligation of Member States to maintain human dignity and proportionality in carrying out border-crossing controls. Moreover, the article strictly forbids discrimination on grounds of sex, race, ethnic origin, religion or belief, disability, age or sexual orientation. However, the provision cannot be understood in such a way that, in carrying out border controls, the Member States are merely obligated to maintain human dignity or avoid grave violations of human rights. On the contrary, arising from the Member States' obligation to respect EU fundamental within the scope of application of EU law,⁴⁷⁸ in carrying out border controls along or beyond the common EU external borders in accordance with the Schengen Borders Code, the Member States are bound by the entirety of EU fundamental rights. Violations of EU fundamental rights in the implementation of border controls fall under the ECJ's jurisdiction.

The extent of human rights commitments beyond state borders is determined by whether the human rights treaties and EU fundamental rights are applicable there. As already seen in connection with the principle of non-refoulement, at least the ECHR, ICCPR and CAT are binding on the Member States in carrying out border and migration controls, also beyond state borders.

In light of the problems of human rights relevance in practice, particularly important here are the rights to life and freedom from bodily harm (Articles 2 and 3 of the EU Charter of Fundamental Rights, and Article 2 of the ECHR, Article 6 of the ICCPR), right to liberty (Article 6 of the EU Charter of Fundamental Rights, and Article 5 of the ECHR, Art. 9 of the ICCPR), and the right to health (Article 35 of the EU Charter of Fundamental Rights, and Article 12 of the UN ICESCR.)

3. Conclusions for border and migration control measures beyond state borders

Weighty arguments exist for the acceptance of the validity of the principle of non-refoulement deriving from the Refugee Convention in situations of intercep-

tion, control and rescue measures beyond state borders. The arguments exist in the wording, as well as the Refugee Convention's object and purpose. As the international organisation for the defence and promotion of the Refugee Convention, the UNHCR also supports this argumentation. There is no legally relevant common practice and legal view among States Parties and no unambiguous historical interpretation that would lead to the exclusion of extra-territorial validity. However, the prohibition of refoulement found in the Refugee Convention is not applicable for persons who are still in the sea of their state. But in this respect, prohibitions of refoulement stemming from the human rights treaties can be applied.

The ECHR and the UN human rights treaties are applicable on ships engaged in border protection or official rescue at sea, also those moving beyond their own territorial sea. From this arises a duty of the States to respect all of the rights contained in these treaties.

Thus the actions of officials on ships may not lead to human rights violations. In light of problems encountered in practice, it must especially be pointed out that beyond the duty of rescue at sea under the law of the sea, migration controls may not be carried out in such a way as to bring harm to people – for example through collisions with small refugee boats or through driving unseaworthy boats out to high sea. EU Member States are bound in all of their measures by the prohibition on discrimination, so that the differentiated treatment of migrants, for example on the basis of their ethnic or social origin, is in violation of human rights. This obligation stemming from the prohibition on discrimination arises from the Schengen Borders Code, EU fundamental rights, ICERD⁴⁷⁹, and the international law of the seas.

Beyond the obligation stemming from the law of the sea, the question of which cases trigger additional obligations to rescue shipwrecked persons discovered through sea surveillance will not be conclusively clarified here. However, with regard to planned development of radar and satellite surveillance of the seas⁴⁸⁰, this question will become relevant in practice.

In connection with persons in need of international protection, the commitments from the prohibitions of

⁴⁷⁷ Regulation (EC) No 562/2006 (Schengen Borders Code).

⁴⁷⁸ Article 6(2) of the EU Treaty; Art. 51 of the EU Charter of Fundamental Rights.

⁴⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination.

⁴⁸⁰ See above Part 2(II)3.

refoulement in the Refugee Convention, the ECHR, the UN human rights treaties and EU fundamental rights are particularly important. These prohibitions of refoulement are also applicable on high seas and in the territorial sea of third countries. The extra-territorial application of the human rights treaties can arise from the jurisdiction in situations of interception, control or rescue measures. This jurisdiction may be based on the nationality of the state ship, the accountability of actions of officials, effective control over persons and/or the prohibition on the circumvention of human rights obligations. The prohibitions of non-refoulement must be secured in accordance with the general guarantees of procedure and legal remedy arising from the human rights treaties. This requires, for example, a thorough examination of whether a danger of human rights violations threatens in other states. Additionally, a crucial requirement is the suspensive effect of a legal remedy against the rejection of applications for international protection. This cannot be ensured on a ship, which, in the absence of adequately safe third countries, means that protection seekers must have access to a procedure in an EU state that examines their need for protection.

The liability of states is grounded in the action that causes the danger of human rights violation. Therefore not every omission beyond state borders triggers liability. The Refugee Convention and the international human rights treaties do not give rise to a general duty to provide every person encountered at sea access to state territory for the examination of their applications for international protection. However, they prohibit exposing people to grave violations of human rights through actions beyond state borders. Return or rejection to a country in which the life or freedom, torture, inhuman or degrading punishment or treatment, or mortal danger

threaten, is thus forbidden. In this, ECHR states are bound by the previously described standards for procedural and legal protection, just as these apply at the border.

When government ships carry out rescues at sea in accordance with their commitments stemming from the international law of the sea, they are bound by the obligation of the law of the sea to bring those shipwrecked to a place of safety. The bringing of those shipwrecked to a place of safety is an action that also must be measured against the prohibitions of refoulement. This means that rescued persons, too, may not be brought to third countries without first having their applications for international protection examined in an EU state.

Duties also exist with regard to mixed groups of migrants who are not on a state ship, but are encountered in the course of border and migration controls, or actions of rescue at sea. It is recognised that, as a rule, boats contain not exclusively, but also persons in need of international protection. In light of this fact, grounds always exist to assume that the escorting or towing back of a boat to states outside the EU could result in grave violations of human rights. Thus it is incompatible with human rights for state ships engaged in border protection or rescue at sea to force migrant ships with migrants to sail to third countries.

If official ships of an EU state are located near harbours of origin on the southern Mediterranean or West African coast, collaboration in emigration controls can additionally represent a violation of the human right to leave and the right to seek asylum. Furthermore, with regard to the access to refugee protection thus thwarted, a violation of the commitment to interpret the Refugee Convention in good faith can exist.

Part 5: Human rights liability in common action

This section of the study is concerned with human rights responsibility for joint actions of various states. Following the results in part 4 of the examination of EU secondary law and fundamental and human rights, it will first be examined whether and to what extent the EU as a supranational community is bound by an obligation stemming from EU fundamental rights to regulate certain questions of human rights relevance explicitly through EU law. Finally, a question of international law will be examined: the human rights responsibility for measures conducted by EU states together with third states.

I. The EU as a Union based on fundamental rights: duties to adopt legal norms

1. Human rights liability and distribution of responsibilities in the supra-national EU

Migrants and persons seeking protection view the European Union as a unitary affluent community and region of destination that is enclosed by a common external border. From the beginning, the arrangement of robustly securing the EU external border intended to serve as compensation for security deficits resulting through the lifting of internal borders. In the region of the single European market, an "area of freedom, security and justice"⁴⁸¹ was to be established through the creation of the Dublin responsibility system and the

harmonising of refugee law, so that asylum applications would only be examined once. At the same time, however, it was always the goal to guarantee that every application for protection really would be examined. Through the establishment of minimum standards under EU law for the examination of applications for international protection, the levels of protection in the varying Member States were to be brought in line with each other, in order to avoid secondary movements within the EU. In accordance with the detailed Schengen acquis, the States along the external border are responsible for the conducting of border controls. In the conducting of border controls, these states along the external borders are supported only financially and through the work and operations of the EU border protection agency FRONTEX. Additionally, in most cases the EU states situated at the external EU-border are responsible for examining applications for asylum. This is because responsibility in accordance with the Dublin II-regulation often arises from the fact that the asylum seeker has crossed the border of the state legally or illegally, or has first rendered an application for international protection⁴⁸² there.⁴⁸³ This functional assignment of tasks under EU law to specific states, namely the states along the external border, are a peculiarity in EU law, which as a rule otherwise obligates all Member States equally. This peculiarity is grounded in the trans-nationality of migration, which is regulated in EU law through immigration and asylum law, as well as the Schengen acquis.

This chapter deals with the question of how responsibility for human rights fares with regard to the func-

⁴⁸¹ Article 61 of the EC Treaty and Article 29 of the EU Treaty.

⁴⁸² The Regulation 343/2003 (Dublin II-regulation) is older than the Qualification Directive and is therefore not applicable to applications for subsidiary protection. In practice, this is seldom problematic because according to Article 2 of the Asylum Procedures Directive, when doubts arise, every application for international protection is considered an application for asylum, which then falls under the Dublin II-regulation. Soon the European Commission will recommend the expansion of the Dublin II-regulation to cover subsidiary protection. COM (2007) 299, p. 6.

⁴⁸³ Articles 9–13 of the Dublin II-regulation.

tional distribution of responsibilities among the EU and the Member States – determined under EU law, as described above. It will also examine whether beyond the liability of the states implementing the protection of EU external borders, there exists a fundamental or human rights liability of the EU, or of the totality of EU Member States as a Union based on fundamental rights. This question is sparked by a number of credible reports of violations of human and refugee rights in connection with protection of the external borders, especially on the part of small border states, which complain of being overburdened by the tasks assigned them by EU law.⁴⁸⁴ In this, there occur both violations of the rescue duties under the international law of the sea and violations of the principle of non-refoulement and other human rights.⁴⁸⁵ Such human rights violations in the course of protecting common EU external borders happen as a rule through actions of single or several Member States, not through those of EU organs or EU institutions themselves. However, as described above, in the framework of FRONTEX, a tight horizontal and vertical interlocking of EU actions and those of the Member States can come about.⁴⁸⁶ This is because the decision on deployment of the Rapid Border Intervention Teams, as well as portions of their financing and equipping, are realised at the community level. Additionally, operations are to be based on a mission plan agreed by FRONTEX and a host Member State. National officials are to be provided with a special FRONTEX badge and an armband with the insignia of the European Union. The amendment to the FRONTEX regulation foresees the delegation of sovereign powers among Member States. Through this, the actions of Member States will be further entwined horizontally. Officers in action are to be bound by Community law and the law and instructions of a host Member State, but remain under the disciplinary law of their home Member State.⁴⁸⁷ Also important is that the analyses, plans and co-ordinating tasks to be carried out by FRONTEX will naturally have strong influence on operations that in the end are carried out by

Member States – even if due to a lack of executive powers⁴⁸⁸ operationally effective measures by FRONTEX in violation of human rights are hardly conceivable.⁴⁸⁹ The EU border protection agency's understanding of the existence or non-existence of an obligation to examine applications for international protection made on high seas, will, for example, have a fundamental effect on an operation's planning and coordination.

As such, the Member States are all bound by the Refugee Convention, the ECHR, and the UN human rights treaties. Especially important for the system of protecting fundamental rights in the EU is that the transfer of sovereignty from the Member States to the EU, expressed in legislative competence and superiority of EU law, is compatible with the ECHR; according to ECtHR jurisprudence, this is only the case insofar, and as long as human rights protections at EU level are guaranteed to be equivalent to those of the ECHR both in material and procedural respect.⁴⁹⁰

The supranational system of protecting fundamental rights is characterised by a division of responsibility with regard to securing the protection of fundamental rights. To the extent that the Member States have transferred authorities to the EU, the precedence of Union law over national law demands standard application and interpretation of Union law by the ECJ. To the extent that national fundamental rights and national court controls cannot guarantee the protection of fundamental rights, this protection occurs through EU fundamental rights. Therefore, in the scope of application of Union law, both the EU organs and the Member States are bound by EU fundamental rights. These principles are undisputed and have been accepted by national courts in their acquiescence to the equivalent protection of fundamental rights at EU level.⁴⁹¹ The EU Charter of Fundamental Rights, in accordance with the conclusions of the European Council of June 2007, will in future have the status of legally binding EU primary law.⁴⁹² The Charter was

⁴⁸⁴ See, for example, "Malta calls on EU to take up dialogue with Libya", *Süddeutsche Zeitung*, 5 July 2007, p. 7; Council of Europe, CPT (2007); Pro Asyl (2007). See above Part 1.

⁴⁸⁵ See above, Part 1.

⁴⁸⁶ See above, Part 2(II)(2.1).

⁴⁸⁷ Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (OJ (2007) L 199, p.30).

⁴⁸⁸ Exceptions are conceivable in the areas of data collection and processing, especially with regard to the EU fundamental right to data protection.

⁴⁸⁹ On the question of possible FRONTEX measures causing infringements of human rights, see Fischer-Lescano/Tohidipur (2007).

⁴⁹⁰ ECtHR: Judgement of the Grand Chamber of 30 June 2005, Application No 45036/98 (Bosphorus Airways/Ireland), para. 155.

⁴⁹¹ German Federal Constitutional Court: Ruling of 22 October 1986, Reference No 2 BvR 197/83 (Solange II); Judgement of 12 October 1993, Reference No 2 BvR 2134, 2159/92 (Maastricht).

⁴⁹² EU, European Council (2007), Annex 1, para. 5.

fashioned with the goal of making visible in one document the fundamental rights already valid in the EU, which stem from aforementioned national and international sources.⁴⁹³ It is remarkable in the present context that the Charter of Fundamental Rights also includes the granting of the right of asylum in accordance with the Refugee Convention as an EU fundamental right.⁴⁹⁴

A duty of the EU legislator arises from EU primary law to pass EU secondary law in accordance with EU fundamental rights and the Refugee Convention.⁴⁹⁵ However, EU law does not regulate everything, since not all political areas are harmonised; and within those that are, the harmonisation has happened only in part, or as minimal harmonisation. The Member States, especially national legislators, are therefore responsible for the application and implementation of EU law in conformity with EU fundamental and human rights, and additionally use autonomous national law in non-harmonised areas.

1.1 Prohibition of explicit or implicit permission under EU law for actions in violation of fundamental rights

In its Judgement on the family-reunification Directive, the ECJ grappled with the distribution of responsibility for the protection of fundamental rights between the EU and the Member States. At issue here was first the question of the extent to which the Member States are also bound by EU fundamental rights in areas where EU secondary law leaves them a margin of appreciation. Also at issue was the question of the circumstances under which EU secondary law itself can violate fundamental rights if it allows actions by the Member States that violate those rights. The ECJ decided that EU fundamental rights are also applicable in those areas

in which EU secondary law leaves a margin of appreciation to the Member States. It stressed the responsibility of the Member States, and thus, above all, national legislatures, to choose an interpretation within a margin of appreciation that is compatible with EU fundamental rights.⁴⁹⁶ The binding of the Member States to EU fundamental rights means that in the end, judgement of whether their actions conform to fundamental rights is a responsibility of the ECJ, and not that of the national courts.⁴⁹⁷

The second question of the circumstances under which EU law itself can violate fundamental rights goes to the responsibility of the Community legislature for guaranteeing the protection of fundamental rights in the EU. In this regard, the ECJ has determined that a Community act itself can violate fundamental rights if it requires the Member States, or explicitly or implicitly authorises these, to adopt or retain national legislation that violates fundamental rights.⁴⁹⁸ This means that Community legislation can also violate fundamental rights when it does not require acts of the Member States in violation of fundamental rights, but even when the explicit or implicit admissibility of violations of fundamental rights arises from it. The jurisprudence does not finally resolve when an explicit or implicit authorisation exists. In another part of the aforementioned judgement, the ECJ has taken account of whether secondary law leaves to the Member States a margin of appreciation adequate to enable application consistent with fundamental rights.⁴⁹⁹ From this it can be concluded that not every margin of appreciation and gap in regulation that Member States can fill in violation of fundamental rights leads to a violation of fundamental rights on the part of EU law. The ECJ is apparently assuming here that more is required for an explicit or implicit authorisation to lead to a violation of funda-

⁴⁹³ Constitutional traditions of the Member States and human rights treaties by which the Member States are bound, especially the ECHR, but also UN human rights treaties.

⁴⁹⁴ Article 18 of the EU Charter of Fundamental Rights.

⁴⁹⁵ Article 6(2) of the EU Treaty and Article 63 of the EC Treaty.

⁴⁹⁶ ECJ: Judgement of 27 June 2006, Case C-540/03, paras. 104–106; see also Judgement of 6 November 2003, Case C-101/01, paras. 83–87.

⁴⁹⁷ For lack of individual application to the ECJ, as a rule it will take up relevant issues pursuant to submissions through the national courts.

⁴⁹⁸ ECJ: Judgement of 27 June 2006, Case C-540/03, paras. 22, 23: "As to that argument, the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC. Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights."

⁴⁹⁹ ECJ: Judgement of 27 June 2006, Case C-540/03, para. 104, where the ECJ finds that the Directive in question leaves a margin of appreciation sufficient for its application by the Member States in a manner consistent with the protection of fundamental rights.

mental rights on the part of EU law, namely a concrete point of connection for the conformity with EU secondary law of certain legislation and practices of the Member States that violate fundamental rights. In a similar vein, Advocate General Kokott has referred to a material criterion regarding the judgement on the illegality of Community legislation. In her pleadings in the case of the European Parliament against the Directive on family reunification, she raised the issue of whether the absence of the explicit adoption of legal norms leads to misunderstandings about the obligations of fundamental rights, and therefore increases the risk of violations of human rights. If this is the case, then "responsibility would lie not only with the national legislature which implemented the Directive, but also with the Community legislature".⁵⁰⁰ This would lead to the illegality of the provision of secondary law.⁵⁰¹

1.2 EU legislature's positive duties to adopt legal norms

If the Community's implicit authorisation of the maintaining or adopting of national legislation in violation of EU fundamental rights can cause the violation of EU fundamental rights on its part, then this means conversely that a positive obligation of the Community legislature can exist with regard to the adoption of legal provisions that protect fundamental rights – if the absence of such legal norms can be understood as an explicit or implicit authorisation that increases the danger of human rights violations.

Even if no EU secondary law exists that explicitly or implicitly authorises legislation and practices of the Member States in violation of fundamental rights, duties to adopt legal norms can additionally arise directly from EU fundamental rights. For states, duties to adopt legal norms that protect fundamental rights arise directly from national fundamental rights or international human rights treaties.⁵⁰² By enacting such legal norms, the public authority can fulfil its duty

to safeguard a certain legally protected interest. In this, it is irrelevant whether the protected interest of fundamental rights is threatened by such actors composed under public law as the EC or Member States, or private actors.⁵⁰³ The protective legislation can be of civil, public, or criminal legal nature.⁵⁰⁴ It is generally recognised that such duties to adopt legal norms can also apply to the Community legislature.⁵⁰⁵ The Community legislature's duties to adopt legal norms can, however, only be taken up in accord with the distribution of competences within the Union⁵⁰⁶ and the principle of subsidiarity.⁵⁰⁷

Because both with regard to border protection, and with regard to immigration and asylum law, competence of the European Community (EC) exists, no special problems arise in light of the distribution of competences in this area. But in individual cases it must be examined whether the assumption of an EU duty to adopt legal norms is compatible with the principle of subsidiarity. If human rights obligations form the basis of the state's duty to adopt legal norms, it must be asked whether and to what extent the protection of fundamental rights required of the Member States cannot be sufficiently realised (the necessity requirement), but can better be achieved precisely at EU level (the efficiency criterion).⁵⁰⁸ If both criteria are met, the EU legislature has a duty to adopt legal norms that arises directly from EU fundamental rights.

The consideration of duties to adopt legal norms under EU law on the basis of threats to human rights originating with Member States can be understood as a reaction to structural threats to the protection of human rights that exist in the supra-national Union. As presented above, the harmonizing of law of the Member States through EU law, as a rule, has not been a complete, but rather a partial harmonisation. In the area of immigration and asylum law, so far there exists only an EU competence for the issuance of minimum

500 ECJ: Opinion of Advocate General Juliane Kokott in Case C-540/03, para. 105. In this specific case, the ECJ did not follow the Advocate General's conclusions.

501 *Ibid.*

502 See, for example, Article 1 of the ECHR, which requires all States Parties to secure all rights contained in the Convention for all persons within their jurisdictions. On the resulting duty to pass legislative regulations for the protection of rights in the Convention, see Frowein/Peukert-Frowein (1996), Article 1 ECHR, para. 10.

503 Rengeling/Szczekalla (2004), para. 6, No 413.

504 Rengeling/Szczekalla (2004), para. 6, Nos 410–411.

505 Rengeling/Szczekalla (2004), para. 6, No 412. Borowsky (2006), Article 51, para. 22; Heselhaus (2006), para. 29; Ladenburger (2006), Article 51, para. 61.

506 See also Article 51 of the EU Charter of Fundamental Rights.

507 Article 5 of the EC Treaty; Para. 5 of the Preamble and Article 51(1) of the EU Charter of Fundamental Rights.

508 Ladenburger (2006), Article 51, para. 61; Heselhaus (2006), para. 3, No 24.

standards. The political dynamic of the Union holds the danger that through partial harmonisation restrictive aspects will be more quickly, intensively and completely regulated than will those aspects that serve the protection of human rights.⁵⁰⁹ Furthermore, in the course of the first harmonisation phase for EU immigration and asylum law, it became apparent that the regulation of aspects of human rights protection were mostly effected on the basis of the least common denominator, while gaps in regulation remained as sore points for the protection of human rights. National legislators are thus tempted to fill the discretionary room and regulatory gaps under EU law in a manner that degrades protection standards or violates fundamental rights. In light of a missing burden-sharing mechanism for refugee protection within the EU, such a temptation is especially great with regard to immigration and asylum law. This is because lowering the level of protection and deterrent measures superficially promises an easing of the burden. As a consequence, in many areas the required protection of fundamental rights by Member States cannot be realised (the necessity requirement). Simultaneously, in light of the standardised functional distribution of responsibilities under EU law among Member States and the tightly interlocking actions of the EU with those of the Member States in the areas of immigration and asylum law, as well as border protection, there is especially reason to assume a human rights responsibility of the Union. Applying legal categories, this means that often the required protection of fundamental rights can better be achieved at EU level (efficiency criterion).

With regard to the foregoing aspects, the state of EU secondary law as it affects the protection of the EU's external border can now be examined.

2. Regulatory gaps in EU secondary law in violation of fundamental rights

As presented above, in several areas crucial to the protection of human rights, EU secondary law is characterized by the ambiguity or the complete lack of pertinent provisions, despite the existence of clear human rights obligations that include a duty of clear legislative regulation. These areas are:

- procedural guarantees for applications for protection made at the border;

- legal remedy and its suspensive effect against rejections of applications for international protection made at or beyond the border;
- and the obligations of Member States stemming from the principle of non-refoulement with regard to persons encountered beyond state borders in the course of border or migration controls and rescue actions.

2.1 Procedural guarantees in border procedures

As presented above,⁵¹⁰ the Asylum Procedures Directive creates an opening for Member States to restrict procedural guarantees in border procedures. Article 35(2) of the Asylum Procedures Directive creates especially far-reaching possibilities in this regard by authorising Member States to maintain special border procedures. According to the Directive, in this case the generally established minimum guarantees of its Chapter II are not valid. Rather, only rudimentary procedural rights expressly named as minimum guarantees. Thus the Directive permits the Member States to retain procedural standards that violate human rights. Specifically, the Directive would allow a Member State to conduct border procedures under further exclusion of the right to legal representation, the right of contact with the UNHCR, and the right to a written decision with advice on applicable legal remedies. The level of minimum guarantees, standardised under secondary law, lies below that required under EU fundamental rights and the obligations of the Member States under international law. This means that the Directive explicitly authorises actions and legislation in violation of fundamental rights. This explicit authorisation of legislation and practice in violation of fundamental rights is suitable to cause or cement misunderstandings about the duties arising from fundamental and human rights; thus it increases the risk of human rights violations. This means that Article 35 of the Asylum Procedures Directive violates fundamental rights.⁵¹¹ The Community legislature's assumption of an obligation to bring into line the procedural guarantees in border procedures with general procedural guarantees – in conformity with fundamental rights – cannot be opposed by the subsidiarity principle. This is because the implementation of minimum guarantees for procedural rights in conformity with fundamental rights cannot be achieved at the level of Member States. Through the functional allocation of responsibility for

⁵⁰⁹ See Weinzierl (2005), p.207.

⁵¹⁰ Part 4(I)(6).

⁵¹¹ Compare for the same result Peers/Rogers(2006), p.507f.

border protection and the examination of applications for protection in states situated at the EU external border, the conformity of border procedures with fundamental rights to a great extent has become a matter of common European interest. Without adoption of legal norms under EU law, there would be danger of increasing human rights violations committed by overburdened states along the EU's external border. In the medium-term, such human rights violations could also call into question the functionality of the common Dublin responsibility system, which presupposes mutual trust in systems of protection. The goal of setting and legally implementing common procedural standards in conformity with fundamental rights is better achievable at Community level.⁵¹² It is therefore the responsibility of the Community legislature to adopt legal norms explicitly under EU law for procedural rights that arise from EU fundamental and human rights, and are valid at the common European external border.

2.2 Legal remedy against the rejection of asylum applications

As shown, the Asylum Procedures Directive leaves it to Member States to regulate legal remedy against the rejection of asylum applications made at and beyond the border. In accordance with the criteria laid out above, this would then violate EU fundamental rights if adoption of legal norms under EU law authorises the retaining or issuing of national regulations in violation of fundamental rights.

The relevant provisions of the Asylum Procedures Directive state:

"Article 39 The right to an effective remedy
(1) Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal [...]
(3) Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy [...]"

The Directive's provision goes beyond this point of granting to the Member States a general regulatory discretion to be applied in conformity with fundamental rights with regard to legal remedy. From the wording, the Member States only provide "where appropriate" for rules on the suspensive effect of the legal remedy or at least the possibility of protective measure where there is no suspensive effect of the remedy – without at least prescribing the latter as a minimum guarantee. Thus the provision gives the impression that a general exclusion of the suspensive effect of the remedy and the concomitant right to stay in the territory until a decision has been reached on the legal remedy would be compatible with EU fundamental rights. Since, as outlined above⁵¹³, Art. 13 ECHR requires an automatic suspensive effect of legal remedies against decisions refusing leave to enter a country in cases where the violation of a ECHR right is claimed, this impression is completely wrong. Taken together with other provisions that explicitly permit a decision at the border to be made exceptionally by other than a specialised asylum agency⁵¹⁴ and restrict the right to remain in the Member State for the period pending an examination of the application by the administrative authority,⁵¹⁵ the text of the Directive should be understood to the effect that the exclusion of suspensive effect or protective measures is implicitly authorised. Because this is liable to create misunderstandings about the requirements stemming from EU fundamental and human rights, and can lead national legislators to promulgate or retain law in violation of fundamental rights, in this point the Asylum Procedures Directive is contradictory to EU fundamental rights.⁵¹⁶ The assumption of an EU legislative duty to explicitly adopt legal norms on the right to an effective legal remedy with suspensive effect also arises from another factor: harmonising minimum guarantees that enable the examination of applications for protection in conformity with EU fundamental rights in an area of freedom, security and justice cannot be achieved at national

⁵¹² In this regard, see also para. 31 of the Preamble to the Asylum Procedures Directive.

⁵¹³ Part 4 (II)(6) and (7). See especially ECtHR: Judgement of 26. April 2007 (Gebremedhin [Geberamadhién]/France), Application No 25389/05.

⁵¹⁴ Article 4(2)(e) of the Asylum Procedures Directive.

⁵¹⁵ Article 7(1) of the Asylum Procedures Directive.

⁵¹⁶ Compare for the same results Peers/Rogers (2006), p. 409 f.

level. The required protection of EU fundamental rights can be better achieved through legal norms under EU law for the reason alone that absent individual appeal to the ECJ, this is the only way for the granting of the right to effective legal remedy to be enforced. From this arises the Community legislature's duty to explicitly adopt legal norms on effective legal remedy with suspensive effect and a concomitant right to stay in the territory until a decision has been reached on the legal remedy.

2.3 Obligations beyond state borders stemming from the principle of non-refoulement

As presented above, human rights – especially the principle of non-refoulement – in many situations also obligate the Member States beyond state borders. As a consequence, Member States must bring persons rescued or otherwise taken up at sea to an EU country in order to examine applications for international protection with adequate legal remedy.⁵¹⁷ Furthermore, this means that Member States may not expose persons in refugee boats to danger through driving away or escorting them to open seas, or to the danger of torture or inhuman or degrading treatment.

As already explained, beyond the borders, with exception of the contiguous zones, it is not the Asylum Procedures Directive, but only the Schengen Borders Code that applies. While the Schengen Borders Code refers to the principle of non-refoulement, it does not explicitly regulate the resulting obligations of Member States with respect to their actions. The Schengen Borders Code expressly rules out the suspensive effect of legal remedy against refusals of entry.

From the foregoing it is clear: the Border Code's exclusion without exception of the suspensive effect of a legal remedy is in violation of EU fundamental rights because the provision cannot even be interpreted in a way that it conforms to those fundamental rights. The Community legislature thus has a duty to regulate explicitly the requirement of suspensive effect of the remedy against denials of entry at the border with respect to those seeking protection.

There is the additional question of the extent to which EU law implicitly authorises non-compliance with the principle of non-refoulement in border and migration controls beyond state borders. To come to a judgement on this question, the entire relevant set of regulations must be considered because the Asylum Procedures Directive is explicitly not applicable. Already the absent applicability of this materially akin legal act can be interpreted as an implicit denial of a duty to examine applications for protection beyond the border. With regard to the Schengen acquis, it is important to note that it exhibits an extremely high regulatory density as far as the prescribed restrictive control measures go. By comparison, the absence of regulation for required protection measures gives the impression that these are not legally mandated. This judgement is apparently shared by several Member States and FRONTEX, which very often represent their operations from the perspective of mere rescue at sea, without even posing questions about responsibility for examining applications for international protection.⁵¹⁸ Additionally of importance, the program adopted by the Council of the European Union for the fight against illegal immigration across the maritime borders⁵¹⁹ suggests the implementation of pre-border and migration controls, and has this as its goal. Admittedly, the program is not a legally binding act of EU law. However, the structures of the decision-taking process among the Member States of the supra-national EU result in a significance even of such EU acts that technically are not legally binding which goes far beyond that of a mere political statement. Just such EU strategies and programs take on a strong steering and legitimising effect for further legal development at EU level and in the Member States.⁵²⁰ Considered together, the regulatory state of EU law is therefore apt to create misunderstandings with regard to the requirements of fundamental and human rights that must be observed in protecting common EU external border. This argues for the assumption that at national level the required protection of fundamental rights cannot be adequately guaranteed, and would be better at EU level. The EU legislature is therefore obligated to clearly adopt legal norms under EU law for the requirements stemming from applicability of the principle of non-refoulement beyond state borders.

517 As shown above, there are currently no safe third countries beyond the southern external sea borders to which persons could be brought without examination of their applications for international protection.

518 See for example FRONTEX (19 February 2006) Longest FRONTEX coordinated operation – HERA, the Canary Islands; press release and timesofmalta.com: Border mission starts today...without Libyan support (25 June 2007).

519 EU, Council of the European Union, Doc. Nr. 15445/03. See above Part 2(II)(3).

520 This is especially the case for such measures that promise to ease the burden on national asylum systems. In regard to the example of the introduction of the third-country arrangement in Germany, see Weinzierl (2005), pp. 176–190 and 208 ff.

Even if one is not of the opinion that the gaps in EU law constitute implicit authorisation of violations of the principle of non-refoulement, the Union legislature still has a duty to legally regulate these matters. This can be derived from the EU fundamental rights. Assumption of this duty does not conflict with the principle of subsidiarity. As previously explained, in border and refugee protection, the horizontal and vertical interlocking of EU actions and those of the Member States are very tight. Lopsided distribution of responsibility to over-burdened border states holds the danger of increasing human rights violations. To guarantee the required protection of human rights under these circumstances, national regulations are apparently insufficient. To counter the dangers described for the protection of human rights, the efficient adoption and enforcement through judicial review of protection standards can be better achieved through the adoption of norms under EU law.

The absence of a burden-sharing system within the EU in regard to refugee and border protection recognisably diminishes the willingness of EU border states to observe human rights obligations. This is a political factor that should be considered for future decisions. While the overburdening of the states situated at the external border does not justify their violations of human rights, in light of the consequences of this overburdening it appears imperative for human rights policy that observance of human rights at the common EU external border also be secured through the creation of an EU burden-sharing mechanism.

2.4 Conclusion

There is a fundamental and human rights obligation to provide to persons seeking protection, taken up at or beyond state borders at sea, access to a procedure in an EU state that examines their need for protection. The human rights of the protection seekers must be secured through procedural rights and legal remedy. At the same time, EU fundamental and human rights prohibit the escorting or towing back of boats with a mixed group of migrants on board to states outside the EU, because this could result in grave violations of human rights. Although EU law regulates border protection and refu-

gee law and the EU border management strategy foresees pre-border migration controls, EU law does not regulate this obligation. Rather it even or explicitly or implicitly permits for actions in violation of EU fundamental and human rights. The duty to regulate in this regard, arising from EU fundamental rights, lies at the feet of the EU legislature. Due to the tightly interlocking actions of the Union and Member States in border protection and the functional distribution of responsibility to overburdened EU border states, adequate protection of fundamental rights can only be efficiently guaranteed through regulation under EU law.⁵²¹

II. Joint action with third countries: no release from human rights responsibility

If Member States are conducting joint border and migration controls with third countries, this raises the question of responsibility for possible human rights violations. This question must be judged not according to the criteria of EU law, but rather those of international law. Accordingly, the actions of one state's organs are only attributable to another state when these organs are made available to the other state in such a way that the other state exercises exclusive command and control, and when the actions of these state organs appear to be the sovereign actions of the other state.⁵²² For joint patrols with third countries in the territorial sea and contiguous zones of these third countries, such effective control by other states does not exist. For this, the contractual transfer of individual control rights to which only the coastal states are entitled is insufficient. The ECtHR has ruled accordingly, most recently in the *Xhavara* Decision, where in agreement with older jurisprudence, it found that Albania is not responsible for migration control measures conducted by Italy on the basis of an agreement between Albania and Italy. At the same time, Italy's responsibility for these actions remained untouched by the agreement.⁵²³

However, joint action with third countries can lead to joint responsibility. In joint actions, each state is responsible in its own right for committing violations

⁵²¹ Compare for the same results UNHCR (2007c), p. 50.

⁵²² Article 6 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; on the requirement for exclusivity of command and control, see Crawford (2002), paras. 2 and 7, with regard to Article 6.

⁵²³ ECtHR, Admissibility decision of 11 January 2001 (*Xhavara* u.a./Italien und Albanien), Application No 39473/98, para. 1; see also European Commission for Human Rights: Admissibility Decision of 14 July 1977, Application No 7289/75 and 7349/76 (*X and Y/Switzerland*), p. 73.

of international law, and therefore infringes its own obligations.⁵²⁴ It is also significant that even when a state's action itself does not violate human rights, international law provides for human rights responsibility if the action constitutes an act of abetting a violation of human rights on the part of another state. Such an abetting act that triggers responsibility exists if the assistance is offered in knowledge of the circumstances of the violation of international law, and the abetting act supports the main action of the primarily acting state. Such abetting acts can include the provision of infrastructure and financing,⁵²⁵ but also such political actions as declarations, assurances and the conclusion of contracts that support an act that violates international law.⁵²⁶ In this connection, joint patrols in the territorial sea of third countries and the support and advising of third countries must be considered critically, as these especially can constitute the abetting of violations of the right to leave. Additionally in this regard, the external dimension of the migration strategy must be considered critically. The exercise of political pressure on issues of migration control or the granting of financial or technical assistance in border control⁵²⁷ can possibly support the treatment of migrants in violation of human rights, and in ways that are foreseeable. This is especially true when assistance is given to states that are recognised as having an especially low standard for human rights protection and an inadequate asylum system. Giving cause for concern in this regard are reports from non-governmental organisations, according to which, for example, the Moroccan government

carried out raids on migrants and expulsions that entailed grave violations of human and refugee rights, presented as measures in the framework of an action agreed at the European-African intergovernmental conference.⁵²⁸

In conclusion, it should be noted that the EU and its Member States have a responsibility for violations of human rights even when these are jointly committed with third countries, or when the human rights violations of third countries are supported or sponsored in a foreseeable manner. For the further development of external aspects of EU border strategy, clear boundaries exist to the extent that these may not render impossible access to international protection.

EU-primary law defines the objective of developing and consolidating of the rule of law, and respect for human rights and fundamental freedoms as an objective of the EU's external policies.⁵²⁹ Therefore, in the external migration strategy as a whole, the EU interest in easing its burdens should not be at the fore, but rather, along with the battle against causes for flight, support for systems of human rights and refugee protection in countries of origin and transit. The creation of an international burden-sharing system should ensure that the EU and its Member States take on the burdens of international protection to a degree that corresponds to their strong economic position.

⁵²⁴ Felder (2007), p. 125.

⁵²⁵ Article 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; Crawford (2002), para. 1, with regard to Article 16.

⁵²⁶ Felder (2007), p. 252.

⁵²⁷ For greater detail, see above, Part 2 (II)(2.4) and (4).

⁵²⁸ Human Rights Watch (2006b), p. 364; Migration Policy Group (2007).

⁵²⁹ See Article 11(1) EU and Articles 177 (1) and 181a(2) EC.

List of Acronyms

APDHA	Asociación Pro Derechos Humanos de Andalucía
CAT	UN-Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment/Committee against Torture (treaty body of the aforementioned Convention)
CESCR	Committee on Economic, Social and Cultural Rights (treaty body of the ICESCR)
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	UN-Convention on the Rights of the Child/Committee on the Rights of the Child (treaty body of the aforementioned Convention)
Doc.	Document
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECtHR	European Court of Human Rights
ed.	editor
ESA	European Space Agency
EU	European Union
EUROMED	Euro-Mediterranean Partnership
EUROSUR	European Surveillance System for Borders
FAL	Convention on Facilitation of International Maritime Traffic
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
GMES	Global Monitoring for Environment and Security
GRC	Geneva Refugee Convention
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
IMO	International Maritime Organization
Inter-Am. CHR	Inter-American Commission on Human Rights
IRIN	The humanitarian news and analysis service of the UN Office for the Coordination of Humanitarian Affairs
JHA	Justice and Home Affairs Council
MPG	Migration Policy Group
MSC	Maritime Safety Committee
NAVTEX	Navigational Information over Telex



OSCE	Organization for Security and Co-operation in Europe
SAR	International Convention on Maritime Search and Rescue 1979
SIC	Schengen Implementing Convention
SIVE	Sistema Integral de Vigilancia Exterior
SOLAS	International Convention for the Safety of Life at Sea
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
US	United States
VCLT	Vienna Convention on the Law of Treaties

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