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Border Controls at Sea: Requirements under International Human Rights and Refugee Law

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Abstract

In 2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was established. The Agency supports member states in coordinating their border controls. Border controls at sea have, therefore, received increasing attention. Coordinated by FRONTEX, member states carry out border controls not only in their territorial waters, but also on the High Seas and within the territorial waters of third countries.

One must assume that at least some of the people on board intercepted vessels are persons in need of international protection. However, some European governments have argued that the principle of *non-refoulement* does not apply exterritorially. This article will challenge this approach. First, it argues that the principle of *non-refoulement*, as laid down in the UN Convention Relating to the Status of Refugees, the European Convention on Human Rights and other international treaties relating to refugee and immigration law does apply beyond the territory of the signatory states. Secondly, it argues why *non-refoulement*, as a principle of refugee and fundamental rights legislation within European primary and secondary law, does apply beyond the territory of the contracting states. Thirdly, regarding the treatment of protection seekers and migrants at sea, it examines the obligations of border guard authorities to act under maritime, human rights and refugee law and when there is a legal failure to act. Finally, the article examines whether EU secondary law, as well as Border Control Practice, are consistent with these obligations.

1. Introduction

According to data from the International Centre on Migration Policy Development, somewhere between 100,000 and 120,000 migrants and persons in need of protection cross the Mediterranean every year without

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the documents required for entry into Europe. About 35,000 of these are from Sub-Saharan Africa, 55,000 from the African Mediterranean states and 30,000 from other states (mainly Asia and the Middle East). It is estimated that about 10,000 people have drowned attempting to cross the Mediterranean in the last decade.[1] The risk of loss of life remains high because the number of irregular migrants expected to travel to the EU is likely to stay at the current level, or even to increase slightly, and most of them will cross the external EU border through the southern maritime borders.[2]

The tragic death of these individuals must be placed in the context of a migration regime created by European law. The paramilitary fashion in which Europe's external borders have been sealed off [3] by border police requires debate and counter measures, not only at a national level, but also at the European level.[4] On the one hand, a holistic approach is needed, including development of cooperation measures and legalised migration. On the other hand, the implementation of border control measures must be measured against international and European legal standards protecting refugee and human rights. The latter are particularly important, as people affected regularly include individuals entitled to protection under existing international and European law, within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention).

This article focuses on the latter point, placing it in the context of current events. Governments occasionally argue that state border controls, particularly on the high seas, take place in a space where refugee and human rights law do not apply. Therefore, the article examines the relevant legal texts and evaluates state practice relating to these fields of law. It is clear from both that European border officials are indeed bound by international human rights and refugee law, even when acting exterritorially.

In the case of EU external border controls, the member states' border control bodies act in close cooperation, supported by the European border security agency FRONTEX. The agency presents itself as 'the anchor stone of the European Concept of Integrated Border Management' and was created by Council Regulation 2007/2004/EC of 26 October 2004.[5] At present, FRONTEX has its own increasing number

[1] ICMPD, Irregular Transit Migration in the Mediterranean, passim.

[2] FRONTEX Programme of Work 2009, 22.

[3] D. Lutterbeck, 'Policing Migration in the Mediterranean' (2006) 11 *Mediterranean Politics* 59-82.

[4] See, 'Public Hearing of the European Parliament's Civil Liberties, Justice and Home Affairs Committee on the subject "Tragedies of Migrants at sea"', 3 July 2007, available at <http://www.europarl.europa.eu/hearings/20070703/libe/programme_en.pdf>.

[5] [2004] OJ No L 349.

of staff and access, via a central technical register, to a number of helicopters, aircrafts and boats, as well as large quantities of mobile equipment.[6] The operational framework coordinated by FRONTEX includes the regulation establishing a mechanism to create Rapid Border Intervention Teams in order to secure the EU's external borders.[7] This same instrument significantly extends the agency's executive powers. Thus, border control teams can be deployed temporarily in urgent and exceptional situations if the member state concerned applies for such support. To this end, an *ad hoc* deployment pool of 500 to 600 border police officers is being set up at FRONTEX. In addition, the regulation gives interventionary powers to all forces deployed in joint FRONTEX operations, thus enabling them to support local border police; for example, in the case of German Federal Police officers sent to Spain or Italy. Members of the Rapid Border Intervention Teams must wear their own uniforms while performing their tasks. In order to be identified, they wear a blue armband bearing the European Union and FRONTEX agency emblems. According to the regulation, which entered into force on 20 August 2007, pursuant to Article 14,[8] Rapid Border Intervention Team members will be given powers to monitor borders and carry out entry and exit controls in accordance with regulation 562/2006/EC, adopted on 15 March 2006 by the European Parliament and the Council. This regulation lays down a common code for people crossing EU borders (Schengen Borders Code) and lists the tasks and authorisations required to meet the legislation's aims. Decisions to refuse entry, in accordance with Article 13 of the Borders Code, may only be taken by the border officials of the member state hosting the operation. This vertical and horizontal division of labour means that German border officials are also involved in measures to protect Europe's Mediterranean borders.

In this context we are going to address the following questions:

1. Does the international legal principle of *non-refoulement* in the United Nations Convention Relating to the Status of Refugees, the European Convention on Human Rights and other international treaties relating to refugee and immigration law apply beyond the territory of the signatory states? (see 2.)

[6] See, the recent answer of the Federal Government to a parliamentary question, BT-Drs. 16/5019 of 13 Apr. 2007, answer to question 18.

[7] Regulation 863/2007/EC of the European Parliament and the Council on a mechanism for the creation of Rapid Border Intervention Teams for the purpose of the protection of the borders and amending Regulation 2007/2004/EC of the Council as regards that mechanism and regulating the tasks and powers of guest officers, 11 July 2007, [2007] OJ No L 199/30.

[8] 2006/0140 (COD).

[9] BGBl. 1985 II 927.

2. Does *non-refoulement*, as a principle of refugee and fundamental rights legislation within European primary and secondary law, apply beyond the territory of the contracting states? (see 3.)
3. Following on from the answers to questions 2 and 3, and regarding the treatment of protection seekers and migrants at sea, what are the obligations to act under maritime, human rights and refugee law, and when is there a legal failure to act? (see 4.)

The relevant international treaties have been interpreted using the rules of interpretation written into the Vienna Convention on the Law of Treaties (VCLT)[9] in order to answer questions of this nature.[10] According to Article 31, paragraph 1, VCLT, a treaty must be interpreted in good faith, in the light of the ordinary contextual meaning given to its terms and on the basis of its aims. According to Article 32 VCLT, historical interpretation has, at most, subsidiary importance. Two distinctive features apply to these fundamental principles in practice. Firstly, literature,[11] state

[10] Art. 4 VCLT must be referred to in conjunction with the customary law application of Art. 31 VCLT, compare, RSAA, Ref. App. No. 74665/03 (7 July 2004), § 45; A. Edwards, 'Human Rights, Refugees, and The Right "To Enjoy Asylum"' 17 *IJRL* 293-330 (2005) at 306; J. H. Hathaway, M. Foster, 'Membership of a Particular Social Group', Discussion Paper No. 4, Advanced Refugee Law Workshop, IARLJ, Auckland, New Zealand, October 2002, 15 *IJRL* 477-91 (2003) at 485; Sir E. Lauterpacht, D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Feller, Türk, Nicholson (eds.), *Refugee Protection in International Law* (Cambridge, 2003), 87-178 at 103.

[11] J. H. Hathaway: *The Rights of Refugees under International Law* (Cambridge, 2005), 53; and *The Law of Refugee Status* (Toronto/Vancouver, 1991), 101 and 107; A. Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing' 20 *IJRL* 273-313 (2008) at 275; A. Klug, 'Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?' (2004) 47 *GYIL* 594-628 at 601; N. Markard, 'Gendered Violence in "New Wars" - Challenges to the Refugee Convention' in van Walsum and Spijkerboer (eds.), *Women and Immigration Law* (New York, 2007), 67-85 (68); J.-Y. Carlier: 'General Report' in Carlier, Vanheule, Hullmann, Peña Galiano (eds.), *Who is a Refugee?* (The Hague/London/Boston, 1997), 685-717 at 701; and 'The Geneva Refugee Definition and the "Theory of the three Scales"' in Nicholson, Twomey (eds.), *Refugee Rights and Realities* (Cambridge, 1999) 37-54 at 38; D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harv.Hum.Rts.J.* 134; N. Sitaropoulos, *Judicial Interpretation of Refugee Status* (Baden-Baden, 1999) 217 and following; H. Lambert, 'The Conceptualisation of "Persecution" by the House of Lords: *Horvath v. Secretary of State for the Home Department*' 13 *IJRL* 16-31 (2001) at 18 and 30; A. Binder, *Frauenspezifische Verfolgung* (Basle/Geneva/Munich, 2001), 79; G. von Thenen, *Geschlechtsspezifische Flucht- und Bleibegründe* (Frankfurt, 2004), 72; D. Vanheule, 'A comparison of the judicial interpretations of the notion of refugee' in Carlier, Vanheule (eds.), *Europe and Refugees: A Challenge?* (The Hague, 1997), 91-106 at 103; Edwards, above n. 10, 295; E. Feller, 'International Refugee Protection 50 years on: The protection challenges of the past, present and future' (2001) 83 *IRRC* 581-606 at 581 and 594; A. Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *HRQ* 213-77 at 224; W. Kälin, 'Refugees and Civil Wars: Only a Matter of Interpretation?' 3 *IJRL* 435-51 (1991) at 447; *M.R. v. Sternberg, The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (The Hague/London/New York, 2002) 2 and following; R. P. G. Haines, 'Gender-related Persecution' in Feller, Türk, Nicholson (eds.), above n. 10, 319-50 at 324; H. Battjes, *European Asylum Law and International Law* (Leiden/Boston, 2006), at 289; P. Kourula, *Broadening the Edges* (The Hague/Boston/London, 1997), 92 and 132; A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I (Leiden, 1966), 212-16.

practice,[12] UNHCR[13] and EXCOM[14] have agreed since the 1990s that the Refugee Convention must be interpreted in conformity with international human rights treaties. This approach achieved formal recognition with the 2001 Declaration of State Parties[15] and is thus binding on the contracting states to the Refugee Convention, according to Article 21, paragraph 3 lit. a VCLT. It is an approach taken from the preamble, which emphasises the need for action in order to ensure full respect for human rights when refugees are identified and processed.[16] Secondly, interpretation must remain dynamic. Thus, changes to concepts occurring over time, as well as changes in the circumstances surrounding international law, must be taken into consideration.[17] The European Court of Human Rights (ECtHR)[18] and the International Court of Justice

[12] *Canada (AG) v. Ward*, [1993] 2 SCR 689, 734 and following, 1993 CanLII 105 (SCC), per La Forest J, under explicit reference to Hathaway; see also, *Chan v. Canada* (MEI), [1995] 3 SCR 593, 634 and following, 1995 CanLII 71 (SCC); *Ranjha v. Canada* (MCI), 2003 FCT 637 (CanLII), § 38, per Lemieux J; *Malik v. Canada* (MCI), 2005 FC 1707 (CanLII), § 8 and following, per Dawson J; *Weiss v. Canada* (MCI), 2000 CanLII 15808 (FC), § 16, per Reed J; IRB, Refugee Protection Division: 'Interpretation of the Convention Refugee Definition in the Case Law', Chapter 3.1.1.1.; *Horvath v. SSHD*, [2000] UKHL 37 (6 July 2000), printed in 13 *IJRL* 174 (2001) at 191 and following, per Lord Bingham; *Islam v. SSHD, Ex Parte Shah*, *R v.*, [1999] UKHL 20 (25 Mar. 1999), printed in 11 *IJRL* 496 (1999) at 510 and following, per Lord Hoffmann; *Sepet v. SSHD*, [2003] 3 All ER 304 (HL), printed in 15 *IJRL* 276 (2003) at 277, per Lord Bingham; RSAA, Ref. App. No. 74665/03 (7 July 2004), § 58 and following; RSAA, Ref. App. No. 71427/99 (16 Aug. 2000), § 47; RSAA, Ref. App. No.71404/99 (29 Oct. 1999), § 67; RSAA, Ref. App. No. 2039/93 (12 Feb. 1996), § 37 and following and 56 and following; particularly emphasising the aspect of subsidiary protection when the country of origin fails, Wellington, CA181/97, [1999] NZAR 205, § 5; RSAA, 74988/2004, § 66; *Applicant A & Anor v. MIEA & Anor*, [1997] HCA 4 (24 Feb. 1997), 142 ALR 331, 333, per Brennan CJ.

[13] UNHCR, Interpretation of Art. 1, § 5; UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 Apr. 2004, Comment on Art. 9, 21.

[14] The close interconnection between refugee and human rights protection is emphasised in EXCOM, Conclusions No. 50 (XXXIX) (1988), (b); 56 (XL) (1989), (b), 71 (XLIV) (1993), (cc) and (ee); 80 (XLVII) (1996), (e), (i), 81 (XLVIII) (1997), 93 (LIII) (2002), 94 (LIII) (2002), 95 (LIV) (2003).

[15] This is the first joint declaration of *all* contracting states to the Refugee Convention, 'Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees': UN doc. HCR/MMSP/2001/09 (16 Jan. 2002), Preamble, §§ 3 and 6; Operative paragraphs, §§ 1 and 2.

[16] Feller, above n. 11, 594; Sitaropoulos, above n. 11, 217; Binder, above n. 11, 22, particularly 24; Hathaway, above n. 11, 107, in para. 54, and 105, para. 41; see also, UNHCR, Interpretation of Art. 1, above n. 13, § 5; Lambert, above n. 11, 30 and 18 in para. 9; Haines, above n. 11, 324.

[17] G. Dahm, J. Delbrück, R. Wolfrum, *Völkerrecht*, Vol. 1/3, (Berlin/New York, 2nd ed. 2002), at 649; T. Stein, C. von Buttlar, *Völkerrecht* (Cologne/Berlin/Munich, 11th ed. 2005), para. 83; I. Brownlie, *Principles of Public International Law* (Oxford, 6th ed. 2003) 604; K. Ipsen, *Völkerrecht* (Munich, 5th ed. 2004), § 11, para. 21; J. A. Frowein, Peukert, *ECHR-Kommentar* (Kehl am Rhein/Strasbourg/Arlington, 2nd ed. 1996), Introduction, para. 10.

[18] *Tyrer v. United Kingdom* (Judgment) ('*Tyrer*'), (1978), ECtHR, Series A, Vol. 26, at 15, § 31; and at 16, §32; consenting, R. Bernhardt, 'Evolutive Treaty Interpretation' in (1999) 42 *GYIL* 11 at 16; see also, ('in the light of current circumstances') *Rees v. United Kingdom* (Judgment), (1986), ECtHR, Series A 106 (1986), at 19, § 47; *Winterwerp* (Judgment), (1980), ECtHR, Series A 33 (1980), at 16, para. 37; *Marckx v. Belgium* (Judgment), (1979), ECtHR, Series A 31 (1979), § 41; *Banković and Others v. Belgium & Ors* (Judgment), (2001), ECtHR, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, 333, § 57; see also, *Al-Adsani v. United Kingdom*, (Judgment), (2001), Reports 2001-XI, at 79, § 55.

(ICJ)[19] both emphasise the particular significance of these basic principles when interpreting human rights conventions. State practice[20] and literature[21] have led to this approach being applied to interpreting the Refugee Convention as well. Therefore, the following analysis focuses on a dynamic human rights interpretation of the relevant conventions.

2. Obligations under international law

In order to examine whether the *non-refoulement* principle in the Refugee Convention, the European Convention on Human Rights and other international treaties relevant to refugee and immigration law applies beyond the territory of the contracting states, this article is structured following the maritime law provisions defining territorial jurisdiction. According to Article 2, paragraph 1, of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS),[22] land territory, internal waters and, in the case of coastal states, territorial sea, all form part of a state's sovereign territory. Under Article 3 UNCLOS, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. The UNCLOS has been ratified by all EU States and its 12 nautical mile limit reflects effective customary international law.[23] State territory ends 12 nautical miles out to sea.[24] This is the context for the following three-step analysis examining how far the relevant conventions are legally binding:

- first, vis à vis the territorial sea belonging to EU state territory (2.1),
- secondly, vis à vis territory beyond the 12 mile zone, that is, in the contiguous zone and on the high seas (2.2), and
- thirdly, vis à vis the territory of third party countries including their territorial sea; refugees' countries of origin and transit countries; and individuals entitled to subsidiary protection and migrants (2.3).

[19] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 3 at 111; see also, W. Kälin, A. Epiney, M. Caroni, J. Künzli, *Völkerrecht* (Bern, 2nd ed. 2006), at 40; Dahm, Delbrück, Wolfrum, above n.17, 651; Bernhardt, above n. 18, at 17; C. Grabenwarter, *Europäische Menschenrechtskonvention* (Munich, 2nd ed. 2005), § 5, para. 13; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports 1971, 4 (19); see also, *Right of Passage over Indian Territory (Preliminary Objections)*, ICJ Reports 1957, 142: 'It is a rule of interpretation that a text (…) must, in principle, be interpreted (…) in accordance with existing law and not in violation of it'.

[20] *R. v. SSHD, ex parte Adan*, [1999] AC 293 (23 July 1999), printed in 11 *IJRL* 702 (1999) at 724, per Lord Woolf MR; *SSHD, Ex Parte Adan, R v. SSHD, Ex Parte Aitseguer, R v.*, [2000] UKHL 67 (19 Dec. 2000) printed in 13 *IJRL* 202 (2001) at 221, per Lord Hutton.

[21] Feller, above n. 11, 594; Lambert, above n. 11, 18; compare also, Hathaway, *Rights of Refugees*, above n. 11, 64 and 106; Binder, above n. 11, 25.

[22] BGBl. 1994 II 1798.

[23] M. Herdegen, *Völkerrecht* (Munich, 4th ed. 2004), § 31, para. 45; Ipsen, above n. 17, § 52, para. 5; W. Graf Vitzthum, *Völkerrecht* (Berlin, 4th ed. 2007), at 420.

[24] States may exercise certain sovereign rights according to Art. 33 para. 1, para. 2 UNCLOS within a contiguous zone of 24 nautical miles, nonetheless, this zone is not attributed to its territory.

2.1 International obligations inside the European 12 mile zone

The legal obligations applying to European border defence bodies are, first and foremost, the result of densely meshed international treaties. The following subsections deal with the applicability of these international legal provisions within the EU member states' territorial sea.

2.1.1 United Nations Convention Relating to the Status of Refugees

Article 33, paragraph 1, of the Refugee Convention[25] contains the principle of *non-refoulement*. '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'. State practice has already featured several attempts by states to rescind the binding effect of this prohibition when implementing domestic legislation in their own territory. For instance, in 2001, Australia adopted a law[26] whereby various islands within the 12 mile zone were defined as outside the 'migration zone' within the meaning of the Migration Act of 1954. Pursuant to this legislation, Australia's Migration Act obligations do not apply on the islands concerned. The Act is also the vehicle for implementing the Refugee Convention in Australia. Thus, the obligations arising from it are also rescinded. Individuals disembarking on the islands concerned are questioned as 'offshore entry persons' by UNHCR or Australian officials there and asked about their reasons for fleeing. They are exposed to a malfunctioning asylum system and have access to neither legal protection nor government information centres.[27] The Australian model resembles the French attempt to legislate to turn several harbour and airport areas into international zones. France's legislation enabled it to exercise state power in the zones concerned and evade its obligations under international law.[28]

[25] BGBl. 1953 II, 560, in the version of the Protocol on the legal status of refugees of 31 Jan. 1967, BGBl. 1969 II, 1294.

[26] Migration Amendment (Excision from Migration Zone) (Consequential Provision) Act 2001, No. 127/2001.

[27] For further details, see, G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law* (Oxford/New York, 3rd ed. 2007), at 255; A. Edwards, 'Tampering with Refugee Protection: The Case of Australia' 15 *IJRL* 192 (2003) at 208; compare also, R. Barnes, 'Refugee Law at Sea' (2004) 53 *ICLQ* 47-77 at 65; F. Feld, 'The Tampa Case: Seeking Refuge in Domestic Law' (2002) 11 *AJHR*, available at <http://www.austlii.edu.au/au/journals/AJHR/>, last visited Mar. 2009.

[28] Regarding the facts, ECtHR, *Amuur v. France* (Judgment), (1996), ECtHR, Appl. No. 17/1995/523/609, §§ 6, and 19.

These approaches have been unanimously criticised in the academic literature,[29] by UNHCR[30] and EXCOM,[31] as well as by NGOs,[32] as legally irrelevant attempts to circumvent international obligations. The *non-refoulement* principle applies across the entire EU territory, including the 12 mile zone, irrespective of conflicting domestic legislation. In the case of France, this principle was upheld regarding the European Convention on Human Rights (ECHR) by the ECtHR judgment in the *Armuur* case.[33] One must agree with this since, according to Article 29 VCLT, all EU sovereign territory falls within the treaty's scope. Therefore, the 12 mile zone is covered by Article 2, paragraph 1, UNCLOS. Thus, the Australian and French models infringe the obligation under Article 29 VCLT to implement the Refugee Convention throughout the sovereign territory concerned.[34] Furthermore, they violate a principle of customary international law, stipulated in Article 27 VCLT,[35] that a state may not evade its international obligations by adopting conflicting domestic legislation. Lastly, legal deregulation would be inconsistent with the spirit and purpose of the Refugee Convention. The Convention's purpose would be circumvented if states were *de facto* able to control their sovereign borders at sea and not be subject to obligations applying on the mainland.[36]

The Refugee Convention's *non-refoulement* principle therefore applies, irrespective of domestic rules, within the 12 mile zone as well.

[29] A. Francis, above n. 11, 277; N. Kelley, 'International Refugee Protection. Challenges and Opportunities' 19 *IJRL* 401-39 (2007) at 422; M. O'Sullivan, 'Withdrawing Protection under Article 1 C(5) of the 1951 Convention: Lessons from Australia' 20 *IJRL* 586-610 (2008) at 609; T. Magner, 'A Less than 'Pacific' Solution for Asylum Seekers in Australia' 16 *IJRL* 53-90 (2004) at 75; Hathaway, *Rights of Refugees*, above n. 11, 321 and 172; Barnes, above n. 27, 69; Lauterpacht, Bethlehem, above n. 10, 111, § 67; Goodwin-Gill, McAdam, above n. 27, 253; Feld, above n. 27, l.c. Feld emphasises that they emerge 'at the latest' at this moment, which does not exclude the possibility of an earlier emergence, since this question is not addressed l.c.; also, R. Weinzierl, U. Lisson, *Border Management and Human Rights*, (Berlin, 2007), at 43; for a summary of the latter study, see, R. Weinzierl, '*Zugang zu internationalem Schutz – Zur Bedeutung der Menschenrechte an der gemeinsamen EU-Außengrenze*' in W. Benz, C. Curio, H. Kauffmann (eds.), *Von Evian nach Brüssel – Menschenrechte und Flüchtlingsschutz 70 Jahre nach der Konferenz von Evian*, (Karlsruhe, 2008), 62-84. For a general overview, see also, V. M. Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carrier's Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *EJML* 315-64.

[30] UNHCR, 'The Principle of *Non-Refoulement* as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 Jan. 1994, § 33.

[31] EXCOM, Conclusion No. 97, § (a) (i): 'The state within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons'.

[32] Refugee Council of Australia, Position Paper of 17 May 2006: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, § 6.

[33] *Amuur*, above n. 28, § 52.

[34] Hathaway, *Rights of Refugees*, above n. 11, 320 and following; Goodwin-Gill, McAdam, above n. 27, 253; A. Francis, above n. 11, 277; Barnes, above n. 27, 66, 69.

[35] Barnes, ibid., 68; Feld, above n. 27.

[36] Barnes, ibid., 69; see also, with reference to ECtHR case law concerning *Amuur*, Hathaway, *Rights of Refugees*, above n. 11, 321.

2.1.2 CAT

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT)[37] contains an explicit reference to *non-refoulement* in Article 3, paragraph 1. '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 subject to torture'. Here, it is necessary to refer to the arguments laid out in 2.1.1. The prohibition in Article 3, paragraph 1, CAT consequently applies throughout a state's sovereign territory, including the 12 mile zone, irrespective of any conflicting domestic rules.

2.1.3 ICCPR

Article 7, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR)[38] expressly prohibits cruel, inhuman or degrading treatment or punishment. Although the ICCPR does not explicitly refer to *non-refoulement*, this principle has been derived from the above-mentioned rule by drawing on the legal precedents established with regard to Article 3 ECHR.[39] The protection conferred by the treaty extends to all individuals within a contracting state's territory and jurisdiction, according to Article 2, paragraph 1. Consequently, here, too, it is necessary to refer to the arguments listed under 2.1.1. Thus, the *non-refoulement* in Article 7, paragraph 1, ICCPR applies, irrespective of any conflicting domestic rules, throughout the sovereign territory concerned, including the 12 mile zone.

2.1.4 ECHR

The wording of the European Convention on Human Rights (ECHR)[40] does not lead to a direct ban on deportation. Nevertheless, European Court of Human Rights (ECtHR) case law has consistently prohibited extradition, expulsion or deportation to states where the person concerned faces torture or inhuman or degrading treatment.[41] The liability of the state under Article 3 ECHR is based on the measure taken by the state party to terminate residence through expulsion.[42] Article 1 of the ECHR binds the

[37] BGBl. 1990 II 247.

[38] BGBl. 1973 II 1534.

[39] Nowak, CCCPR Commentary, Art. 7, § 21.

[40] BGBl. 2002 II, 1055.

[41] Consistent practice since *Soering v. UK* (Judgment), (1989), ECtHR, Appl. No. 14038/88, §§ 91 and following; in detail, R. Marx, *Handbuch zur Flüchtlingsanerkennung* (Neuwied, Berlin, 2006), § 39, at 190; additionally – although of less practical relevance – a ban on deportation comes into consideration if other ECHR rights are threatened, *Soering v. UK*, above, § 115.

[42] M. Wollenschläger, in *Handbuch der Europäischen Grundrechte* (Munich, 2006) § 17, para. 32, with further references; Marx, above n. 41, § 39, para. 154 with further reference to Commission and Court jurisprudence; R. Bank, '*Das Verbot von Folter, unmenschlicher oder erniedrigender Behandlung oder Strafe*' in R. Grote, T. Marauhn, *EMRK/GG Konkordanzkommentar* (Tübingen, 2006), Ch. 11, para. 106.

contracting parties in relation to 'all persons within their jurisdiction'. The subject of the *Amuur* decision[43] was a zone located on the mainland. However, a state's jurisdiction undisputedly extends over its entire territory that, according to Article 2, paragraph 1, UNCLOS, includes its territorial sea. Hence, the principle established in *Amuur* undoubtedly applies inside the 12 miles zone, especially since the arguments put forward in 2.1.1 also apply here. The ECHR *non-refoulement* principle is thus effective inside a state's entire territory including the 12 mile zone. This remains the case irrespective of any conflicting domestic rules.

2.2 International obligations beyond the European 12 mile zone

The question here is whether the treaties referred to also apply beyond the strip of territorial sea, that is, in the respective contiguous zone or on the high seas.

2.2.1 United Nations Convention Relating to the Status of Refugees

The current debate on legal policy has seen arguments for deregulation of the area beyond the 12 mile zone. For example, the German Federal Ministry of the Interior (*Bundesministerium des Innern*, BMI) has the backing of the German Federal Government[44] when it argues as follows: 'State practice and predominant legal opinion are that the principle of *non-refoulement* in the Geneva Refugee Convention does not apply on the high seas to persons alleging persecution, since the high seas are exterritorial'.[45]

The BMI and the Federal Government provide no source for the alleged state practice. Their statement gives a false impression, since EU member states do not all share the same legal opinion.[46] This is also the reason why the Human Rights Commission announced, in November 2006, that its planned study on International Maritime Law would address, among other issues, 'to what extent the Member States are bound by the principle of *non-refoulement* to provide protection when their vessels are executing interception, search and rescue measures in the most varied situations'.[47] State

[43] *Amuur*, above n. 28, § 52.

[44] Answer of the Federal Government to the brief question put by Members of Parliament Winkler, Beck, further delegates and the Bündnis 90/Die Grünen parliamentary group – Drs. 16/2542 –, BT-Drs. 16/2723 of 25 Sept. 2006, 6: 'The rules of German and European asylum and refugee law come into effect through territorial contact, i.e, at or within a country's borders. The same applies, according to predominant state practice, to application of the *non-refoulement* principle in the Geneva Convention'.

[45] BMI, *Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration*, Press release, Sept. 2005, at 2, available at <http://www.bmi.bund.de>; (last visited Mar. 2009): 'According to state practice and predominant legal conception the *non-refoulement* of the Refugee Convention does not apply on the high seas, which is exterritorial space, towards persons who assert reasons for persecution'.

[46] For an identical assessment in light of the cited documents, see, Weinzierl, Lisson, above n. 29, at 36.

[47] Commission of the European Communities, Communication from the Commission to the Council of 30 Nov. 2006, COM(2006) 733 final, § 34.

practice contains, at most, a few individual positions rejecting exterritorial application of the Refugee Convention. The international debate centres on the United States Supreme Court's decision in the *Sale v. Haitian Ctrs. Council* case. The Court ruled as lawful the controversial practice of US American patrol boats physically forcing Haitian boat refugees back out of US territorial waters,[48] stating that Article 33, paragraph 1, of the Refugee Convention does not have an extraterritorial effect.[49] Australian[50] case law, and some parts of British[51] case law, subsequently upheld this interpretation. Yet it must be emphasised that judgments by a few domestic courts should, at most, be discussed as aspects of comparative law, but cannot claim to be binding under international law.[52]

The statement that, in addition to the alleged state practice, predominant legal opinion rejects extraterritorial application of the *non-refoulement* principle from the Refugee Convention is one that neither the BMI nor the Federal Government has backed with evidence; in fact, it misrepresents international debate of more than a decade. A corresponding legal opinion is, at most, to be found in literature from the 1950s and 60s.[53] More recent literature,[54] however, agrees with

[48] Extensive background information, S. H. Legomsky, 'The USA and the Caribbean Interdiction Program' 18 *IJRL* 677 (2006) at 679 and following; Magner, above n. 29, 72.

[49] *Sale v. Haitian Ctrs. Council*, 509 US 155, 156 (USSC 1993).

[50] *MIMA v. Ibrahim*, [2000] HCA 55 (16 Nov. 2000), § 136, per Gummow J; *MIMA v. Khawar*, [2002] HCA 14 (11 Apr. 2002), § 42, per McHugh and Gummow JJ; similarly, *Applicant A & Anor v. MIEA & Anor*, [1997] HCA 4 (24 Feb. 1997), 142 ALR 331, 366, per Gummow J, who refers to *Sale* l.c., he does not, however, consider the exterritorial application of the *non-refoulement* principle, but the question of a right to asylum under the Refugee Convention, which he rejects.

[51] *Regina v. Immigration Officer at Prague Airport and Anor (Respondents) ex parte European Roma Rights Centre & Ors (Appellants)*, [2004] UKHL 55 (9 Dec. 2004), § 68, per Lord Hope, see also, Lord Bingham, § 17.

[52] Something else could only apply if either a *consistent* practice in the meaning of Art. 31 para. 3 lit. b VCLT is expressed, or such has become part of customary international law in the meaning of Art. 38 para. 1, Statute of the International Court of Justice. Yet, neither is the case for the combination in question.

[53] A. Grahl-Madsen, *The Status of Refugees in International Law, Volume II* (Leiden, 1966), 94; N. Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation* (1953, Reprint Geneva 1997), Art. 33, § 5; as far as the Supreme Court refers in *Sale*, above n. 49, 183, to Aga Khan, in (1976) 149 *Recueil des Cours* 287 (318), it misconceives that the right to asylum, which is discussed l.c. and regretfully declined, is different from the principle of *non-refoulement*; compare, G. Goodwin-Gill, 'The Haitian *Refoulement* Case: A Comment' 6 *IJRL* 103-9 (1994) at 109.

[54] Lauterpacht, Bethlehem, above n. 10, 110, § 62; Goodwin-Gill, McAdam, above n. 27, 244; Goodwin-Gill, above n. 53, 103 and following; Barnes, above n. 27, 68; C. Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea' (2003) 25 *HRQ* 741-77 at 751; A. Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15 *EJIL* 721-49 at 745; A. Fischer-Lescano, T.Tohidipur, '*Die europäische Grenzschutzagentur Frontex*' (2007) 5 *Europäisches Asyl- und Migrationsrecht, Beilage zum Asylmagazin* 19-28, 24; Legomsky, above n. 48, 687; S. Debenedetti, 'Externalization of European Asylum and Migration Policies', RSCAS Working Paper 2006, at 6 <http://www.iue.it/RSCAS/Research/>; Hathaway, *Rights of Refugees*, above n. 11, 336; Magner, above n. 29, 71; Weinzierl, Lisson, above n. 29, 56; not explicitly, but eventually probably identical, J. Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harv.Hum.Rts.J.*, 229-53 at 248, who criticises the decision in *Sale* as 'particularly stark and troubling'.

UNHCR,[55] EXCOM[56] and NGOs[57] that Article 33, paragraph 1 of the Refugee Convention binds the contracting states outside their territory as well. This opinion is upheld by parts of, to date inconsistent, British case law[58] and by Justice Blackmun in his Dissenting Opinion in *Sale*.[59] The Inter-American Commission on Human Rights, which found that United States practice towards Haitian boat refugees violated various rights of the Inter-American system,[60] shares UNHCR's opinion.[61]

Thus, the decisive factor cannot be the place where the person concerned and the acting state official are located. Rather, the only point at issue is whether the person concerned is under the control of state institutions or is affected by their actions.[62] There can be no place outside the country of origin of the person concerned where the Refugee Convention's *non-refoulement* principle does not apply – whether this be on a state's own territory, at its borders, beyond national borders, in transit zones or in

[55] UNHCR: 'Advisory Opinion on the Exterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' ('Advisory Opinion'), §§ 24 and following; 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' ('Background Note'), 18 Mar. 2002, § 18; above n. 30, § 30; 'UN High Commissioner for refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*' ('*Sale*'), printed in (1993) 32 *International Legal Materials* 1215 (1215); Amicus Curiae Brief of 21 Dec. 1992 submitted to the United States Supreme, cited in (1993) 32 *ILM* 1215 (1215); 'Comments on the Communication from the Commission to the Council and the European Parliament on the Common Policy on Illegal Immigration' (COM(2001) 672 final of 15 Nov. 2001), § 12; and, see also, UNHCR/IMO, 'Rescue at Sea – A Guide to Principles and Practice As Applied to Migrants and Refugees', 2006, 8: 'If people rescued at sea make known a claim for asylum, key principles as defined in international refugee law need to be upheld'.

[56] EXCOM, Standing Committee, 18th Meeting, 'Interception of Asylum Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach': UN doc. EC/50/SC/CRP.17 (9 June 2000), § 23: 'The principle of *non-refoulement* does not imply any geographical limitation'; in addition, EXCOM has repeatedly referred to situations in which *non-refoulement* exists independent of the presence of the persons concerned in the territory of the contracting state; thus it has assessed the turning back at the border in EXCOM, Conclusion No. 22 (XXXII) (1981), § II.A.2; No. 81 (XLVIII) (1997), § (h); and Conclusion No. 82 (XLVIII) (1997), § (d) (iii), as a violation, as well as the prevention of access to the territory of the state; compare, EXCOM, Conclusion No. 82 (XLVIII) (1997), § (d) (iii); Conclusion No. 85 (XLIX) (1998), § (q); and also, compare, the reference to the need for protection of stowaways on board of vessels, Conclusion No. 53 (XXXIX) (1981), § (1).

[57] HRW, 'By Invitation Only: Australian Asylum Policy', 40; Young, NGO Submission to UNHCR's Executive Committee, Standing Committee 5-7 July 2000, 'Statement of Wendy Young of the Women's Commission for Refugee Women and Children on behalf of the NGO Community'; European Council on Refugees and Exiles, 'Defending Refugees' Access to Protection in Europe', Dec. 2007, 20 and following.

[58] *European Roma Rights Centre & Ors v. Immigration Officer at Prague Airport & Anor* [2003] EWCA Civ 666 (20 May 2003), § 34, per Simon Brown LJ.

[59] Dissenting Opinion, Blackmun J, above n. 72, 190.

[60] *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am CHR,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), §§ 183-8.

[61] Ibid., § 157.

[62] A. Francis, above n. 11, 277; Lauterpacht, Bethlehem, above n. 10, 110, § 63 and 64; Goodwin-Gill, McAdam, above n. 27, 245; UNHCR, Advisory Opinion, above n. 55, § 43.

areas declared as international zones.[63] The United States Supreme Court's decision to the contrary has been criticised in exceptionally sharp terms[64] by advocates of the above approach as a purely politically motivated decision,[65] and rejected by them.[66]

Indeed, the approach outlined above is already supported by the wording of the Refugee Convention, which follows the English and French versions of Article 33 VCLT in conjunction with Article 46 of the Refugee Convention. The English version of Article 33 VCLT states: '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 (…)'. The formulation 'in any matter whatsoever' covers any imaginable action exposing the person concerned to the risk of persecution.[67]

Furthermore, in addition to the term 'expel', the related term 'return' is used. This latter must be given separate significance. The US Supreme Court also acknowledges this point, but circumvents it by arguing that 'return' only covers persons who were on the verge of entering state territory.[68] Such an assumption, though, runs counter to the common meaning of the term 'return'[69] which includes 'to send back'[70] or 'to bring, send, or put back to a former or proper place'.[71] The destination to which a person may not be returned is the sole geographical reference point. A geographical restriction regarding the place where this obligation emerges cannot be understood from the wording.[72] The Supreme Court does concede that it chooses a narrower than customary interpretation of the wording, contrary to Article 31 VCLT, yet justifies this by referring to the French meaning of the term. However, the court examined purely passive acts of border defence, but not the relevant actions of the US-American security forces on the high seas.[73] The Court's arguments are far from watertight and this

[63] Lauterpacht, Bethlehem, above n. 10, 111, § 67; Goodwin-Gill, McAdam, ibid., 246; Fischer-Lescano, Tohidipur, above n. 54, 25.

[64] Compare, Goodwin-Gill, above n. 53, 109: 'The Court has merely compounded the illegality, itself becoming a party to the breach'; Hathaway, *Rights of Refugees*, above n. 11, 337: 'Of all of the Court's Arguments, this is perhaps the most disingenuous'.

[65] Goodwin-Gill, McAdam, above n. 27, 247: 'essentially policy decision'.

[66] UNHCR, Advisory Opinion, above n. 55, § 28; Legomsky, above n. 48, 686 and following; Hathaway, *Rights of Refugees*, above n. 11, 336.

[67] Goodwin-Gill, McAdam, above n. 27, 246; Goodwin-Gill, above n. 53, 103; UNHCR, *Sale*, above n. 55; Legomsky, above n. 48, 688; Magner, above n. 29, 71; Weinzierl, Lisson, above n. 29, 56.

[68] *Sale*, above n. 49, 180.

[69] Hathaway, *Rights of Refugees*, above n. 11, 337.

[70] Oxford English Dictionary, Online-edition, <http://www.oed.com>, Return, III. c., last visited Mar. 2009; see also, Merriam-Webster Online Dictionary, Return, 3. a., www.m-w.com/cgi-bin/dictionary (last visited Mar. 2009).

[71] Merriam-Webster Online Dictionary, Return, 2.a., <www.m-w.com/cgi-bin/dictionary> (last visited Mar. 2009).

[72] UNHCR, Advisory Opinion, above n. 55, § 26 and following; Dissenting Opinion Blackmun J, above n. 72; Weinzierl, Lisson, above n. 29, 58.

[73] Above n. 68.

is shown by the fact that the French press used the term *refouler* to describe the actions in question.[74] '*Refouler*' is equated with '*repousser*'[75] (to push *back*, to drive *back*[76]) and '*pousser en arrière*'[77] (to push *back*,[78] to move back).[79]

This view is supported by teleological considerations. The convention is there to confer effective protection against human rights abuses in the country of origin. Any territorial restriction frustrates its aim.[80] Considerable weight can be attached to this argument for three reasons:

- First, a refugee's need of protection can be measured solely in terms of the danger of persecution in the state of origin. The emphasis on the victim's perspective has prevailed as the element determining interpretation whenever questions regarding refugee status have been disputed in recent years.[81] A consistent interpretation of the Refugee Convention must adopt the same perspective when interpreting the *non-refoulement* principle.
- Secondly, extraterritorial application is increasingly gaining recognition in other human rights treaties.[82] Any dynamic, human rights interpretation of the Refugee Convention[83] needs to be in accordance with such developments.[84]

[74] Compare, *Le Monde* of 31 May/1 June 1992, *Le bourbier hai'tien*; cited pursuant to Blackmun J in his Dissenting Opinion, *Sale*, above n. 49, 194; see also, Legomsky, above n. 48, 690.

[75] Collins Robert French Dictionary (New York, 30th ed. 2008), 453.

[76] *Langenscheidts Großwörterbuch Französisch-Deutsch* (Munich, 13th ed. 1990), 830.

[77] Above n. 75, 399, 30.

[78] Above n. 76, 59 and 747.

[79] UNHCR, Advisory Opinion, above n. 55, § 29; UNHCR, *Sale*, above n. 55, with reference to the amicus curiae letter submitted in the same proceeding.

[80] Ibid.

[81] Compare the emphasis on the victim's point of view as an argument against the requirement of a hostile motivation, at RSAA, Ref. App. No. 71427/99 (16 Aug. 2000), § 46; Hathaway, Foster, above n. 10, 468; S. S. Cook, 'Repairing the Legacy of *INS v. Elias-Zacarias*' (2002) 23 *Mich.J.Int'l L.* 223 at 243; von Thenen, above n. 11, 71; the victim's point of view is acknowledged as the decisive argument against the requirement for an inner coherence in the interpretation of certain social groups, compare, *Islam v. SSHD and Anor, Ex Parte Shah, R v.*, [1999] UKHL 20 (25 Mar., 1999), printed in 11 *IJRL* 496 (1999) at 511, per Lord Hoffmann; ultimately, the victim's point of view is one of the decisive arguments against the public character of the persecution, as is traditionally demanded, compare, RSAA, Ref. App. No. 71427/99 (16 Aug. 2000), § 63; P. Mathew, J.C. Hathaway, M. Foster, 'The Role of State Protection in Refugee Analysis: Discussion Paper No. 2 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002' 15 *IJRL* 444-60 (2003) at 451.

[82] Compare, below 2.2.2, 2.2.3, 2.2.4 and 2.3.2, 2.3.3 and 2.3.4, Human Rights Commission: *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am CHR,OEA/Ser.L/V/II.95 Doc. 7 rev., 550 (1997), § 167.

[83] Against this background, the reference of the House of Lords and the US Supreme Court to Grahl-Madsen (compare, *Prague Airport*, above n. 51, § 70, per Lord Hope; *Sale*, above n. 49, 182) and to Robinson (UKHL, § 17, per Lord Bingham; USSC) is not as persuasive. Both authors had argued in favour of the cited theses for several decades (Grahl-Madsen 1966, Robinson 1953), until the consensus under human rights law prevailed. Whether they would do so again thus may be doubted.

[84] Explicit reference to the Refugee Convention and the Human Rights Contracts as interacting systems, in UNHCR, Advisory Opinion, above n. 55, § 34; Goodwin-Gill, above n. 53, 105; see also, with extensive presentation of the according approaches of the HRC and the ECtHR, Lauterpacht, Bethlehem, above n. 10, 110 and following, §§ 64; Goodwin-Gill, McAdam, above n. 27, 244 and following; Barnes, above n. 27, 68; Fischer-Lescano, Tohidipur, above n. 54, 24; Goodwin-Gill, above n. 53, 103; Roberts, above n. 54, 745; Hathaway, *Rights of Refugees*, above n. 11, 339.

- Thirdly, the opposing view would provide contracting states with the opportunity to circumvent their international commitments by shifting *de facto* border controls outside their territorial waters. Thus, states acting in bad faith would gain a possibility of thwarting the Refugee Convention's aims.

Systematic considerations support extraterritorial application. The US Supreme Court actually refers to Article 33, paragraph 2, of the Refugee Convention in *Sale*. This paragraph states that a person posing a severe threat to the general public of 'the country in which he is' cannot invoke paragraph 1 of this same provision. Thus, Article 33, paragraph 1, of the Refugee Convention only refers to persons on state territory.[85] However, this objection is also groundless. Firstly, Article 33, paragraphs 1 and 2, of the Refugee Convention have an exceptional relationship to each other. The described approach is methodically wrong, taking the exception to infer the rule.[86] Secondly, no account is taken of the fact that the two provisions pursue different purposes.[87] The exception in paragraph 2 refers to the refugee's danger to the community. Yet the danger to the host country cannot emerge until the applicant is actually in the country concerned.[88] Given such danger, Article 33, paragraph 2, of the Refugee Convention is to be regarded as a concession to state sovereignty, a concession that, however, cannot apply on the high seas. Thirdly, the convention contains explicit rules for situations where legal consequences are only triggered by residence within a state's territory. These are precisely formulated and distinguish between mere presence[89] and legitimate residence in the state's territory.[90] Conversely, states are banned from reading geographical restrictions into rules of the Convention containing no such limitations.[91]

Another argument often used against exterritorial application is that it would be tantamount to a right to territorial asylum. Yet, such a right is not included in the Refugee Convention.[92] This argument is basically correct,

[85] *Sale*, above n. 49, 179 and following.

[86] Compare, the Dissenting Opinion Blackmun J, above n. 72, 194: 'nonreturn is the rule, the sole exception (…) is that a nation endangered by a refugee's very presence may "expel or return" him to an unsafe country if it chooses'.

[87] UNHCR, Advisory Opinion, above n. 55, § 28.

[88] UNHCR, ibid.; Legomsky, above n. 48, 689; Hathaway, *Rights of Refugees*, above n. 11, 336; Dissenting Opinion Blackmun J, above n. 72, 194.

[89] Art. 2: 'in which he finds himself'; Art. 4: 'refugees within their territories'; Art. 27: 'any refugee in their territory'.

[90] Art. 15, 17 I, 19 I, 21, 23, 24 I, 28 I: 'lawfully staying'; Arts. 18 and 32: 'Refugee lawfully in their territory'; Art. 26: 'refugees lawfully in its territory'.

[91] UNHCR, Advisory Opinion, above n. 55, § 28.

[92] *Applicant A & Anor v. MIEA & Anor*, [1997] HCA 4 (24 Feb. 1997), 142 ALR 331, 366, per McHugh J; *Prague Airport*, above n. 51, § 17, per Lord Bingham, referring to *MIMA v. Ibrahim*, above n. 50, § 142, per Gummow J; compare, l.c. in this meaning also §§ 137 and following; compare also, the view of the US Government in *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am CHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), § 72.

but fails to recognise that the right to asylum is different from the *non-refoulement* principle.[93]

Lastly, in the *Sale* case, the Supreme Court draws upon drafting history,[94] as parts of British case law have done.[95] The historical interpretation is still subsidiary, according to Article 32 VCLT.[96] Thus, it may have no bearing on the conclusion presented here. Moreover, the Supreme Court rests its decision purely upon the statements of two delegates,[97] who contradicted the contributions of a third delegate,[98] that, therefore, do not prove an Assembly consensus.[99] Thus, it should come as no surprise that a very different view is taken of the drafting history by UNHCR,[100] and that the relevant literature[101] can be described as equivocal, to say the least. However, there is no need for a conclusive evaluation of this controversy since Article 32 VCLT renders it legally irrelevant. The *non-refoulement* referred to in Article 33, paragraph 2, of the Refugee Convention therefore applies exterritorially.

2.2.2 CAT

The body given monitoring responsibility by the Convention, the UN Committee against Torture, has confirmed the exterritorial scope of Article 3, paragraph 1, CAT vis à vis the Guantánamo inmates.[102] In addition, the Committee has stated that rules of the convention concerning the establishment of jurisdiction apply extraterritorially if the State party exercises effective control over an area or a person.[103] In the English version of the CAT, English being one of the official drafting languages,[104] the terms 'expel, return ("*refouler*")' are used in addition to the term 'extradite'. Thus, the English version uses the same terms as the prohibition

[93] Compare, Goodwin-Gill, above n. 53, 109; see also, 4.1.

[94] *Sale*, above n. 49, 184 to 187; but the Supreme Court admits a subsidiary application, compare, 187.

[95] *Prague Airport*, above n. 51, § 17, per Lord Bingham.

[96] Compare 1.; also, Dissenting Opinion, Blackmun J, above n. 72, 194 and following; Weinzierl, Lisson, above n. 29, 59.

[97] *Sale*, above n. 49, 184 and following.

[98] Compare the statement of the US delegate Henkins, according to which solely the risk in the country of origin is decisive, ECOSOC, Ad Hoc Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR. 20 (1 Feb. 1950), § 54 and following; printed in L. Takkenberg, C. L. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, *Vol. I* (Amsterdam, 1989), 290 and 295.

[99] Legomsky, above n. 48, 690; Goodwin-Gill, above n. 53, 104.

[100] UNHCR, Advisory Opinion, above n. 55, §§ 30 and following.

[101] Dissenting Opinion, Blackmun J, above n. 72, 194; Hathaway, *Rights of Refugees*, above n. 11, 337.

[102] CAT, Concluding Observations: United States of America: UN doc. CAT/C/USA/CO/2 (25 July 2006), § 20.

[103] CAT, ibid., § 15.

[104] Compare, Art. 33 CAT.

in Article 33, paragraph 1, of the Refugee Convention. Hence, the above-mentioned[105] arguments may be used in full in order to justify this particular approach. Furthermore, the wording refers to acts of expulsion, extradition and deportation and does not require jurisdiction to be established. This also indicates extraterritorial application. Consequently, Article 3, paragraph 1, CAT applies exterritorially.

2.2.3 ICCPR

The literature[106] also assumes that the *non-refoulement* principle in Article 7, clause 1, ICCPR applies exterritorially. It thus agrees with the Human Rights Committee, which is the body set up to monitor implementation of the Covenant. As early as 1981 the Committee stated that, in order to establish jurisdiction, as required under Article 2, paragraph 1, ICCPR, what counted was not the place where the state's acts took place, but whether a human rights violation resulted from the relationship between state and individual.[107] In 2004, the Committee emphasised this point in General Comment No. 31, stating that the sole relevant consideration is whether a person is under the state party's jurisdiction or effective control; place is not relevant.[108] Accordingly, Article 7, clause 1, ICCPR also applies exterritorially.

2.2.4 ECHR

According to most of the literature, the *non-refoulement* principle in the ECHR applies beyond the 12 mile zone.[109] The ECtHR has repeatedly examined the ECHR's exterritorial scope, as has the European Commission of Human Rights. However, application of the *non-refoulement* principle has not been the subject of any judgment.

The ECtHR judgments are strongly case-related. Bearing that in mind, this article will briefly outline general developments in court case law before moving on to some specific judgments and examining the conclusions that may be drawn. Judgments always focus on whether the persons concerned

[105] Compare, above 2.2.1.

[106] R. Lawson, 'Life after Bancovic: On the Extraterritorial Application of the European Convention on Human Rights' in F. Coomans, M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp, 2004) 83-123 at 93; Fischer-Lescano, Tohidipur, above n. 54, 24.

[107] Human Rights Committee, *Delia Saldias de Lopez v. Uruguay*, 'Communication No. 52/1979': UN doc. CCPR/C/OP/1 (29 July 1981), §§ 12.1.-12.3.; see also, Human Rights Committee, 'Communication No. 106/1981: Uruguay': UN doc. CCPR/C/18/D/106/1981 (31 Mar. 1983), § 5.

[108] Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant': UN doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), § 10.

[109] Goodwin-Gill, McAdam, above n. 27, 245; Fischer-Lescano, Tohidipur, above n. 54, 24; Lauterpacht, Bethlehem, above n. 10, 111, § 66.

are subject to the acting state's jurisdiction, as defined in Article 1 ECHR. The former European Commission of Human Rights acknowledged, in various decisions, that extraterritorial ECHR application is basically possible. In its view, 'Within their jurisdiction' in Article 1 ECHR is not to be understood as restricted to a given state's territory. It depends on whether a state actually exercises power over a person and thereby affects the person concerned or his or her possessions. If this is the case, the state is responsible; whether a given event occurs inside or outside the state's territory is irrelevant.[110] The ECtHR has confirmed this same point in many cases using near-identical wording and adding no further restrictions.[111] Furthermore, in the *Loizidou*[112] case, and other subsequent cases,[113] the Court derived state responsibility not only from effective control over persons, but also from the fact that military occupation, whether legal or illegal, means that the state exercises effective territorial sovereignty over both its own and foreign territory. The ECtHR laid down jurisdictional restrictions in the *Behrami & Saramati*[114] decision of May 31 2007 regarding missions under the United Nations' aegis. If states transfer jurisdiction to international organisations – and this is exercised outside the state concerned – as in operations to be decided on later during the Kosovo peacekeeping mission, then the ECtHR is not competent. In the case of measures executed by cooperating European border control bodies, however, there is no such transfer of jurisdiction to international organisations. On the one hand, the functional territorial reference point for border control measures is different from that of peacekeeping missions. On the other hand, neither the FRONTEX regulation nor Regulation 863/2007/EC covering Rapid Border Intervention Teams (RABITs) provide for a complete transfer of jurisdiction, as defined by ECtHR case law. Therefore, for European border defence measures, the fundamental principle continues to be that the ECHR applies exterritorially when jurisdiction is exercised.

In 2001, this fundamental principle of exterritorial ECHR applicability was made subject to certain restrictions by the strongly criticised[115] *Banković* decision. The ECtHR did not regard the bombing of Yugoslavia by several contracting states to be an exercise of jurisdiction. The court now stressed

[110] *Cyprus v. Turkey*, (1975), ECtHR, Appl. Nos. 6780/74 and 6950/75, Decisions and Reports 2 (1975), 125, 136; *Hess v. UK* (Judgment), (1975), ECtHR, Appl. No. 6231/73, Decisions and Reports 2 (1975), 72, 73; *W.M. v. Denmark* (Judgment), (1992), ECtHR, Appl. No. 17392/90, § 2.

[111] *Stocké v. Germany* (Judgment), (1991), ECtHR, Appl. No. 11755/85, § 166; *Drozd and Janousek v. France and Spain* (Judgment), (1992), ECtHR, Appl. No. 12747/87, § 91.

[112] *Loizidou v. Turkey*, (1995), ECtHR, Appl. No. 40/1993/435/514, § 62.

[113] *Cyprus v. Turkey*, (Judgment), (2001), ECtHR, Appl. No. 25781/94, § 77; *Dĳavit An v. Cyprus* (Judgment), (2003), ECtHR, Appl. No. 20652/92, §§ 18-23.

[114] *Behrami v. France & Saramati v. France, Germany & Norway*, (Judgment), (2007), Appl. No. 78166/01 & 71412/01 § 151.

[115] Compare, M. Breuer, '*Völkerrechtliche Implikationen des Falls Öcalan*' (2003) *EuGRZ* 449-54 at 450; Lawson, above n. 106, 83.

the relationship between rule and exception, Article 1 ECHR being the rule for a territorial concept of jurisdiction. Exterritorial ECHR application could only be the exception, acceptable in particular circumstances for special cases.[116] The grounds given in the *Banković* case have the principle of territoriality as their starting point, each state having unlimited sovereignty inside its territory.[117] Here, the ECtHR emphasised that one state's exterritorial exercise of sovereignty, within the meaning of Article 1 ECHR, is subordinate to the territorial sovereignty of the other state. Furthermore, one state may, in principle,[118] only exercise jurisdiction on foreign territory belonging to another state if the latter allows it to do so.[119]

Although this seemed to represent a severe restriction of exterritorial scope, the court has repeatedly accepted exterritorial application even after the *Banković* case.[120] The decision, therefore, can on no account be cited as a general argument against exterritorial application. Rather, the Court's judgment should be regarded as open to further development.[121] This applies all the more as the Court confirmed its preceding case law in principle during *Banković*,[122] non-fulfilment being deemed purely due to the special circumstances of the case.[123] The reasoning in *Banković*, in particular, is based upon the principle of territoriality in a manner that can claim application solely on foreign territory and not on the high seas. Since there can be no foreign territorial sovereignty on the high seas, the conflict which the ECtHR seeks to avoid with its interpretation of Article 1 ECHR cannot emerge.

Having described the background, this article will now examine what conclusions may be drawn from existing case law regarding exterritorial scope. The schema followed is taken from Ruth Weinzierl's study, published by the German Institute for Human Rights.[124]

(a) Maritime flag sovereignty as jurisdiction

The ECtHR explicitly affirms the exterritorial effect of the ECHR aboard seagoing vessels.[125] One must agree with this as a direct consequence of Article 92 UNCLOS, which defines what is known as flag

[116] *Banković*, above n. 18, §§ 59 and following.

[117] K. Doehring, *Völkerrecht* (Heidelberg, 2 ed. 2004), 808.

[118] As exception are phrased situations of occupation l.c.

[119] *Banković*, above n. 18, §§ 60 and following; for further arguments, compare, §§ 61-75.

[120] *Öcalan v. Turkey* (Judgment), (2003), ECtHR, Appl. No. 46221/99, § 93; *Öcalan v. Turkey* (Judgment), 2005 (Grand Chamber), Appl. No. 46221/99, § 91; identical, but dismissed due to the facts, *Issa & Ors v. Turkey* (Judgment), (2004), ECtHR, Appl. No. 31821/96, § 71 and following.

[121] See also, Goodwin-Gill, McAdam, above n. 27, 246.

[122] *Banković*, above n. 18, §§ 67-73.

[123] Ibid., §§ 74 and following.

[124] Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*; also, Weinzierl, Lisson, above n. 29.

[125] *Banković*, above n. 18, § 73, under reference to customary law and Treaty Obligations; also already the Commission, compare, *Cyprus*, above n. 110.

sovereignty. Although sovereignty of this kind cannot be equated with territorial sovereignty,[126] it does provide functional jurisdiction, so that a state has jurisdiction over any vessel sailing under its flag. Thus, the legal system applying on board is that of the flag state.[127] The ship's crew, therefore, is bound by the ECHR vis à vis every person on board.[128]

However, it is questionable whether flag sovereignty means that crew members on board are also bound by the ECHR towards people in the water or on board other vessels. To date, there has been no ECtHR decision regarding these particular circumstances.[129] Two arguments speak in favour of taking flag sovereignty as the defining element for establishing jurisdiction in such cases as well. Firstly, it would be contradictory if the crew members on board were deemed obliged by Art 92 UNCLOS to comply with the ECHR and the persons affected by their actions were not deemed ECHR beneficiaries. Secondly, in expulsion and deportation cases, it is acknowledged that the act of expulsion or deportation starting within a given state's own territory is the connecting factor; that is the case even if the individuals entitled to protection under the ECHR have their rights violated outside that state's territory, that is, in the state of destination only.[130] Consistent ECHR interpretation, therefore, requires the act of *refoulement* resulting from a state's flag sovereignty to be the connecting factor, even if a person's rights are violated on the high seas outside the flag sovereignty concerned.[131]

Maritime flag sovereignty consequently brings with it Article 1 ECHR jurisdiction over any person on board, in the water or on board other vessels.

(b) Effective control over a person as jurisdiction

In various decisions subsequent to *Banković* the Court ruled in favour of exterritorial application because there was effective physical control over a person.[132] Effective control on the high seas can result when state vessels use their physical presence and strength in order to make smaller, more vulnerable or less manoeuvrable vessels move back or return to ports in the

[126] Compare, D. Wiefelspütz, '*Bewaffnete Einsätze der Bundeswehr auf See*' (2005) 4 *NZWehrr* 146-63 at 154.

[127] V. Röben, in R. Grote, T. Marauhn, *Konkordanzkommentar EMRK/GG*, Ch. 5, para. 89; B. H. Oxman, 'Jurisdiction' in Bernhardt, *EPIL*, Vol. II, Jurisdiction of States, 55-60 at 58.

[128] Identically, Weinzierl, Lisson, above n. 29, 62.

[129] The ECtHR decided upon a case, in 2001, in which an Albanian ship was deliberately rammed by an Italian ship beyond the 12 mile zone; compare, ECtHR, *Xhavara & Ors v. Italy and Albania* (Judgment), (2001), ECtHR, Appl. No. 39473/98. However, the Court refused admissability due to non-exhaustion of national remedies, without addressing Art. 1; the ECtHR explicitly refers to this in a later decision, *Banković*, above n. 18, § 81.

[130] Wollenschläger, above n. 42, § 17, para. 32, with further references; Marx, above n. 41, § 39, para. 154, with further references from court rulings of the Commission and the Court; R. Bank, above n. 42, Ch. 11, para. 106.

[131] See also, Weinzierl, Lisson, above n. 29, 62.

[132] *Öcalan* judgments, above n. 120.

country of origin or transit country by threatening or exerting physical force. In such cases, jurisdiction is approved on the basis of effective control over the persons concerned.[133]

(c) Competence and control as jurisdiction

The ECtHR confirmed in the *Banković* case that whether the acts in question could be attributed to a contracting state depended on whether the state body concerned was exercising its assigned state powers and acting both on behalf and under the control of the contracting state.[134] Both conditions are regularly met at sea by state border control authorities. Therefore, grounds for jurisdiction exist.[135]

(d) Fiction of jurisdiction resulting from the circumvention ban and the obligation to prevent zones with no human rights

In the *Issa* case, the ECtHR formulated a ban on circumventing human rights for exterritorial action. Article 1 ECHR should be interpreted as prohibiting states from taking action within the territory of another state that is not permitted on their own territory.[136] In the same case, and in other judgments, the Court justified the exterritorial application requirement on the basis that a human rights vacuum should be avoided. This was with reference to Turkish security force activities in North Cyprus. The Court considered that the ECHR system was in jeopardy since the Cypriot government, a contracting state of the ECHR, was unable to meet its human rights obligation.[137] If both approaches are combined, then, firstly, the forward displacement of border controls to exterritorial areas would be considered a circumvention ban violation, should the state in question intend to avoid ECHR obligations applying within its own territory and borders.[138] Secondly, the contracting state would be given the opportunity to move a situation to an extra-legal sphere, instead of remaining inactive until legally bound to deal with the issue inside its own territory or borders. The state would thereby be acting in bad faith since it would create the very legal vacuum that the ECtHR sought to avoid, at least concerning the specific situation. Furthermore, *Banković* cannot be understood as a spatial restriction to the effect that the requirement to prevent a human rights vacuum only applies on other ECHR contracting states' territory. The ECtHR implicitly clarified this matter in the *Issa* case when it examined exterritorial obligations applying to Turkish state agencies on Iraqi territory.[139] The circumvention ban together with the need to prevent spaces

[133] Compare, Weinzierl, Lisson, above n. 29, 64.

[134] *Banković*, above n. 18, § 69, under reference to *Drozd and Janousek v. France and Spain* (Judgment), (1992), ECtHR, Appl. No. 12747/87, § 91.

[135] Also, Weinzierl, Lisson, above n. 29, 63.

[136] *Issa & Ors v. Turkey* (Judgment), (2004), ECtHR, Appl. No. 31821/96, § 71.

[137] *Cyprus v. Turkey* (Judgment), (2001), ECtHR, Appl. No. 25781/94, § 78.

[138] Also, Weinzierl, Lisson, above n. 29, 64.

[139] *Issa & Ors v. Turkey* (Judgment), (2004), ECtHR, Appl. No. 31821/96, § 71.

devoid of human rights therefore constitute grounds for presumption of jurisdiction if states displace immigration controls to areas outside their territory.

(e) Functional territorial reference point for border control measures as jurisdiction

Border control measures, wherever they are carried out, have a functional territorial reference point since they are linked to the enforcement of state jurisdiction. This factually substantiated territorial reference significantly relativises exterritoriality and means that sovereign measures linked to border control activities fall within the ECHR's scope.[140]

2.2.5 Interim conclusion

For the above-mentioned reasons it can be concluded that the ECHR *non-refoulement* principle applies to all migration control measures on the high seas and is binding on the EU member states when they carry out border controls.[141]

2.3 International obligations inside origin and transit countries' 12 mile zone

2.3.1 United Nations Convention Relating to the Status of Refugees

A differentiated approach is required in order to evaluate the application of *non-refoulement* within the 12 mile zone of the country of origin. There is broad[142] consensus that the people benefiting from Article 33, paragraph 1, of the Refugee Convention are the same ones covered by Article 1 A (2) Refugee Convention.[143] It is undisputed, however, that only individuals outside their state of nationality can be refugees as defined in

[140] *Xhavara & Ors v. Italy & Albania* (Judgment), (2001); ECtHR, 39473/98; European Commission of Human Rights, 14 July 1977, 7289/75 and 7349/76 (X & Y/Switzerland), 73; on the substantial reference in the context of exterritorial application of European primary law, see, ECJ, Case C-214/94, [1986] para. 14.

[141] Also, Weinzierl, Lisson, above n. 29, 66.

[142] Admittedly, Lauterpacht, Bethlehem, above n. 10, 127 and following, do have a different opinion, wanting to extend *non-refoulement* to cases of human rights violations that are not connected to a discrimination criterion, but compare the critical examination of this approach in Hathaway, *Law of Refugee Status*, above n. 1, 304; compare l.c., 307, see also, for persuasive arguments against the position of the USSC, *INS v. Cardoza-Fonseca*, 480 US 421, 444 (USSC, 9 Mar. 1987), which is too restrictive.

[143] Goodwin-Gill, McAdam, above n. 27, 232; Hathaway, *Law of Refugee Status*, above n. 11, 304; EXCOM, Conclusion No. 6 (XXVIII) (1977), § (c); No. 79 (XLVII) (1996), § (j); No. 81 (XLVII) (1997), § (i); No. 82 (XLVII) (1997), § (i); *Sivakumaran v. SSHD*, [1987] UKHL 1 (16 Dec. 1987), [1988] 1 All ER 193, 202 and following, per Lord Goff; *M38/2002 v. MIMIA* [2003] FCAFC 131 (13 June 2003), § 38, per Goldberg, Weinberg and Kenny JJ; *R. v. SSHD, ex parte Adan*, [1999] 1 AC 293 (UKHL, 2 Apr. 1998), 301, 306, 312, per Lord Lloyd of Berwick, Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead; *AG v. Zaoui*, Dec. No. CA20/02 (NZ CA, 30 Sept. 2004), § 36; *European Roma Rights Centre*, above n. 58, § 31, per Simon Brown LJ.

Article 1 A (2) Refugee Convention.[144] Thus, literature[145] and state practice[146] rightly say that a *non-refoulement* infringement can only occur if the person concerned is outside his or her state of origin. When assessing migration across the Mediterranean, it must be borne in mind that people crossing it can be divided into two categories. Members of the first category are from a coastal state and are still within its 12 mile zone. Thus, measures taken towards members of this category are not subject to Article 33 obligations.[147] Members of the second category, on the other hand, are inside the 12 mile zone of a state that is not their country of origin, but a transit country. Consequently, the Refugee Convention is legally binding here, in accordance with the principles described above.[148] However, it is to be assumed that measures taken by a state towards groups will often involve persons from both categories. Additionally, a person's citizenship is not immediately apparent at sea, administrative procedures to identify citizenship not yet having been completed. Thus, within the 12 mile zone of transit states and states of origin the assumption must be that the *non-refoulement* principle in Article 33, paragraph 1, of the Refugee Convention applies, an assumption that can only be disproved at a later stage of proceedings.

2.3.2 CAT

All the arguments outlined above[149] can be used in full vis à vis the CAT. The CAT applies exterritorially.

2.3.3 ICCPR

The case of individuals within the 12 mile zone of their country of origin shows particularly clearly how tightly refugee and human rights protection interlock. Article 12, paragraph 2, ICCPR stipulates: 'Everyone shall be free to leave any country, including his own'. This codification of the right to leave a country already found in customary international law plugs the gap remaining theoretically in Article 33, paragraph 1, of the Refugee Convention. Literature[150] and the Human Rights Commission[151] have rightly pointed out that arbitrary exit prevention by immigration

[144] Compare, stateless persons who are beyond the country in which they have their habitual residence.

[145] Hathaway, *Law of Refugee Status*, above n. 11, 307.

[146] *European Roma Rights Centre*, above n. 58, § 31, per Simon Brown LJ; the UKHL in the same case as well, [2004] UKHL 55 (9 Dec. 2004), § 18, per Lord Bingham.

[147] Hathaway, *Law of Refugee Status*, above n. 11, 309; Weinzierl, Lisson, above n. 29, 59.

[148] Compare, above 2.2.1.

[149] Compare, above 2.2.2.

[150] Hathaway, *Law of Refugee Status*, above n. 11, 309 and following; Weinzierl, Lisson, above n. 29, 68.

[151] HRC, 'General Comment No. 27: Freedom of Movement (Art.12)': UN doc. CCPR/C/21/Rev.1/Add.9 (2 Nov. 1999), § 10.

authorities in the country of origin constitutes a possible infringement of Article 12, paragraph 2, ICCPR. The state agencies involved are thus forbidden from arbitrarily curtailing freedom of exit. Restrictions have to be weighed against Article 12, paragraph 3, ICCPR, which lays down the need to protect national security, public order (*ordre public*), public health, morals or the rights and freedoms of others as necessary prerequisites.[152] Following on from this, shared responsibility for the arbitrary prevention of exit from countries of origin and transit ensues from Article 16 of the ILC Draft Articles on Responsibility of States for internationally wrongful acts.[153] The Draft Articles codify customary international law and classify aiding or assisting an internationally wrongful act as an internationally wrongful act itself and subject to the legal consequences of Article 47 (ILC Draft Articles).

2.3.4 ECHR

With regard to the ECHR, all the arguments presented above[154] apply in full. Even though there is competing state territorial jurisdiction for measures taken in third countries' territorial waters, the *Banković* exception does not apply since border control measures are always territorially linked to the member states.

2.4 Interim conclusion: Common responsibility for compliance with international law

Exit rights, *non-refoulement* and the relevant procedural law apply to all migration control measures. European border control officials must adhere to the relevant legal standards if they take measures:

- within a state's territorial sea,
- in the contiguous zone,
- on the high seas,
- or, in the coastal waters of non-European coastal states.

The border control bodies are legally bound, not least because their activities have a functional territorial reference point and thus actually relate to sovereign territory. Turning back, escorting back, preventing the continuation of a journey, towing back or transferring to non-European coastal states all constitute an exercise of jurisdiction requiring international human and refugee rights to be upheld.

[152] For details, see, Harvey and Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' 19 *IJRL* 1 (2007).
[153] A/RES/56/83, 12 Dec. 2001.
[154] Compare, above 2.2.4.

These same rules continue to be legally binding when responsibility under international law is transferred to African coastal states by means of operational cooperation and forward displacement of immigration controls. Thus the ECtHR decided in the *Xhavara* case that Italy bore international responsibility for border control measures taken by Italian government agencies on the high seas and in Albanian coastal waters while implementing a bilateral agreement between Italy and Albania.[155] In this particular case, a boat carrying Albanian refugees sank after a collision with an Italian military vessel. The Court decided that Italy could not shirk its international responsibility by contracting out the forward displacement of border control measures.

The forward displacement and cooperative exercise of migration controls in no way signify that international obligations have ceased to apply; rather they constitute the moment when international responsibility begins. If EU member states, for example, jointly carry out coastal patrols with third states and these patrols have been moved to the latter's coastal waters, then joint responsibility is established under international law. This means that the states are jointly and severally responsible and must take the necessary organisational measures to ensure that those involved in any given operation observe exit rights, *non-refoulement* and the procedural law concerned.[156] During joint operations, therefore, the obligation exists to ensure, if necessary by means of active measures, that all state bodies involved observe the rules of international law.[157] The violation of such protective obligations constitutes a breach of international law. A breach of this kind also occurs if European states aid and assist a violation of international law. Hence, Article 16 of the ILC Codification, which systemises the applicable customary international law, reads as follows:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

Aiding and assisting can occur if infrastructure, technical utilities or funds are made available, but also if supportive political statements are made. Support for third states infringing exit rights or *non-refoulement* falls within European states' international responsibility if it is foreseeable for those

[155] *Xhavara & Ors v. Italy & Albania* (Judgment), (2001), ECtHR, 39473/98.

[156] Weinzierl, Lisson, above n. 29, 70; compare, 'Comment of the ILC on codification of State Responsibility' (A/RES/56/83, 12 Dec. 2001), Art. 47, 314.

[157] In the Matthews case, the ECtHR has similarly stated extensive duties to protect when measures are executed jointly by several states and has established in such a case (in the case at issue: conclusion of an agreement) that joint responsibility under international law arises, *Matthews v. United Kingdom*, (1999), ECtHR 24833/94, cypher 31.

European states that the third states they support do not meet international migration control standards.

3. Obligations originating in European law

European law is also binding on border control bodies vis à vis human and refugee rights. Here, a distinction must be drawn between primary and secondary law.

3.1 European primary law

European primary law includes, in particular, the Founding Treaties. Particular reference should be made to Article 63.1 TEC; this stipulates that secondary law adopted by the EC must be concordant with the Refugee Convention and other relevant treaties. Thus, the EC is bound under primary law to abide by the treaties mentioned within the EC.[158] Therefore, just as the member states are bound in terms of domestic implementation, so the EU is bound both legislatively and administratively by the above-mentioned treaties when adopting acts of secondary law. Thus, all the above-named international obligations apply and are legally binding under European primary law.

The Charter of Fundamental Rights of the European Union (CFR) also contains a European law reference to obligations under international law. Article 18 CFR reads: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in concordance with the Treaty establishing the European Community'. In its most recent case law, the ECJ refers to the CFR as one of the sources of fundamental legal principle it draws on in order to develop European fundamental rights.[159] Thus, the right to asylum is included among the Community's fundamental rights as part of the dynamic process updating European fundamental rights protection. This regulation, as well as Article 19 CFR, which prohibits collective expulsions (paragraph 1) and refers to

[158] R. Bank, C. Hruschka, '*Änderungen im Asylverfahren durch den Entwurf des Änderungsgesetzes zum Zuwanderungsgesetz aus der Sicht des Flüchtlingsrechts*' in Barwig, Beichel-Bendetti, Brinkmann (eds.), *Perspektivwechsel im Ausländerrecht?*, (Baden-Baden, 2007), 620-44 at 622; W. Weiss, Art. 63 EU, in Streinz, *EUV/EGV*, para. 6; B. Gerber, *Die Asylrechtsharmonisierung in der Europäischen Union* (Frankfurt/Berlin/Bern/Brussels/New York/Oxford/Vienna, 2004) 119; T. Wiedmann, in Schwarze, *EU-Kommentar* (Baden-Baden, 2000), Art. 63, para. 5; T. Löhr, '*Die Qualifikationsrichtlinie – Rückschritt hinter internationale Standards?*' in R. Hofmann/T. Löhr (eds.), *Migrationspolitik nach dem Amsterdamer Vertrag* (Baden-Baden, 2008), 47-98; M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' in 19 *IJRL* 601-29 (2006) at 622; E. Feller, Remarks, 'Public Hearing on the Future Common European Asylum System', 20 *IJRL* 216-20 (2008) at 216.

[159] ECJ, case C-432/05, Unibet, [2007] ECR I-2271 para. 37; ECJ Case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3633 para. 46; see also, EC, Case T-54/99, *Maxmobil/Kommission*, [2002] ECR II-313, para. 48, 57.

non-refoulement (paragraph 2), creates an obligation for European border authorities to provide active protection.[160] Article 51 CFR, which regulates the CFR's scope, does not take territory into account, only the authority responsible.[161] There is no reason why consideration of the right to asylum under community law, the ICCPR as a source of fundamental legal principle[162] and the reference in Article 6, paragraph 2, TEU to the ECHR should be restricted to substantive law. Rather, the basic principles of exterritorial application also rank among the legal norms that the ECJ must take into consideration for European protection of fundamental rights. Furthermore, no restriction results from Article 299 TEC regarding the geographical scope of European fundamental rights. For, according to established ECJ practice (the decision was issued pursuant to Article 227 TEC, old version), the article 'does not preclude Community rules from having effects outside the territory of the Community',[163] a functional reference to the creation of obligations being accepted by the ECJ as sufficient. The latter criterion is met in the case of border control measures.

3.2 Secondary law obligations

European secondary law also confirms the finding that European border officials are obliged to respect fundamental, refugee and human rights, even when acting exterritorially.

3.2.1 Qualification and Asylum Procedures Directives

The so-called Qualification Directive was adopted in 2004[164] and harmonises substantive refugee law. It covers both refugee protection, in accordance with the CFR, and subsidiary protection.[165] Article 21, paragraph 1, of Directive 2004/83/EC obliges the member states to 'respect the principle of *non-refoulement* in accordance with their international obligations'. Article 21, paragraph 1, of the Qualification Directive must therefore be interpreted in line with the above assessment of international

[160] Compare, N. Bernsdorff, in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union* (Baden-Baden, 2nd ed. 2006), Art. 18 para. 11 and J. Delbrück, *Die Universalisierung des Menschenrechtsschutzes: Aspekte der Begründung und Durchsetzbarkeit*, in A. Zunker (ed.), *Weltordnung oder Chaos?*, FS for Klaus Ritter (Baden-Baden, 1993), 551 and following, at 556.

[161] M. Borowsky, in J. Meyer (ed.), ibid., Art. 51, para. 16.

[162] ECJ Case C-540/03, Family Reunification Directive, [2006] para. 37; see, ECJ, Case 4/73, *Nold/Commission*, [1974] ECR 491, para. 13.

[163] ECJ Case C-214/94, *Ingrid Boukhalfa v. Federal Republic of Germany*, [1996] ECR I-2253 para. 14.

[164] Directive of the Council 2004/83/EC of 29 Apr. 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, OJ No. L 304/12 of 30 Sept. 2004.

[165] For extensive legal analysis and cross references, see, H. Storey, 'EU Refugee Qualification Directive: a Brave New World?' 20 *IJRL* 1-49 (2008).

law regarding *non-refoulement* and its exterritorial scope. Furthermore, the directive, like the Refugee Convention,[166] explicitly refers to this when it links rights and obligations to residence.[167] Article 21, paragraph 1, of the Qualification Directive consequently has exterritorial effect.

According to the wording of Article 3, paragraph 1, of the Asylum Procedures Directive (Directive 2005/85/EC),[168] member states are obliged to accept and examine requests for international protection submitted on their territory – this includes requests made at the border or in transit zones. Direct exterritorial application cannot, therefore, be inferred from the directive. Nonetheless, the primary law ranking of Article 63 TEC means that the procedural rights implicit in international law, on the basis of Article 33, paragraph 1, of the Refugee Convention, do apply.[169]

The exterritorial applicability of the Asylum Procedures Directive, the Qualification Directive and the Dublin II Regulation on maritime border control measures has also been confirmed in a study by a European Commission staff working group.[170]

3.2.2 Schengen Borders Code

The fact that *non-refoulement* does not only apply when the person seeking protection is already on EU territory has also found expression in Article 3 lit. b of the Schengen Borders Code, which entered into force in 2006. The rule stipulates that entry controls must be implemented 'without prejudice to [. . .] the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*'. Even though *non-refoulement* does not include a general right to admission, in practice it means – as does the wording of the borders code – that member states are obliged to allow temporary admission for the purpose of verifying the need for protection and the status of the person concerned.[171]

3.3 Interim Conclusion: Obligations under European law in the case of exterritorial border control measures

European primary and secondary law oblige European border control bodies to uphold the *non-refoulement* principle and related procedural rights. European border officials must observe the relevant legal norms when carrying out measures within territorial sea, the contiguous zone, on the

[166] Compare, above 2.2.1.

[167] Compare, Recital (9); Art. 2 i) and j); Art. 31; Art. 32.

[168] Directive of the Council 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[169] Compare, below 4.1.

[170] European Commission, SEC (2007) 691, 13 and following.

[171] Compare, the first extensive elaboration of the significance of the Schengen Borders Code regarding this question, Weinzierl, Lisson, above n. 29, 77.

high seas or in the coastal waters of non-European coastal states. The legal obligation binding border control bodies arises because their activities have a functional territorial reference point and, consequently, a factual relationship with the sovereign territory concerned. Interception, turning back, escorting back, preventing the continuation of a journey, towing back or transferring to non-European coastal regions all involve an exercise of jurisdiction requiring international human and refugee rights to be observed.

4. Obligations for state bodies to act vis à vis persons at sea and on board vessels

The following subsections will begin by analysing which obligations arise in general from the *non-refoulement* principle (4.1), and will proceed to specify the obligations for state bodies vis à vis persons at sea or on board vessels (4.2-4.3).

4.1 Obligations to act under refugee and human rights law

4.1.1 Access to proceedings: a right implicit in the non-refoulement principle

Article 33, paragraph 1, of the Refugee Convention only provides for a ban on expulsion and return to a country where the person concerned would be in danger of persecution. The Refugee Convention, however, does not provide a right to asylum in the sense of a broader obligation for a state to grant protection within its own territory.[172,173]

Nonetheless, UNHCR,[174] EXCOM[175] and literature rightly point out that the *non-refoulement* in Article 33, paragraph 1, of the Refugee Convention means that governments are obliged to provide access to official proceedings in order to verify refugee status. Article 33, paragraph 1, of the Refugee Convention thus includes the implicit right to access to proceedings,[176] which must be organised as an individual procedure to

[172] A. Grahl-Madsen, 'Asylum, Territorial' in R. Bernhardt (ed.), *EPIL*, Vol. I, 283 and following; for further examination of the concept, see, Goodwin-Gill, McAdam, above n. 27, 355.

[173] UNHCR, Advisory Opinion, above n. 55, § 8.

[174] UNHCR: Background Note, above n. 55, § 19 and following; and, 'Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status' ('Provisional Comments'), Council Document 14203/04, Asile 64, of 9 Nov. 2004, Geneva, 10 Feb. 2005, Comment to Art. 3 (1), 5.

[175] EXCOM, 'Note on International Protection': UN doc. A/AC.96/882 (2 July 1997), § 14; Conclusion No. 8 (XXVIII), § (vii).

[176] Edwards: above n. 10, 301; and, above n. 27, 197; Hathaway, *Rights of Refugees*, above n. 11, 279; Goodwin-Gill, McAdam, above n. 27, 215.

investigate the circumstances of the case in question.[177] This follows directly from the Convention's protective purpose. Compliance with *non-refoulement* is only ensured if its prerequisite, refugee status within the meaning of Article 1 A (2) Refugee Convention, is adequately examined.[178]

It is not possible to conclude definitively from the Refugee Convention where proceedings should take place. Yet all judicial and administrative fora must be measured against the requirement to guarantee compliance on *non-refoulement*. Compliance is certainly not guaranteed on board shipping vessels, since the personnel, temporal and infrastructure preconditions to carry out proceedings are not fulfilled in a way that would be possible for domestic official proceedings. On the other hand, in situations of this kind and bearing in mind current circumstances, it must be assumed that appropriate, fair proceedings under the rule of law are guaranteed neither in the African transit countries nor in potential 'Transit Passing Centers' or 'Protection Zones'.[179] The latter would supposedly serve to outsource the administrative examination (with no right to judicial review) of international protection requests. The only conclusion possible is that, given these circumstances, access to proceedings on the territory of an EU member state must be provided.

4.1.2 Access to effective legal protection: a right implicit in the non-refoulement principle

In addition, UNHCR[180] and literature[181] rightly state that *non-refoulement* from Article 33, paragraph 1, of the Refugee Convention is only guaranteed if the person concerned can claim effective legal protection. Here, too, the decisive factor ensuring effectiveness is for the person concerned to have the possibility of claiming legal protection on the contracting state's territory.[182] Consequently, Article 33, paragraph 1, of the Refugee Convention contains the implicit right to effective legal remedy.

The same point has not only been confirmed by the Human Rights Committee with reference to Article 2, paragraph 3, vis à vis Article 7, clause 1, ICCPR,[183] but also by the ECtHR regarding the *non-refoulement*

[177] Lauterpacht, Bethlehem, above n. 10, § 100; EXCOM, Conclusion No. 30 (XXXIV), 1983, § (e) (i).

[178] Edwards, above n. 10, 301.

[179] For extensive discussion on the proposals in recent European debate, which need to be rejected, see, G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' in (2003) 5 *EJML* 303-41, at 303.

[180] UNHCR, Provisional Comments, above n. 174, commenting Art. 38 (3), 53; compare also, the Comment to Art. 4, 8, Art. 30, 41, 35A, 48.

[181] Noll, above n. 178, 332; Hathaway, *Rights of Refugees*, above n.11, 279; Edwards, above n. 27, 210; Weinzierl, Lisson, above n. 29, 50.

[182] UNHCR, Provisional Comments, above n. 174, Comment to Art. 38 (3), 53.

[183] HRC, 'Communication No. 1051/2002: Canada, 15 June 2004': UN doc. CCPR/C/80/D/1051/2002 (15 June 2002), § 12.

principle of Article 3 ECHR in connection with Article 13 ECHR. The latter guarantees the right to effective remedy. This is an accessory right, which may be asserted in connection with another right in the ECHR and serves to guarantee implementation of the Convention.[184] Indeed, the remedy need not take the form of an actual court appeal. Administrative or parliamentary supervisory committees may suffice, subject to stringent conditions.[185] However, the possibility to seek redress must be effective and efficient, both legally as well as in actual fact.[186] It should be remembered that, for the question at hand, effectiveness must be measured against the gravity of the alleged Convention infringement.[187] Since *Soering*, the Court has continually emphasised in its case law that, even in an Article 15 ECHR state of emergency, no deviation from Article 3 ECHR is possible. An absolute right, Article 3 ECHR thus embodies a fundamental value of the democratic societies assembled in the Council of Europe.[188] Consequently, the Court measures the effectiveness requirement in the case of an imminent Article 3 ECHR infringement against particularly stringent conditions: '(…) given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it 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'.[189] Here, too, justification must be given in terms of an otherwise imminent thwarting of the protective purpose. This is particularly important when one looks at what happens in practice: a high number of requests have only been successful on appeal. Indeed, UNHCR pointed out in 2004 that such was the case for 30 to 60 per cent of all recognised refugees in some European states.[190] Article 33, paragraph 1, of the Refugee Convention contains an implicit right to effective legal protection. On the basis of the arguments in 4.1.1, this must be understood as access to effective legal protection on an EU member state's territory.

[184] C. Grabenwarter, *Europäische Menschenrechtskonvention* (Munich, 2nd ed. 2005), § 24, para. 164; J. Meyer-Ladewig, EMRK, Art. 13, para. 1; D. Richter, in R. Grote, T. Marauhn (eds.), *Konkordanzkommentar EMRK/GG* (Tübingen 2006), Ch. 20, para. 19 and following.

[185] Richter, ibid., Ch. 20, para. 56.

[186] *Kaya v. Turkey* (Judgment), (1998), ECtHR, Appl. No. 158/1996/777/978, § 106; *Paul and Audrey Edwards v. Turkey* (Judgment), (2002), ECtHR, Application No. 46477/99, § 96.

[187] Ibid.; *Anguelova v. Bulgaria*, Judgment of 13 June 2002, Appl. No. 38361/97, § 161.

[188] Established practice of the courts since *Soering*, above n. 41, § 88.

[189] *Jabari v. Turkey* (Judgment), (2000), ECtHR, Appl. No. 40035/98, § 50.

[190] UNHCR, Press release, 30 Apr. 2004: 'European Union asylum legislation: UNHCR regrets missed opportunity to adopt high EU asylum standards'.

4.1.3 Temporary entry into state territory: a right implicit in the non-refoulement principle

UNHCR,[191] EXCOM[192] and literature rightly say that at least temporary entry into state territory must be granted.[193] It is not only the authorities responsible for examining international protection requests that are found on state territory. With regard to individuals' awareness that judicial remedy is possible, it must be remembered that courts, as well as governmental and non-governmental advisory centres and structures, are all to be found on state territory. The particularly strong effectiveness requirements [194] mean that permission for temporary residence is indispensable.[195] Such permission is an explicit right under European secondary law. The Asylum Procedures Directive stipulates in Article 7, paragraph 1, and Article 35, paragraph 3 lit. a), that the protection seeker shall be entitled to remain in the member state, at the border or in the transit zone until the request for protection has been examined. *Ad hoc* turning away at sea is prohibited, therefore. Given the points raised in 4.1.1 and 4.1.2, Article 7, paragraph 1, and Article 35, paragraph 3 lit. a) of the Asylum Procedures Directive therefore lay down an obligation to grant temporary access to EU member state territory.

4.1.4 No exceptions to residence granted by a safe third country

In the study referred to previously,[196] Weinzierl rightly alluded to the problem of so-called safe third countries and the obligations under discussion here. Article 33, paragraph 1, of the Refugee Convention prohibits the expulsion or return to a state where there is a threat of persecution, yet does not grant asylum. This has led to international debate on the concept of so-called safe third countries. These are countries that are willing to admit asylum seekers and where he or she will not be subject to persecution or to the kind of human rights violations justifying subsidiary protection. The 'super safe countries'[197] concept, as it is known, has been adopted in Article 36, paragraph 2, of the Asylum Procedures Directive along the lines of German third country rules. However, the concept is controversial in international law,[198] particularly since a country's

[191] UNHCR, Provisional Comments, above n. 174; Background Note, above n. 55, § 25.

[192] EXCOM, Conclusion No. 85 (XLIX), 1998, § q.

[193] Edwards: above n. 10, 301; and, above n. 27, 197; Hathaway, *Rights of Refugees*, above n. 11, 279 and following; Goodwin-Gill, McAdam, above n. 27, 215; Weinzierl, Lisson, above n. 29, 15 and 19.

[194] Compare, above 3.3.1.2.

[195] UNHCR, Provisional Comments, above n. 174, Comment to Art. 38 (3), 53.

[196] Weinzierl, Lisson, above n. 29, 20 and following.

[197] Goodwin-Gill, McAdam, above n. 27, 400.

[198] Compare, Hathaway, *Rights of Refugees*, above n. 11, 327; Goodwin-Gill, McAdams, above n. 27, 399; compare also, against the background of the amendments to the German right of asylum under constitutional law, J. A. Frowein, A. Zimmermann, *Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts* (Cologne, 1993); UNHCR, Provisional Comments, above n. 174, Comment on Art. 35 A, 48.

'safe' status can be revoked. Criticism of the concept is justified but, for practical reasons, it is beyond the scope of this article. Even if the rules in Article 36, paragraph 2, of Directive 2005/85 were deemed in conformity with international law, the fact still remains that Council members have not yet agreed upon a list of safe third countries, as provided for in Article 36, paragraph 3, of Directive 2005/85. Apart from non-EU members Norway and Iceland,[199] which participate in the Dublin II-system, and Switzerland,[200] which will participate as from 2008, there are currently no third countries that meet the criteria of Article 36, paragraph 2, of Directive 2005/85. Consequently, there can be no exception to the above obligations.[201]

4.1.5 Right to enter EU territory resulting from asylum rights under primary law

Worthy of note is the fact that Article 18 CFR, unlike the Refugee Convention, provides a right to asylum. Nonetheless, most literature currently assumes that this does not signify a separate right to asylum going beyond the expulsion and return prohibition in the Refugee Convention.[202]

Such an approach is not persuasive. The wording of the rule is unambiguous: 'The right to asylum shall be guaranteed (. . .)'. This being so, references to historical arguments[203] by the opposing opinion are invalid and not only due to their subsidiarity. The opposing opinion also points out that the right to asylum was only '(…) guaranteed with due respect for

[199] Decision of the Council of 15 Mar. 2001, (2001/258/EC).

[200] BBl. (Switzerland) 2004, 6447.

[201] The approach briefly outlined here may be found, together with a critical discussion, in detail in Weinzierl, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders, 20 and following. In as much as separate countries exercise the option to determine their own safe third countries at the level of domestic law, in accordance with Art. 27 Directive 2005/85, these regulations cannot have an effect on the presented opinion in 4.1.1 and 4.1.2, since their creation under international law can claim the status of primary law according to Art. 63 cyph. 1 TEC and, thus, domestic regulations must be measured against these. Furthermore, the BVerfG precisely measures the actions of German authorities against these duties and rights to access under international law. The Court not only requires ratification of the Geneva agreements, but also the jurisdication of the judicial panels which were implemented in order to monitor compliance with the ECHR. Hence, the BVerfG has stressed that third countries were only be considered as safe, 'if the state has ratified both treaties. Since the Geneva Refugee Convention, according to Art.1 para. 2 originally applied to events creating refugees that occurred prior to 1 Jan. 1951, and this date only ceased to apply when Art. 1 para. 2 of the Protocol relating to the Status of Refugees was adopted on 31 Jan. 1967 (BGBl. 1969 II, 1294), the state must also have ratified the Protocol. Furthermore, the state must have submitted to the monitoring procedures, provided for in the Convention, which are designed to guarantee compliance with the ratified obligations. This applies, firstly, to the Art. 35 GFK obligation to cooperate with UNHCR. Secondly, in accordance with Art. 25 ECHR, it must be possible for anybody to bring to the European Commission for Human Rights an individual complaint concerning a violation of the rights laid down in this Convention'. (BVerfGE 94, 49 (89)).

[202] Weiss, above n. 158, para. 5; H. D. Jarrass, *EU-Grundrechte* (Munich, 2005), § 23, para. 12; Bernsdorff, above n. 160, para. 13; Wollenschläger, above n. 42, § 16, para. 32.

[203] Wollenschläger, ibid., § 16, para. 34.

the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees'. It argues that since the Refugee Convention does not include any right to asylum, further-reaching protection could not have been intended by the CFR.[204] However, precisely because the Refugee Convention does not incorporate any right to asylum, stand-alone significance must be attached to the wider formulation of Article 18 CFR. Thus, the wording 'with due respect' must be read as referring in full to the prerequisites and legal consequences of refugee status in the Refugee Convention, but also as providing a self-contained right to asylum. Residence on state territory is a concomitant of this.[205]

4.2 Obligations under the law of the sea

Cases where asylum seekers and migrants encounter distress at sea are subject to further requirements under international maritime law. The duty to rescue persons in distress has a long maritime tradition and is an international legal obligation. Thus Article 98 UNCLOS[206] provides that:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

The humanitarian law of the sea must also be observed, that is, the International Convention for the Safety of Life at Sea (SOLAS)[207] and the International Convention on Maritime Search and Rescue (SAR)[208] including the important amendments that entered into force on 1 July 2006.[209] SOLAS regulation 33 (1), which is relevant to the matter at hand, spells out this obligation by obliging each master of a ship, who is able to provide assistance and is aware of an emergency at sea, to render assistance. 'This obligation', as the provision stipulates, 'applies regardless of the nationality or status of such persons or the circumstances in which they are found'. The same obligation to provide assistance irrespective of nationality or status is also found in the SAR (Annex §2.1.10). The SAR

[204] Weiss, above n. 158, para. 5; Wollenschläger, ibid., § 16, para. 32.
[205] Compare, Grahl-Madsen, above n. 171, 283.
[206] BGBl. 1994 II, 1798.
[207] International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 UNTS 278.
[208] International Convention on Maritime Search and Rescue (SAR), 1979, 1405 UNTS 97.
[209] See, the announcement of these amendments in the BGBl. of 11 July 2007, BGBl. 2007 II, 782 and following.

Annex, an integral part of the Convention and, as such, legally binding, clarifies in §1.3.2. that it does not suffice to take refugees on board a rescue vessel. Rather, states must ensure the medical or other care of refugees 'and deliver them to a place of safety'.

The main point of concern relating to measures in the Mediterranean is what constitutes a place of safety for refugees in distress. The same point is also raised in a study by European Commission staff, which calls for guidelines to clarify the situation.[210] Indeed, a great many institutions have already adopted such guidelines.[211] It is not possible to reflect the debate in full here. Nonetheless, one point should be made concerning EXCOM's view that asylum seekers should be taken to the 'next port of call'.[212] Particularly with respect to refugee protection and *non-refoulement*, this approach must be understood as requiring that a 'place of safety' within the meaning of the SAR be interpreted in accordance with refugee law provisions. A place cannot be deemed 'safe' for refugees simply because distress at sea has been prevented; it is only safe when *non-refoulement* is guaranteed.

Such is the exact interpretation of the Maritime Safety Committee (MSC) at the International Maritime Organization (IMO). The MSC has produced 'Guidelines on the treatment of persons rescued at sea', stating that rescued persons are to be taken to a place where a further transfer can be arranged. The aim is to prevent refugees rescued at sea from being put ashore in countries where refugee protection is not guaranteed. On this point, §6.17 of the guidelines stipulates: 'The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea'.[213]

In March 2007 the UN General Assembly (GA) formally took up the issue and adopted a resolution. The GA calls on states:

> to ensure that masters on ships flying their flag take the steps required by the relevant instruments to provide assistance to persons in distress at sea, and urges States to cooperate and to take all necessary measures to ensure the effective implementation of the amendments to the International Convention on Maritime

[210] 'One of the problems that could be solved by such a clarification would be the determination of the most appropriate port for disembarkation following rescue at sea or interception, as well as the connected question of the sharing between the States participating in the interception and search and rescue operations, of responsibilities regarding the protection of persons intercepted or rescued seeking international protection' (COM, Study on the International Law Instruments in Relation to Illegal Immigration by Sea, SEC(2007) 691, 15 May 2007, cypher 4).

[211] See, the inventory taking in UNHCR/IMO, above n. 55.

[212] UNHCR, Background Note, above n. 55.

[213] Maritime Safety Committee, Resolution 167 (78), 20 May 2004, Guidelines on the Treatment of Persons Rescued at Sea, MSC 78/26/Add.2, Annex 34, para. 6.17. Incidentally, Art. 1 of the Directive defining the facilitation of unauthorised entry, transit and residence (2002/90/EC) has to be interpreted in the light of these duties to provide assistance; compare, the preliminary results of the study of the European Commission working group (COM, Study on the International Law Instruments in Relation to Illegal Immigration by Sea, SEC(2007) 691, 15 May 2007).

Search and Rescue and to the International Convention for the Safety of Life at Sea relating to the delivery of persons rescued at sea to a place of safety, as well as of the associated Guidelines on the Treatment of Persons Rescued at Sea.[214]

The guidelines thus endorsed by the GA, as well as the textual amendments to the relevant humanitarian law of the sea conventions, have caused the rules of maritime and migration law to tightly interlock. These clarifying amendments to the maritime conventions have implications for the practice of states turning vessels away or interrupting travel and declaring a rescue operation – the refugees then being returned to their port of departure as the 'next port of call'.[215] No longer does such a practice simply imply a violation of the refugee law and human rights referred to above; it now constitutes a violation of the very rules of humanitarian maritime law itself. The 'place of safety' for refugees in distress at sea may not be established without taking due account of refugee and human rights provisions.

4.3 Consequences for the treatment of asylum seekers and migrants at sea and on board

The outcome of this synopsis of refugee, human rights and maritime law is that states cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting etc. of refugee boats – to be rescue measures. In the case of both rescue at sea and border control measures vis à vis migrants who are not in distress at sea, the following procedures are required:

- transfer of the protection seekers and migrants to a safe place on EU territory,
- conduct of proceedings in order to examine the asylum application,
- legal review of the decision.

The maritime obligations apply to private and state sector captains alike. Whether the rescue of refugees in distress is carried out by private persons or border control bodies is irrelevant; the obligation remains to transfer the persons affected to a 'place of safety' where the above-mentioned human rights and refugee law requirements concerning proceedings and legal protection can be met. According to guidelines from the International Maritime Organisation's Maritime Safety Committee (MSC), a vessel, as a general rule, cannot be deemed a safe place within the meaning of the SAR[216] any more than procedural rules for human rights and refugee law

[214] UNGA, A/RES/61/222, 16 Mar. 2007, Resolution cypher 70.

[215] For comprehensive discussion of this point, see, B. Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 *Fordham Int'l L.J.* 75.

[216] Maritime Safety Committee, Resolution 167 (78), 20 May 2004, 'Guidelines on the Treatment of Persons Rescued at Sea', MSC 78/26/Add.2, Annex 34, para. 6.13: 'An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors…'.

can be observed on board. Asylum seekers and migrants who are captured at sea, or who have reached the jurisdiction of European border control bodies by other means, must, therefore, be permitted to disembark and reside on dry EU land pending a decision and appeal.

5. Compatibility of EU secondary law and Border Control Practice

These human rights and refugee law requirements for the treatment of asylum seekers and migrants have to be observed in EU secondary law, especially the FRONTEX regulations, and in border control practice in general.

5.1 Provisions regarding Human Rights

The FRONTEX regulations do not include any explicit provisions regarding Human rights. According to Article 9 of the RABIT-regulation, the applicable law for any border control team member is that of the Community and the national law of the host member state. In addition to that, the border guards shall remain subject to disciplinary measures of their home member state. Furthermore, members of FRONTEX or RABIT teams shall fully respect human dignity. However, without a relevant definition of human dignity and the obligations resulting from it,[217] this provision displays a general telos rather than concrete binding law with a structuring impact on the practice of border controls. The search for any mention of further binding international law remains futile.[218] Thus, the demand for binding EU secondary law, as raised by the German Institute for Human Rights,[219] must be supported, whether it be in the FRONTEX Regulations or in the Schengen Borders Code.[220] It is noteworthy, therefore, that the European Commission has announced a decision laying down additional rules to the Schengen Borders Code aiming at 'ensuring that surveillance operations under FRONTEX coordination are conducted in accordance with a homogeneous set of rules and in full compliance with international law'.[221]

[217] See, H. Bielefeldt, *Menschenwürde. Der Grund der Menschenrechte* (Berlin, 2008), 18 and following; D. Schultziner, 'Human Dignity: Functions and Meanings' in J. Malpas, N. Lickiss (eds.), *Perspectives on Human Dignity* (Berlin/Heidelberg/New York, 2008), 73-92; C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655-724; M. Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *HRQ* 547-630 at 557 and following.

[218] For a detailed analysis of the gaps remaining in the Asylum Procedures Directive, see, Weinzierl, Lisson, above n. 29, 75 and following.

[219] See in detail, Weinzierl, Lisson, above n. 29, 71-8; also, Weinzierl, above n. 29, 78 and following, referring to, 5.

[220] Specifically referring to an amendment of the Schengen Borders Code, R. Weinzierl, *Human Rights at the EU's common external maritime borders* (German Institute for Human Rights, Berlin, 2008), 5; and German Institute for Human Rights, Press release, 22 Oct. 2008, *Deutsches Institut für Menschenrechte kritisiert EU-Pakt zu Einwanderung und Asyl und empfiehlt Änderung des Schengener Grenzkodexes*.

[221] KOM, Planned Commission Initiatives until Dec. 2009, 73, <http://ec.europa.eu/atwork/programmes/index_de.htm> (last visited Mar. 2009).

5.2 Common Core Curriculum

One of the central tasks of FRONTEX is the establishment of common training standards and with it to ensure an 'efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States'.[222] The agency provides training for national instructors of border guards and additional training and seminars, related to control and surveillance at external European borders and removal of third-country nationals irregularly present in the Member States, for officers of the competent national services. This Common Core Curriculum is according to Article 4 and 5 of the FRONTEX Regulation, substantially based on the two founding Council Regulations of FRONTEX, and practically on collected data of the ongoing integrated risk analysis. However, the two relevant regulations do not contain any explicit obligation to integrate international human rights standards into the curriculum. In order to overcome this deficit, the agency signed a working agreement with UNHCR that should lead to the explicit inclusion of human rights in the curriculum and, in the end, to a fair balance between the very different remits of FRONTEX and UNHCR. This should result in an efficient EU border control management system that is fully compliant with human rights standards.[223] The agency seems to be open to debate on human rights in the training of border guards.[224]

These projects are necessary but ambiguous at the same time, because they will result in only internal binding rules in administrative provisions, which could be revised without expenditure. As with the previous problems with the cooperation between FRONTEX and UNHCR, there still remains only the general obligation arising from international law to bind European border control bodies, directly or indirectly through European law, to uphold human and refugee rights. Thus, laying down human rights provisions in the common curriculum should only be an additional measure, which, nevertheless, in the process of establishing a Common European Asylum System,[225] could lead to significant improvements in border training standards. It would also reflect the demand of the UNHCR for substantial protection of refugees, including access to fair and effective asylum procedures and protection mechanisms.[226]

[222] FRONTEX Programme of Work 2009, 14.

[223] FRONTEX Press Release 18. June 2008, <http://view.frontex.europa.eu/newsroom/news_releases/art39.html>.

[224] FRONTEX Press Release 27 Nov. 2008, <http://view.frontex.europa.eu/newsroom/news_releases/art47.html>.

[225] Commission of the European Communities, Green Paper on the future Common European Asylum System, Brussels, 6 June 2007, COM (2007) 301 final, 4.

[226] Feller, above n. 158, 217.

5.3 Border Control Practice and Effective Legal Protection

The integrated European border control regime with its agency is part of the institutional setting of the EU and must be embedded in a structure where any action – according to settled case law of the ECJ – remains subject to effective legal protection.[227] Legal protection as a general principle reflects constitutional traditions common to the Member States and is also rooted in Article 6 and 13 ECHR.[228] However, specific jurisdiction concerning FRONTEX and border controls does not exist. The FRONTEX regulations do not establish a special legal process before European Courts for legal protection against unlawful actions by border control guards. Responsibility for legal protection at first instance lies with the national courts of host Member States. The circumstances under which migrants and refugees come in to contact with border control guards, and whether they lead to the opportunity to take legal action, therefore, comes under scrutiny. In connection with pre-border controls, especially the so-called interception measures, which describe the catching, turning back, diversion, or escorting back of ships may violate human rights,[229] statistics offered via the FRONTEX annual reports contain only information on the number of persons intercepted and diverted back. They contain neither information about where the persons concerned were diverted to, nor how many persons claiming international protection were among the migrants.[230] Consequently, it has been claimed that efforts of Human Rights monitoring need to be strengthened.[231] While European border officials are bound by obligations arising from International and European refugee law, even when operating exterritorialy, the refusal of rescue at sea, temporary entry into state territory or international protection must be seen as a failure to act.

FRONTEX and the integrated border control system are successful *per definitionem* by preventing migrants from arriving at the coast of the EU Member States.[232] That includes working agreements with third countries whereby, for example, North African states should prevent migrants and potential refugees from leaving the African coast or even their country of

[227] ECJ Case 294/83, *Les Verts/Parlament*, [1986] ECR 1339, para.23; ECJ, Case 314/85, *Foto-Frost*, [1987] ECR 4199, para. 16; ECJ Case C-314/91, *Weber/Parlament*, [1993] ECR I-1093, para. 8; EC Case T-222/99, T 327/99 and T-329/99, *Martinez u. a./Parlament*, [2001] ECR II-2823, para. 48; EC Case T-315/01.

[228] ECJ Case 222/84, *Johnston*, [1986] ECR 1651, para. 18. See also, ECJ Case C-97/91, *Oleifici Borelli/Kommission*, [1992] ECR I-6313, para. 14; ECJ Case C-1/99, *Kofisa Italia*, [2001] ECR I-207, para. 46; ECJ Case C-424/99, *Kommission/Österreich*, [2001] ECR I-9285, para. 45; ECJ Case C-50/00 P, *Unión de Pequeños Agricultores/Rat*, [2002] ECR I-6677, para. 39.

[229] Weinzierl, Lisson, above n. 29, 55.

[230] R. Weinzierl, *Human Rights at the EU's Common External Maritime Borders* (Berlin, 2008), 4.

[231] T. Löhr, M. Pelzer, '*Menschenrechtliches Niemandsland — Die Abschottung Europas unter Missachtung der Flüchtlings- und Menschenrechte*' (2008) 41 *Kritische Justiz* 303–10 at 307.

[232] Weinzierl, Lisson, above n. 29, 27 and following.

origin. This external dimension targets an enhanced effort on key third countries, such as Libya, Mauretania, Egypt, Algeria, Turkey, and even China.[233] It may result in the externalization of responsibility, because the EU institutions do not exercise any command or control and the actions taken by third states appear to be of a sovereign nature. These measures are flanked by ambitious efforts to construe a new safe-third-country system in cooperation with states like the Ukraine and Georgia.[234] European jurisdiction is at present unable to react to potentially unlawful practice of the European border control regime because the situation suffers from a lack of efficient access to legal protection.[235] However, with the ratification of the Lisbon Treaty some important changes will be made to the system of legal protection regarding agencies and other administrative bodies. According to Article 263 of the Treaty on the Functioning of the EU, the ECJ 'shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis à vis third parties'.[236] This will mean that agencies like FRONTEX will not be exculpated from claims against their legal acts for or in the name of the EU. However, that presupposes effective monitoring of every sea border control mission conducted by FRONTEX.[237]

6. Aspects of long term Migration Control

Migration in general cannot be stopped or governed by border controls itself. Even the most sophisticated technical tools will fail to provide extensive control.[238] Every intensification of the EU's border control policy will have a direct impact on the selection of migration routes and modus operandi[239] – and may increase the death toll by forcing migrants to take more and more dangerous routes to the EU mainland. The Mediterranean Union, as an outcome of the Barcelona Process, could be the political and legal framework for long term cooperation – but it hardly

[233] FRONTEX Programme of Work 2009, 27.

[234] ECRE, 'Recommendations to the Justice and Home Affairs Council on the "Safe Third Country" concept', AD1/01/2004/EXT/MTGB; Weinzierl, Lisson, above n. 29, 14, 48; Löhr, Pelzer, above n. 231, at 306. Instructive but rather uncritical, L. Feijen, 'Facing the Asylum Enlargement-Nexus: the Establishment of Asylum Systems in the Western Balkans' 20 *IJRL* 413-31 (2008).

[235] A. Fischer-Lescano, T. Tohidipur, '*Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX*' (2007) 67 *HJIL*, 1219-76, 1265 and following; Weinzierl, Lisson, above n. 29, 75 and following.

[236] See also, M. Schröder, '*Neuerungen im Rechtsschutz der Europäischen Union durch den Vertrag von Lissabon*' (*Die Öffentliche Verwaltung*, 2009), 61-6 at 63.

[237] Löhr, Pelzer, above n. 231, 308.

[238] Regarding similar problems at the border between Mexico and the US, see, W. A. Cornelius, J. M. Lewis (eds.), *Impacts of Border Enforcement on Mexican Migration* (CCIS/Rienner Publishers Inc., 2007). P. Legrain, *Immigrants* (London, 2009), 22, talks about 'War on our Borders'.

[239] That is part of the outlook for Migration to the EU, see, FRONTEX Programme of Work 2009, 22.

plays a significant role today.[240] The aim to link migration with development policy seems to be a minimum requirement, as long as this conjunction is not misused to blackmail third countries to hold back migrants and refugees.

7. Conclusion

The international obligations arising, in particular, from the Refugee Convention, the ECHR, the ICCPR, CAT and European primary and secondary law prohibit the *refoulement* of refugees and subsidiary protection beneficiaries. The *non-refoulement* obligations prohibit European border officials from turning back, escorting back, preventing the continuation of a journey, towing back or transferring vessels to non-EU coastal regions in the case of any person in potential need of protection, as long as the administrative and judicial examination of the asylum application has not been completed on European territory.

European border officials are bound by this obligation even when operating exterritorially. In the case of measures at sea, this applies inside the 12 mile zone, as well as in the contiguous zone, on the high seas and inside the coastal waters of third countries.

Persons in need of asylum and migrants encountering distress at sea must be treated in accordance with the humanitarian law of the seas. It is prohibited to take such individuals to third countries where adequate protection is not guaranteed. Protection seekers have a legal right to be taken to the nearest safe port on European territory. The law of the seas criterion of 'safe' must be interpreted in the light of refugee law.

Criteria for establishing international responsibility and the circumvention ban mean that European border control bodies cannot be relieved of their obligations by cooperating with third country authorities. Insofar as authorities from third countries are integrated into European surveillance and rescue operations, European authorities are obliged to ensure that migrants and protection seekers are treated in accordance with maritime, human rights and refugee law and are taken to a safe place guaranteeing, in particular, that the *non-refoulement* principle is observed. Since this is not the case in the African transit states, the individuals concerned must be brought to the territory of an EU member state. To ensure the application of these human and refugee rights, concrete obligations must be included in EU secondary law and in the Common Core Curriculum in order to transform the requirements of human and refugee rights law into operational standards.

[240] See, R. Aliboni, A. Driss, T. Schumacher, A. Tovias, 'Putting the Mediterranean Union in Perspective' (EuroMeSCo Paper June 2008), 8 and following.