



The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders

Ruth Weinzierl



German Institute
for Human Rights



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German Institute for Human Rights
Zimmerstr. 26/27
D-10969 Berlin
Phone (+49) (0)30 – 259 359 0
Fax (+49) (0)30 – 259 359 59
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de

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About the Author

Dr. Ruth Weinzierl, German Institute for Human Rights – Legal Services, Policy & Research. Her work focuses on migration, internal security and Europe.

German Institute for Human Rights

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The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders

Introduction

This text is an unedited pre-publication excerpt of a study¹ forthcoming from the German Institute for Human Rights in the fall of 2007 on the human rights requirements for EU border protection.

It presents the requirements from fundamental and human rights and EU secondary law for the protection of the EU's external borders. The main focus of the examination is on the special human rights problems arising from the protection of the southern maritime borders. Primarily this involves the question of access to refugee protection. Although specific questions dealing with rescue at sea remain reserved for the later study, the obligations of human and refugee rights in the course of state actions in rescue at sea will be examined. A special area of focus of this study consists of an analysis of EU secondary law and the requirements stemming from EU fundamental rights.

Chapter I will explain the criteria. Chapter II handles the requirements for the review of applications for international protection—those in territorial waters as well as at (land and maritime) borders.

Against the background of current developments in the area of EU border protection strategy, which among other things anticipates the forward placement of border and migration controls beyond state borders ("pre-border controls"), chapter III handles the human rights obligations that fall on EU states engaged in activities at sea, beyond the EU's external borders. The human rights requirements for migration-control measures on the dry land of third countries will not be examined.

Chapter IV deals with the human rights responsibility of various states acting together. This first entails an examination of whether and to what extent the EU, as a supra-national community, is meeting its obligation in line with EU fundamental rights to regulate explicitly certain issues relevant to human rights by law. Finally, a question of

¹ Forthcoming: Ruth Weinzierl/Ula Lisson: EU Border Protection and Human Rights. Berlin. German Institute for Human Rights, 2007.

international law will be examined: the human rights responsibility for measures undertaken by EU states together with third countries.

Main findings

1. Applications for international protection made in territorial waters or at land or maritime borders

Persons seeking international protection in territorial waters or at maritime borders, independent of the 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 three of the EU-Asylum Procedures Directive² 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, Article 33(1) of the Refugee Convention; Article 3(1) of the UN Convention against Torture (CAT)³ regarding the threat of torture; and from ICCPR⁴ Article 7, ECHR Article 3 and EU fundamental rights⁵ regarding the threats of torture or inhuman or degrading treatment or punishment. 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 reviewed.

Against the background of the principle of non-refoulement, other approaches would be theoretically conceivable only where and insofar 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 ECtHR jurisprudence 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

² Directive 2005/85/EC (Asylum Procedures Directive).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁴ International Covenant on Civil and Political Rights.

⁵ See also Art. 19 of the EU Charter of Fundamental Rights.

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 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 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 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, 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 waters of a coastal state, the applicants are to be allowed disembarkation and a stay on dry land pending a decision on legal remedy.

2. Human rights obligations beyond EU maritime borders (high sea and territorial waters of third states)

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. However, the prohibition of refoulement found in the Refugee Convention is not applicable for persons who are still in the territorial waters 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 waters. 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, ICERD⁶, and the international law of the seas.

In which cases duties exist to rescue shipwrecked persons discovered in the course of sea observation, beyond that of rescue at sea under the law of the sea, will not be finally clarified here. However, this question will become relevant in practice in light of the planned further development of radar and satellite-supported sea observation.

In connection with persons in need of international protection, 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 waters 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, 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

⁶ International Convention on the Elimination of All Forms of Racial Discrimination.

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 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.

3. Conformity of the EU acquis with fundamental rights

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 territorial waters, 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 fundamental rights as far as it is applicable to persons seeking international protection who are encountered beyond state borders during pre-border controls.

4. 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 legal remedy. At the same time EU fundamental and human rights prohibit the escorting or towing back of a 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 protection 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.

5. 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 waters 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 waters 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 handling 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.

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.

I. Criteria

In the protection of the EU's external borders, the actions of member states tightly intertwine with the actions of the European Community (EC). Member states thus carry out border control in accordance with the Schengen Borders Code⁷ and the rest of the Schengen acquis that is binding under EU law. They are supported in this by the EU border-protection agency FRONTEX⁸. 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 anticipates 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.⁹

Therefore criteria for human rights must consider EU fundamental rights as well as the obligations of Member 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 view represented here, EU fundamental rights can obligate the EU legislator to clearly regulate human rights requirements.¹⁰ The extent to which EU fundamental rights are decisive depends on two factors. To begin with it depends on the concrete question of who is implementing the action being judged, and on the basis of which law. It depends too on the legal question of the circumstances under which EU fundamental rights are also binding on Member States.

International human rights obligations deriving from UN human rights conventions¹¹ and the European Convention on Human Rights (ECHR) are clearly of significance. This is

⁷ Regulation (EC) 562/2006 (Schengen Borders Code).

⁸ European Agency for the Management of Operational Cooperation at the External Borders, see Regulation (EC) 2007/2004.

⁹ See Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004, COM (2006) 401, in the version of 1 June 2007, Council Document PE-CONS 3616/07.

¹⁰ See above Main Findings, point 4 and below IV 1.

¹¹ 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).

both because the Member States are bound by these treaties, and because the UN human rights conventions and ECHR¹² serve as a legal reference for the European Court of Justice in the determination of EU fundamental rights as general legal principles. The European Court of Human Rights (ECtHR) also draws on the UN human rights conventions in the interpretation of the ECHR. Additionally, through primary law¹³, EU Member States as well as the Union are bound by the Geneva Convention Relating to the Status of Refugees (Refugee Convention). This chapter will therefore first use as criteria the human rights treaties under international law, especially the ECHR as well as the Refugee Convention. 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.

¹² 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.

¹³ Article 63, EC. Note also the reference to the Refugee Convention in Article 18 of the EU Charter of Fundamental Rights.

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

Territorial waters fall under state sovereignty and therefore the jurisdiction of the coastal state. Insofar as coastal states claim this sovereignty, they are entitled to treat territorial waters as part of their state territory.¹⁴ The territorial waters of Spain¹⁵, France, Italy, Malta, Cyprus, and for the most part those of Germany, are twelve nautical miles wide, while those of Greece are six nautical miles wide.¹⁶ Jurisdiction in this zone is only restricted by the right of innocent passage.¹⁷ 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 statutory law 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 territorial waters or at maritime borders, independent of the situation and the form of protection sought, are therefore to be handled the same as persons who apply for protection on land. Article three of the Asylum Procedures Directive¹⁸ 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."¹⁹ A study commissioned by the European Commission has confirmed the applicability of the Asylum Procedures Directive, the Qualification Directive and the Dublin II-regulation in territorial waters.²⁰ 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 Dublin II-regulation results in the responsibility of the coastal state through whose territorial waters 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 waters the interception occurs.²¹

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

¹⁴ Sharma (2000), p 819.

¹⁵ With exception of the Straits of Gibraltar.

¹⁶ EU, European Commission, SEC (2007) 691, p. 11, footnote 14; Heintschel von Heinegg/Unbehau (2002), p. 13.

¹⁷ Articles 2(3) and 17 of UNCLOS.

¹⁸ Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive).

¹⁹ Article 3, paragraph 1 of the Asylum Procedures Directive.

²⁰ EU, European Commission, SEC(2007) 691, pp. 15 ff.

²¹ UNHCR, Executive Committee, Conclusion No 97 (2003).

expressly request another form of protection that can be applied for separately.²² 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.²³ 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 statutory 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 or ,rejection 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, Article 33(1) of the Refugee Convention; Article 3(1) of the UN Convention against Torture (CAT)²⁴ regarding the threat of torture; and from ICCPR²⁵ Article 7 and ECHR Article 3 and EU fundamental rights²⁶ regarding the threats of torture or inhuman or degrading treatment or punishment. Differences among these prohibitions of refoulement exist with regard to the human rights violations against which they aim to protect, 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.

Because the protection of fundamental human rights counts among the peremptory norms of international law,²⁷ 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*.²⁸ Of note for the development of international law is the further development of prohibitions of

²² Second sentence of Article 2(b) of the Asylum Procedures Directive.

²³ Council 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).

²⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²⁵ International Covenant on Civil and Political Rights.

²⁶ See also Art. 19 of the EU Charter of Fundamental Rights.

²⁷ Frowein (1992), p. 67.

²⁸ 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.

refoulement in the UN human rights conventions by their treaty bodies²⁹ and the ECtHR.³⁰ Increasingly from the beginning of the 1990s, states have expressly recognised the validity of prohibitions of refoulement from the human rights conventions.³¹ 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.³² 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,³³ 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.³⁴ 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.”³⁵ 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 bodies³⁶ and those of the UNCHR Executive Committee.³⁷ Insofar there is unanimity that while the principle of non-refoulement does not entail a general right to admission, it at least

²⁹ 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).

³⁰ Discussed in greater detail below, II 3.

³¹ For further information and citations on this development, see Goodwin-Gill/McAdam (2007), pp. 217, 220-221.

³² UNHCR, Executive Committee Conclusion No 103 (2005)(m) and 99 (2004).

³³ 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.

³⁴ Hailbronner (1989), p. 39; Hailbronner (1995), pp. 371-372; Hailbronner (2000), p. 439; Henkel (1996), p. 152; Kaelin (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.

³⁵ Article 3(b) of the Schengen Borders Code.

³⁶ With regard to the UN Convention against Torture: Committee against Torture, Doc. A/53/44, Nos. 137-148; Committee against Torture, Doc. A/61/44, p. 26. With regard to the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): Committee on the Elimination of Racial Discrimination, Doc. A/58/18 (2003) 69 para. 408. In relation to the ICCPR: Human Rights Committee, General Comment No 15 (1986), No 5.

³⁷ 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).

includes a basic duty to temporarily admit the person concerned for the purpose of examining his or her protection needs and status.³⁸

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, including refugees.³⁹ 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.⁴⁰

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

The jurisprudence of the ECtHR 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 objective⁴¹ 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.⁴² The treaty parties to the ECHR are bound by the ECHR as it has been given concrete effect through the jurisprudence of the ECtHR.⁴³ Article 32(1) of the ECHR empowers the ECtHR to authoritative and authentic interpretation and further development of the ECHR.⁴⁴

The ECtHR derives an implicit non-refoulement principle especially from Article 3 of the ECHR.⁴⁵

³⁸ 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.

³⁹ 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.

⁴⁰ UNHCR's recommendations for Portugal's 2007 European Union Presidency, July-December 2007 from 15 June 2007, No 2.

⁴¹ See para. 2 of the preamble of the ECHR and Article 1 of the ECHR.

⁴² Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

⁴³ Grabenwarter (2005), p. 98; Ress (2004), p. 630.

⁴⁴ See Papier (2006), p. 1.

⁴⁵ 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.

“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.”⁴⁶

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.⁴⁷ 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.⁴⁸ 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 trial⁴⁹). Prohibitions of expulsion can also arise from Article 8 of the ECHR (right to respect for family and private life⁵⁰) and from Article 34 of the ECHR (right of individual application to the ECtHR⁵¹). 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 signatory.⁵² 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.⁵³ The activity of border guards in securing the border is clearly the fulfilment

⁴⁶ ECtHR: Judgement of 11 July 2000 (Jabari/Turkey), Application No 40035/98, para. 38 with further references.

⁴⁷ Alleweldt (1996), p. 15; Frowein/Peukert-Frowein (1996), Article 3, para. 18; Grabenwarter (2005), p. 139; Mole (1997), p. 13.

⁴⁸ 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.”

⁴⁹ ECtHR: Judgement of 7 July 1989 (Soering/United Kingdom), Application No 14038/88, para. 113.

⁵⁰ ECtHR: Judgement of 18 February 1991 (Moustaquim/Belgium), Application No 12313/86; Judgement of 2 August 2001 (Boultif/Switzerland), Application No 54273/00; Judgement of 10 July 2003 (Benhebbba/France), Application No 53441/99; Judgement of the Grand Chamber of 9 October 2003 (Slivenko and Others/Latvia), Application No 48321/99. On the jurisprudence of the ECtHR, see Thym (2006).

⁵¹ 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.

⁵² 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. B.

⁵³ 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.

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.⁵⁴

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.⁵⁵ 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,⁵⁶ or grave health risks independent of existing responsibility of government authorities for these.⁵⁷ Jurisprudence that the ECtHR justifies with a requirement for the dynamic interpretation of the ECHR⁵⁸ has been assessed in different ways in literature and in German jurisprudence, including sharp criticism.⁵⁹ 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.⁶⁰

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 arrangements⁶¹ on the readmission of citizens of third countries 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

⁵⁴ Hailbronner, (1999), pp. 617, 623; Noll (2000), pp. 442-443.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ ECtHR Judgement of 2 May 1997 (D./United Kingdom), Application No 30240/96, para. 49.

⁵⁸ 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.

⁵⁹ 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, 9 C 38.96. For criticism of the open deviation of the German Federal Administrative Court from ECtHR jurisprudence, see Frowein (2002).

⁶⁰ Rengeling/Szczekalla (2004), para. 859.

⁶¹ See Cassarino (2007).

responsibility for asylum procedures. This is also true even with regard to agreements arranged only among ECHR-states.⁶² In isolation, the fact that a state is willing to take back a person and formally fulfils the 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.⁶³

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.⁶⁴ 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 immigration and residence,⁶⁵ 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 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 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.⁶⁶

⁶² ECtHR, Admissibility Decision of 7 March 2000 (T.I./United Kingdom), Application No 43844/98.

⁶³ 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.

⁶⁴ ECtHR Judgement of 15 November 1996 (Chahal/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 [...]"*.

⁶⁵ Hailbronner (2007), Commentary on Article 18 of the German Asylum Procedures Law, para. 38.

⁶⁶ 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.

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 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.⁶⁷ 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.⁶⁸ 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 Dublin system.⁶⁹ 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,⁷⁰ 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.⁷¹ 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

⁶⁷ Article 36 of the Asylum Procedures Directive.

⁶⁸ 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.”

⁶⁹ For example, Switzerland and Norway.

⁷⁰ 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.

⁷¹ EU, European Commission, COM (2000) 755, p. 8.

and exceptions are made for exceptional circumstances.⁷² Nevertheless, the international literature in the field remains very critical of the conformity of such third-country arrangements with international law⁷³—especially against the backdrop of ECtHR jurisprudence that requires an individual examination.⁷⁴

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 Convention, which is unclear on the point.⁷⁵ 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 an interpretation of the Refugee Convention binding for the EC States 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 UNCHR.

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 State parties can be determined, and which establishes the agreement of the parties regarding its interpretation (*opinio iuris*).⁷⁶ For the VCLT's requirement of a uniform and common⁷⁷ 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 state 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 intended by the Refugee Convention.⁷⁸ That this retreat would necessarily lead to a greater burden on other State parties that

⁷² German Federal Constitutional Court: Judgement of 14 May 1996 (third-country arrangements), Reference No 2 BvR 1938, 2315/93.

⁷³ Zimmermann (1994), pp. 177-184; Wiederin (2003), p. 43; Goodwin-Gill/McAdam (2007), p. 400; Hathaway (2005), pp. 328, 329; Costello (2006), pp. 61 ff.

⁷⁴ ECtHR: Admissibility Decision of 7 March 2000 (T. I. /United Kingdom), Application No 43844/98.

⁷⁵ Hailbronner (2006), p. 724.

⁷⁶ Article 31(3)(b).

⁷⁷ Ipsen (1999), p. 119.

⁷⁸ 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."

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 strengthened⁷⁹ through a change in primary law, agreed in principle in June 2007.⁸⁰ 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 protection⁸¹. 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 remedies through courts or other independent instances. If such obligations must be observed, the persons who are rendering an application for international protection in territorial waters or at the sea border must therefore 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,⁸² 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.⁸³ 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,⁸⁴ 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

⁷⁹ Heselhaus/Nowak-Heselhaus (2006), § 2, No 24.

⁸⁰ 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.

⁸¹ Article 52 paragraph 3 of the EU Charter of Fundamental Rights.

⁸² Article 4(3) of the Qualification Directive.

⁸³ Article 4(1) and 4(2) of the Asylum Procedures Directive.

⁸⁴ Articles 10 and 12 of the Asylum Procedures Directive.

suspensive effect and concomitant right to stay in the territory until a decision has been reached on the legal remedy.⁸⁵

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.⁸⁶ 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 Fundamental Rights through Article 19(1). Inherent to every fundamental and human right is that the state that is obliged to honour fundamental rights enables each person entitled to fundamental rights to fulfil those rights (obligation to fulfil). The more severe the threatened 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 freedom (Article 33 of the Refugee Convention), and torture or cruel, inhuman or degrading treatment or punishment (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). 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,⁸⁷ multiple recommendations of the Parliamentary Assembly,⁸⁸ the Committee of Ministers⁸⁹ and the Human Rights Commissioner⁹⁰ 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.⁹¹

⁸⁵ 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.

⁸⁶ See Article 6(1) of the EU Treaty.

⁸⁷ 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).

⁸⁸ For example: European Council, Parliamentary Assembly, Recommendations 1163 (1991); 1309 (1996); 1327 (1997); 1440 (2000).

⁸⁹ European Council, Committee of Ministers, Recommendation No R (94) 5; No R (98) 13; No R (98) 15.

⁹⁰ See, for example: Thomas Hammarberg (30.01.2006): Viewpoint - Seeking asylum is human right, not a crime.

⁹¹ UNHCR, Press release from 30 April 2004, UNHCR regrets missed opportunity to adopt high EU asylum standards.

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.”⁹²

Article 13 of the ECHR guarantees a subjective right to an effective remedy⁹³ against the alleged violation of a fundamental right in the ECHR before a court or other independent and impartial instance.⁹⁴ The authority whose decision is being appealed may not handle the appellate instance.⁹⁵ At the same time, the claimed violation of human rights must be examined on the merits. An examination for violation of the law or inconceivability does not suffice.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.⁹⁹ Of particular importance is that in these cases the ECtHR has regarded the implementation of deportation as violating the Convention, and thus views as compulsory the opportunity of suspensive effect of the legal remedy.¹⁰⁰

The right to an effective remedy in accordance with Article 13 of the ECHR presupposes an arguable claim. This precondition excludes appeals that are not adequately substantiated or improper. The ECtHR has not yet defined the requirement in the abstract¹⁰¹ 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

⁹² ECtHR: Judgement of 11 July 2000 (*Jabari/Turkey*), Application No 40035/98, para. 50.

⁹³ For more detail, see Grabenwarter (2005), pp. 350 ff.

⁹⁴ ECtHR: Judgement of 12 May 2000 (*Khan/United Kingdom*), Application No 35394/97 para. 44 ff.

⁹⁵ ECtHR: Judgement of 3 September 2004 (*Bati and Others/Turkey*), Application No 33097/96 and 57834/00, para. 135.

⁹⁶ ECtHR: Judgement of 8 July 2003 (*Hatton and Others/ United Kingdom*), Application No 36022/97, para. 141-142.

⁹⁷ See Wiederin (2003), pp. 39-43.

⁹⁸ ECtHR: Judgement of 6 March 2001 (*Hilal/United Kingdom*), Application No 45276/99, para. 67-68.

⁹⁹ ECtHR: Judgement of 11 July 2000 (*Jabari/Turkey*), Application No 40035/98), para. 40.

¹⁰⁰ 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.

¹⁰¹ Grabenwarter (2005), p. 355.

obligations.¹⁰² Furthermore, also in a case where national law qualifies an application for asylum or appeal as “manifestly unfounded”, an “arguable claim” 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 claim”.¹⁰³

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.¹⁰⁴

As a rule, expulsion without the guarantee of legal remedy with suspensive effect makes it impossible for the person concerned to lodge an individual appeal with the ECHR or an organ 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 temporary legal remedy can simultaneously amount to a violation of the individual right to file an appeal with the ECtHR (Article 34 of the ECHR) or the UN Committee against Torture (Article 22 of the UN Convention against Torture).¹⁰⁵

There exists at EU level an EU fundamental right to an effective remedy before a tribunal¹⁰⁶ that is also binding on Member States when they are implementing Union 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.”¹⁰⁷

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

¹⁰² ECtHR: Judgement of 5 February 2002 (Čonka/Belgium), Application No 51564/99, para. 79.

¹⁰³ ECtHR: Judgement of 20.6.2002 (Al-Nashif/Bulgaria), Application No 50963/99, para. 131-132.

¹⁰⁴ Council of Europe, Committee of Ministers (2005), Twenty Guidelines of the Committee of Ministers of Europe on forced return, guidelines 2 and 5.

¹⁰⁵ 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.

¹⁰⁶ For more detail, see Heselhaus/Nowak-Nowak (2006), para. 51; Brouwer (2005), pp. 221-222.

¹⁰⁷ ECtHR: Judgement of 27 February 2007, Case C-354/04 P, para. 56.

effect in conformity with fundamental rights, as described.¹⁰⁸ 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.¹⁰⁹

7. Admissibility of reducing guarantees of procedure and legal recourse 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.¹¹⁰ 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.¹¹¹ The provision apparently intends to enable border protection 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.¹¹²

According to the Directive, the Member States may also maintain border procedures for deciding on permission of entry.¹¹³ 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”,¹¹⁴ 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.¹¹⁵ 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

¹⁰⁸ 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.

¹⁰⁹ See below, IV.1.2.2. For the application of the provision at the border, II. 7.

¹¹⁰ Article 35 of the Asylum Procedures Directive.

¹¹¹ Article 35(1) taken together with Article 4(1), 4(2)(e) and 4(3) of the Asylum Procedures Directive.

¹¹² Article 8(3) of the Asylum Procedures Directive.

¹¹³ Article 35(2) of the Asylum Procedures Directive.

¹¹⁴ Article 35(3)(d) of the Asylum Procedures Directive.

¹¹⁵ 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.

inadmissible.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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 Basic Law, respectively.¹¹⁹ The lack of clearly regulated guarantees of legal remedy in EU law with regard to denials of entry has been frequently criticised.¹²⁰ 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.¹²¹

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 implementation 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 appeal standardised in the ECHR and several UN human rights treaties.

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.¹²²

¹¹⁶ Article 35(3) (at the end) of the Asylum Procedures Directive.

¹¹⁷ Article 35(3)(a) of the Asylum Procedures Directive.

¹¹⁸ Kokott (1996), p. 570.

¹¹⁹ 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.

¹²⁰ See Brouwer (2005); Cholewinski (2005).

¹²¹ Boeles/Brouwer/Woltjer/Alfenaar (2005).

¹²² 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*

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.¹²³

In conclusion, human rights do not allow a downgrading of guarantees of procedure and 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 right of appeal, 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 handled later¹²⁴. The form of procedural 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 territorial waters

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

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, CAT [2006], Doc. A/61/44, p. 36).

¹²³ 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.”

¹²⁴ See below, IV 1.2.2.

submitted at the maritime border or in the territorial waters 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 sea and territorial waters 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 protection strategy that are directed toward pre-border controls;¹²⁵ second, reports and evidence proving that individual Member States are already undertaking such pre-border controls, which are also being coordinated by FRONTEX;¹²⁶ 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.¹²⁷

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 is raised, whether beyond their State borders the Member States are bound by other basic and human rights in the implementation of border controls, for example the right to life and freedom from physical injury.

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.¹²⁸ 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.

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.

¹²⁵ See EU, Council, Doc. No 15445/03, paras. 14-22; Council, Doc. No 13559/06, para. 5 No 2; EU, Council, CIVIPOL study, p. 75.

¹²⁶ See, for example, the press release on Operation Hera II, FRONTEX (19 February 2006).

¹²⁷ EU, European Commission, COM (2006) 733, para. 34.

¹²⁸ EU, European Commission, SEC (2007) 691, p. 20.

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.¹²⁹ According to Article 33(1) of the UN Convention on the Law of the Sea from 1982 (UNCLOS), the coastal state may 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”,¹³⁰ 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.¹³¹ 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 territorial waters 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 territorial waters.

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

¹²⁹ Articles 86 and 87 of the UN Convention on the Law of the Sea from 1982 (UNCLOS).

¹³⁰ Article 3 of the Asylum Procedures Directive.

¹³¹ Article 2(b) of the Asylum Procedures Directive.

1.2. Remaining high seas and foreign territorial waters

This chapter will examine the obligations that exist for an act on high seas, including the contiguous zones and territorial waters 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.¹³² The Schengen Borders Code, however, is also applicable to immigration controls that take place beyond the territorial waters 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 regardless of the rights of refugees and persons seeking international protection, especially with regard to non-refoulement.¹³³ 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.¹³⁴

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 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 passenger train travel, the explicit possibility of conducting border controls in agreement with a third country, at train stations of that third country, is foreseen.¹³⁵ 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

¹³² See previous chapter.

¹³³ Article 3(b) of the Schengen Borders Code.

¹³⁴ Article 13(3) of the Schengen Borders Code. On the non-conformity of this provision with fundamental rights, see below, IV.1.2.2.

¹³⁵ Annex IV, No 1.2.2. of the Schengen Borders Code.

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 control 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 laws 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 waters and contiguous zone, on high seas or in the territory of third countries. 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 concerned¹³⁶ 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 in this area.

The reference in the Schengen Borders Code to obligations stemming from the principle of non-refoulement does not substantiate a materially 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 territorial waters 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.”

¹³⁶ Articles 3 and 6 of the Schengen Borders Code.

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.¹³⁷ 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.

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.¹³⁸ 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, in any case 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.¹³⁹

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 waters, 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 territorial waters because the granting of protection there conflicts with the sovereign rights and interests of the coastal state.¹⁴⁰

¹³⁷ 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 already denies any applicability of the principle of non-refoulement at the border stemming from the Refugee Convention.

¹³⁸ Article 31 of the VCLT.

¹³⁹ See, for example, Lauterpacht/Bethlehem (2003), pp. 159-160.

¹⁴⁰ 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.

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.¹⁴¹ 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 waters 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.¹⁴² 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 that the prohibitions on refoulement stemming from the human rights treaties¹⁴³ are also applicable if the person concerned has not (yet) left his or her country.¹⁴⁴

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 granting 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.¹⁴⁵ 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

¹⁴¹ In this regard, see also Noll (2005), p. 552.

¹⁴² Senior employees of FRONTEX report that patrols in Libyan territorial waters have not been able to be carried out for lack of Libyan agreement. The patrols of border protection ships under the flag of an EU State in the course of a FRONTEX operation then had to take place outside of Libyan territorial waters.

¹⁴³ See below, IV 1.2.3. and IV.1.2.4.

¹⁴⁴ Goodwin-Gill/McAdam (2007), p. 385.

¹⁴⁵ US Supreme Court: Judgment from 21 January 1993, Reference No 509, US 155.

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 subjective right to asylum. 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.¹⁴⁶

This US Supreme Court decision, however, 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.¹⁴⁷ 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.¹⁴⁸

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 law¹⁴⁹ and from the UNHCR,¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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, search, and rescue measures on high seas.¹⁵³ 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-

¹⁴⁶ See UNHCR, Advisory Opinion (2007), para. 30 with further references.

¹⁴⁷ Goodwin-Gill/McAdam (2007), p. 248.

¹⁴⁸ 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.L/V/II.95 Doc. 7 re. (13 March 1997), paras. 156-158.

¹⁴⁹ Goodwin-Gill/McAdam (2007); pp. 244-253 ff.; Hathaway (2005), pp. 335-342; Lauterpacht/Bethlehem (2003), para. 242.

¹⁵⁰ See, for example, UNHCR (1994); UNHCR (2000), para. 23; UNHCR, Advisory Opinion (2007).

¹⁵¹ Hathaway (2005), p. 337.

¹⁵² 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).

¹⁵³ EU, European Commission, COM (2006) 733, paras. 31-35.

refoulement is to be respected and the rights to protection under international law to be enforced for persons seeking protection on ships.¹⁵⁴ Older Conclusions of the UNHCR Executive Committee stress the importance of the principle of non-refoulement, likewise independent of the question of whether the refugee is on the territory of the particular State Party.¹⁵⁵

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”.¹⁵⁶ 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 Committee¹⁵⁷ 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.

¹⁵⁴ UNHCR, Executive Committee, Conclusion No 97 (2003).

¹⁵⁵ See also UNHCR (2007), para. 33 with further references to UNHCR Executive Committee Conclusions.

¹⁵⁶ Article 31(3)(b) of the VCLT.

¹⁵⁷ Cyprus is counted here, which only joined the EU in 2004.

However, the prohibition of refoulement found in the Refugee Convention is not applicable for persons who are still in the territorial waters 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 of importance that when State ships engage in rescue at sea – in accordance with their obligations stemming from international law of the sea¹⁵⁸ - 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 for measures of migration control and rescue at sea beyond territorial waters obligations arise from Article 3 of the ECHR. Included in the examination are the contiguous zones of the EU States, territorial waters 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 especially suggestive because – as presented above¹⁵⁹ - ECHR jurisprudence assumes that the principle of non-refoulement stems from states' duty to protect.¹⁶⁰ 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 subjective 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 on high seas, 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:

¹⁵⁸ Article 98 of UNCLOS (1982), and international customary law.

¹⁵⁹ See above, II.3.

¹⁶⁰ In this vein, see also Noll/Fagerlund/Liebaut (2002), p. 45.

“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.¹⁶¹ Here it should be noted that especially the judgements that concern themselves with wartime or peace-keeping measures are in two senses characterised by 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.¹⁶² Of fundamental importance, however, 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 ECHR¹⁶³ whose effects on the jurisprudence on prohibitions of refoulement in the ECHR were already presented above.¹⁶⁴ The first emphasis is on the ECtHR’s dynamic-teleological interpretation - its interpretation of the Convention as a “living instrument”¹⁶⁵ that considers a provision’s current purpose and object, which can have changed since the ECHR’s signing.¹⁶⁶ Of importance here is that the ECtHR also explicitly considers international trends on the recognition of certain

¹⁶¹ See also the analyses of Gondek (2005) and Lawson (2004).

¹⁶² 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.

¹⁶³ See Peters (2003), p. 18 ff.

¹⁶⁴ Above, II.3.

¹⁶⁵ 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.

¹⁶⁶ An example for this is the jurisprudence of the Court on the rights of transsexuals, which has changed dramatically over time.

rights even when a common European consensus is still absent.¹⁶⁷ 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.¹⁶⁸ The second special emphasis lies in securing effectiveness through interpretation, which has manifested itself in jurisprudence on procedural rights and legal remedy,¹⁶⁹ and on the right of access to individual application before the ECtHR.¹⁷⁰

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.¹⁷¹ 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 government in the area concerned.¹⁷² 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 protection 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

¹⁶⁷ ECtHR: Judgement of the Grand Chamber of 11 July 2002 (*Goodwin/United Kingdom – rights of transsexuals*), Application No 28957/95, para. 85.

¹⁶⁸ ECtHR: Judgement of the Grand Chamber of 11 July 2002 (*Goodwin/United Kingdom – rights of transsexuals*), Application No 28957/95, para. 74.

¹⁶⁹ 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.

¹⁷⁰ See above, II.6.

¹⁷¹ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 59.

¹⁷² 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.

craft and vessels registered in, or flying the flag of, that State”,¹⁷³ 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.”¹⁷⁴

For actions in the area of migration control and border protection this means that the ECHR’s applicability on state ships for border protection or sea 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,¹⁷⁵ 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 Parties not to subject the person concerned to the danger of grave rights violations through actions of expulsion or return.¹⁷⁶

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 expulsion or repatriation 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 territorial waters 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.¹⁷⁷ 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 v Italy and Albania*, in which people on a refugee boat drowned after colliding with a state border protection ship.¹⁷⁸

¹⁷³ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 73.

¹⁷⁴ 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.

¹⁷⁵ Kimminich/Hobe (2004), p. 441; Noll/Fagerlund/Liebaut (2002), pp. 43-44.

¹⁷⁶ See above II.3.

¹⁷⁷ The carrying out of patrols alone does not constitute jurisdiction at sea. In this regard, see also Eick (2006), p. 121.

¹⁷⁸ 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.

This also has as a consequence that the actions of private persons on ships that, 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.¹⁷⁹

The Flag State's jurisdiction is determined and restricted by other affected States' rights of control.¹⁸⁰ This restriction serves the demarcation of state spheres under international law.¹⁸¹ The restriction therefore corresponds with, but does not exceed, the rights of coastal states in the various sea 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. Action of officials in the context of authorities transferred to them as an element forming the basis for jurisdiction

The responsibility for the actions of border protection officials and government sea-rescue employees can, however, also arise independent of whether the person in action is on a ship. In the case of *Drozd and Janousek*¹⁸² the ECtHR recognised, with reference to a series of older decisions by the European Commission of Human Rights, that jurisdiction in the sense of Article 1 of the ECHR can exist over officials acting outside of the territory if the action can be ascribed to the State Party.¹⁸³ The ECtHR last confirmed in the *Banković* Decision that the action of officials in the context of

¹⁷⁹ 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.

¹⁸⁰ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 59.

¹⁸¹ Gondek (2005), p. 365.

¹⁸² ECtHR: Judgement of 26 June 1992 (*Drozd and Janousek/France and Spain*), Application No 12747/87, para. 91

¹⁸³ 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.

authorities transferred to them constitutes an element forming the basis for jurisdiction.¹⁸⁴

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.¹⁸⁵ 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 protection 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-protection 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.”¹⁸⁶

From this circumvention prohibition 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 protections of procedure and remedy 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

¹⁸⁴ 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.

¹⁸⁵ 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.

¹⁸⁶ ECtHR: Judgement of 16 November 2004 (*Issa/Turkey*), Application No 31821/96, para. 71.

of granting adequate procedural and legal protections. On the contrary, from this practical impossibility of granting adequate procedural and legal protections, the conclusion must be drawn that the persons concerned must be granted just the same access to the state territory and process 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 guarantees of procedure and legal remedy, 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 ECtHR as an instrument of a regional European *ordre publique* in the *espace juridique* of the States Parties was emphasised, has led to discussions in academic works.¹⁸⁷ 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 waters 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,¹⁸⁸ 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 legal space in which the ECHR can be applied. The ECHR's *espace juridique* can therefore absolutely extend beyond the territory of ECHR States.¹⁸⁹

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.¹⁹⁰

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 and legal protection,¹⁹¹ 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

¹⁸⁷ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (*Banković/Belgium and Others*), Application No 52207/99, para. 80.

¹⁸⁸ ECtHR: Judgement of 16 November 2004 (*Issa/Turkey*), Application No 31821/96, para. 74.

¹⁸⁹ Similarly, see also Coomans/Kamminga (2004), p. 5; Gondek (2005), pp. 375 ff.; Lawson (2004), S. 114.

¹⁹⁰ Similarly: EU, European Commission, SEC (2007), p. 4.

¹⁹¹ See above, II.6. and II.7.

also be found persons seeking protection. This is because, in practice, there are no adequately safe third countries.¹⁹²

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.¹⁹³ 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 Article 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 VCLT¹⁹⁴ - takes into account when interpreting the ECHR. The UN human rights treaties are also sources of legal findings 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 organ 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.¹⁹⁵ 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.¹⁹⁶ 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 territory¹⁹⁷ – have extra-territorial applicability. In so doing, the Committee began partly with the control over a territorially

¹⁹² See above, II.5.

¹⁹³ Article 98 of UNCLOS, and international customary law.

¹⁹⁴ Article 31(3)(c) of the VCLT.

¹⁹⁵ UN, CAT (2006), p. 36, see above II.6. and II.7.

¹⁹⁶ 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."

¹⁹⁷ 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."

definable area,¹⁹⁸ partly with the de facto existing control over a detained person,¹⁹⁹ and explicitly confirmed the applicability of the principle of non-refoulement beyond state borders.²⁰⁰ 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 such controls.

The ICCPR obligates a State Party to guarantee rights recognised in the Covenant “to all individuals within its territory and subject to its jurisdiction”.²⁰¹ 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*²⁰² and *Montero vs. Uruguay*²⁰³ 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), 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 territory 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.”²⁰⁴

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

¹⁹⁸ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Para. 14.

¹⁹⁹ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Paras. 17, 20.

²⁰⁰ UN, CAT (2006), Doc. No CAT/C/USA/CO/2, Para. 20.

²⁰¹ Article 2(1) of the ICCPR.

²⁰² UN, HRC, Communication No 52/1979.

²⁰³ UN, HRC, Communication No 106/1981.

²⁰⁴ UN, HRC (2004), General Comment No 31, para. 10.

ICCPR.²⁰⁵ 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.²⁰⁶ 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"²⁰⁷ 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.²⁰⁸ 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 Article 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,²⁰⁹ 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.²¹⁰ 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 stay²¹¹ and this may be restricted only under certain pre-conditions that will be explained later.

²⁰⁵ ECtHR: Admissibility Decision of the Grand Chamber of 12 December 2001 (Banković/Belgium and Others), Application No 52207/99, para. 78.

²⁰⁶ Eick (2006), p. 119.

²⁰⁷ See quotation above in the text.

²⁰⁸ Scheinin (2004), p. 76.

²⁰⁹ 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).

²¹⁰ 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.

²¹¹ 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.

The right serves the free development of a person²¹² and is grounded in the understanding that migration is a normal aspect of human history.²¹³ The right to leave does not simultaneously include the right to enter a certain other State.²¹⁴

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, as well as the requirement of a democratic society and proportionality of the restrictions to the stated purposes.²¹⁵ 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.²¹⁶ Restrictive measures are only admissible as an exception. Measures that systematically and regularly impair exit are inadmissible.²¹⁷

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 measures²¹⁸ 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.²¹⁹ 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."²²⁰ It is apparent 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

²¹² UN, HRC (1999), General Comment No 27, para. 1.

²¹³ Similarly, see Juss (2004), p. 292.

²¹⁴ Juss (2004), p. 293.

²¹⁵ UN, HRC (1999), General Comment No 27, paras. 14-17.

²¹⁶ UN, HRC (1999), General Comment No 27, para. 18.

²¹⁷ Hofmann (1988), p. 184; UN, HRC (1999), General Comment No 27, para. 13.

²¹⁸ Like for example visa regimes and carrier sanctions.

²¹⁹ 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; on the current importance of the external dimension of border protection, Weinzierl/Lisson: EU border protection and human rights, Fn. 1.

²²⁰ UN, HRC (1999), General Comment No 27, para. 10.

joint liability of the countries of departure and destination - determined specifically by the principles of state responsibility presented below.²²¹

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.²²² 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.²²³ 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 waters 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"²²⁴ 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 freedom 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.²²⁵

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* case, 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

²²¹ Hathaway (2005), p. 310.

²²² Goodwin-Gill/McAdam (2007), p. 382.

²²³ Goodwin-Gill/McAdam (2007), p. 387 ff.

²²⁴ 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.

²²⁵ In this vein, see also Goodwin-Gill/McAdam (2007), p. 381.

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 Air²²⁶ cannot be introduced as legitimising such migration-control measures, because these provisions are only valid subject to human rights.²²⁷ 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.

2. Implementation of border controls in conformity with human rights

Article 6 of the Schengen Borders Code²²⁸ 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' ties to EU fundamental rights in the scope of application of EU law,²²⁹ in carrying out border controls along 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, in any case 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), right to liberty (Article 6 of the EU Charter of Fundamental Rights, and Article 5 of the ECHR), 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 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

²²⁶ Additional Protocol to the United Nations Convention against Transnational Organised Crime.

²²⁷ See the reservation clause in Article 19 of the Protocol.

²²⁸ Regulation (EC) No 562/2006 (Schengen Borders Code).

²²⁹ Article 6(2) of the EU Treaty.

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 waters 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 waters. 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, ICERD²³⁰, and the international law of the seas.

In which cases duties exist to rescue shipwrecked persons discovered in the course of sea observation, beyond that of rescue at sea under the law of the sea, will not be finally clarified here. However, this question will become relevant in practice in light of the planned further development of radar and satellite-supported sea observation.

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

²³⁰ International Convention on the Elimination of All Forms of Racial Discrimination.

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.

IV. Human rights liability in common action

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

1.1 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 common external borders. From the beginning, the arrangement of robustly securing the EU external borders 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”²³¹ 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 borders 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-borders 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 protection²³² there.²³³ This functional assignment of tasks under EU law to specific States, namely the border States of the EU, 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 functional distribution of responsibilities among the EU and the Member States - determined under common 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

²³¹ Article 61 of the EC Treaty and Article 29 of the EU Treaty.

²³² 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.

²³³ Articles 9-13 of the Dublin II-regulation,

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 monitoring 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.²³⁴ In this, there occur both violations of the rescue duties under international sea and maritime law and violations of the principle of non-refoulement.²³⁵ 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 interweaving of EU actions and those of the Member States can come about.²³⁶ 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 anticipates 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.²³⁷ 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 powers²³⁸ operationally effective measures by FRONTEX in violation of human rights are hardly conceivable.²³⁹ 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 so long as human rights protections at EU level are guaranteed to be equivalent to those of the ECHR both in material and procedural respect.²⁴⁰

²³⁴ See, for example, "Malta calls on EU to take up dialogue with Libya", *Süddeutsche Zeitung*, 5 July 2007, p. 7.

²³⁵ For a presentation of the facts, see Weinzierl/Lisson, footnote 1.

²³⁶ See above, p. 2.

²³⁷ See Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004, COM (2006) 401, in the version of 1 June 2007, Council Document PE-CONS 3616/07.

²³⁸ Exceptions are conceivable in the areas of data collection and processing, especially with regard to the EU fundamental right to data protection.

²³⁹ On the question of possible FRONTEX measures causing infringements of human rights, see Fischer-Lescano/Tohidipur (2007).

²⁴⁰ ECtHR: Judgement of the Grand Chamber of 30 June 2005, Application No 45036/98 (Bosphorus Airways/Ireland), para. 155.

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.²⁴¹ 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.²⁴² The Charter was 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.²⁴³ 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.²⁴⁴

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.²⁴⁵ 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 fundamental and human rights, and additionally use autonomous national law in non-harmonised areas.

1.1.1. 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 common 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

²⁴¹ 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).

²⁴² EU, European Council (2007), Annex 1, para. 5.

²⁴³ 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..

²⁴⁴ Article 18 of the EU Charter of Fundamental Rights.

²⁴⁵ Article 67(2) of the EU Treaty and Article 63 of the EC Treaty.

interpretation within these a margin of appreciation that is compatible with EU fundamental rights.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ 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.²⁴⁹ 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 fundamental 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”.²⁵⁰ This would lead to the illegality of the provision of secondary law.²⁵¹

²⁴⁶ 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.

²⁴⁷ For lack of individual application to the ECJ, as a rule it will take up relevant issues pursuant to submissions through the national courts.

²⁴⁸ 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.”

²⁴⁹ 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.

²⁵⁰ 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.

²⁵¹ *Ibid.*

1.1.2. 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 fundamental rights can cause the violation of 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.²⁵² 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.²⁵³ The protective legislation can be of civil, public, or criminal legal nature.²⁵⁴ It is generally recognised that such duties to adopt legal norms can also apply to the Community legislature.²⁵⁵ The Community legislature's duties to adopt legal norms can, however, only be taken up in accord with the distribution of competences within the Union²⁵⁶ and the principle of subsidiarity.²⁵⁷

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).²⁵⁸ 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.

²⁵² See, for example, Article 1 of the ECHR, which requires all State 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.

²⁵³ Rengeling/Szczekalla (2004), para. 6, No 413.

²⁵⁴ Rengeling/Szczekalla (2004), para. 6, Nos 410-411.

²⁵⁵ Rengeling/Szczekalla (2004), para. 6, No 412. Borowsky (2006), Article 51, para. 22; Heselhaus (2006), para. 29; Ladenburger (2006), Article 51, para. 61.

²⁵⁶ See also Article 51 of the EU Charter of Fundamental Rights.

²⁵⁷ Article 5 of the EC Treaty; Para. 5 of the Preamble and Article 51(1) of the EU Charter of Fundamental Rights.

²⁵⁸ Ladenburger (2006), Article 51, para. 61; Heselhaus (2006), para. 3, No 24.

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 guarantees. 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.²⁵⁹ 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. There results for national legislators a temptation 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 law as it affects external border protection can now be examined.

1.2. 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 has provisions that are either ambiguous or lacking altogether, 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.

1.2.1. Procedural guarantees in border procedures

As presented above,²⁶⁰ 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

²⁵⁹ See Weinzierl (2005), p.207

²⁶⁰ II.6.

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, but 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. 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 border protection and the examination of applications for protection in States situated at the EU external borders, 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 border States. 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.²⁶¹ It is therefore the responsibility of the Community legislature to adopt legal norms explicitly under EU law for procedural rights that arise from fundamental and human rights, and are valid at the common European external border.

1.2.2 Legal remedy against the rejection of asylum applications

As already presented above, 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

²⁶¹ In this regard, see also para. 31 of the Preamble to the Asylum Procedures Directive.

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 and the possibility of an application for a stay of implementation – without at least prescribing the latter as a minimum guarantee. Thus the provision gives the impression that a general exclusion of temporary legal remedy would be compatible with EU fundamental rights. Taken together with other provisions that explicitly permit a decision at the border to be made exceptionally by other than a specialised asylum agency²⁶² and restrict the right to remain in the Member State for the period pending an examination of the application by the administrative authority,²⁶³ the text of the Directive should be understood to the effect that the exclusion of temporary legal remedy is implicitly authorised. Because this is liable to create misunderstandings about the requirements stemming from 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. The assumption of an EU legislative duty to explicitly adopt legal norms the right to temporary legal remedy also arises from another factor; harmonising minimum guarantees that enable the examination of applications for protection in conformity with fundamental rights in an area of freedom, security and justice cannot be achieved at national level. The required protection of fundamental rights can be better achieved through legal norms under EU law alone for the reason that absent individual application to the ECJ, this is the only way for the granting of the right to effective legal remedy and appeal to be implemented. From this arises the Community legislature's duty to explicitly adopt legal norms on effective legal remedy with suspensive effect.

1.2.3 Obligations beyond State borders stemming from the principle of non-refoulement

As presented above, human rights – especially the principle of non-refoulement – 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

²⁶² Article 4(2)(e) of the Asylum Procedures Directive.

²⁶³ Article 7(1) of the Asylum Procedures Directive.

examine applications for international protection with adequate legal remedy.²⁶⁴ 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 temporary 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 temporary legal 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 the EU border protection agency, which always represent their operations from the perspective of mere rescue at sea, without even posing questions about responsibility for examining applications for international protection.²⁶⁵ Additionally of importance, the program adopted by the Council for the fight against illegal immigration at the sea borders 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 nature of the structural decision-taking process among the Member States of the supra-national EU means that even such EU acts that technically are not legally binding nonetheless gain significance 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

²⁶⁴ As described 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.

²⁶⁵ 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).

Member States.²⁶⁶ 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 borders. 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.

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 border States 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.

1.2.4. 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 refugee law and the EU border protection 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

²⁶⁶ 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, among others, see Weinzierl (2005), pp. 176-190 and 208 ff.

border States, adequate protection of fundamental rights can only be efficiently guaranteed through regulation under EU law.

2. 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.²⁶⁷ For joint patrols with third countries in the territorial waters 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.²⁶⁸

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 of international law, and therefore infringes its own obligations.²⁶⁹ 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,²⁷⁰ but also such political actions as declarations, assurances and the conclusion of contracts that support an act that violates international law.²⁷¹ In this connection, joint patrols in the territorial waters 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 control²⁷²

²⁶⁷ 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.

²⁶⁸ 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.

²⁶⁹ Felder (2007), p. 125.

²⁷⁰ 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.

²⁷¹ Felder (2007), p. 252.

²⁷² For greater detail, see above, section II.2.5.

can possibly support the handling 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.²⁷³

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 policies²⁷⁴. 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.

²⁷³ Human Rights Watch (2006b), p. 364; Open letter by Moroccan, African and European associations (2007).

²⁷⁴ See Article 11(1) EU and Articles 177 (1) and 181a(2) EC.

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