

LEGAL OPINION

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

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and Tillmann Löhr, September 2007

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1. List of Abbreviations

A/...	Document of the General Assembly of the United Nations
ABl. EU	Amtsblatt der EU
AC	Law Reports, Appeal Cases (Third Series)
AC	Canadian Reports, Appeal Cases
AG	Attorney General
All ER	All England Law Report
AMRK	Amerikanische Menschenrechtskonvention
Anm.	Anmerkung
Anor	Another
Art.	Article
BGBL	Bundesgesetzblatt
BMI	Bundesministerium des Innern
BYIL	British Yearbook of International Law
CA	Court of Appeals
CA	Quebec Official Reports, Court of Appeal
CanLII	Canadian Legal Information Institute
CAT	Committee Against Torture
cf.	confer
CFR	Charter of Fundamental Rights of the European Union
Cir.	Circuit
CJ	Chief Justice
CONF	Conference
Doc.	Document
EC	European Communities
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
Ed. / Eds.	Editor / Editors
ed.	edition
EU	European Union
EuGRZ	Europäische Grundrechtezeitschrift
EWCA	England and Wales Court of Appeal (Civil Division)
EXCOM	Executive Committee of the High Commissioner's Programme
FC	Federal Court Reports
FCT	Federal Court (Trial Division)
GC	General Comment
GYIL	German Yearbook of International Law
Harv.Hum. Rts.J.	Harvard Human Rights Journal

HCA	High Court of Australia
HCR	High Commissioner for Refugees
HJIL	Heidelberg Journal of International Law
HRC	Human Rights Committee
HRW	Human Rights Watch
HUDOC	Database of the case-law of the European Convention on Human Rights
Hum.Rts.Q.	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICMPD	International Centre on Migration Policy Development
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IGH	Internationaler Gerichtshof
IJRL	International Journal of Refugee Law
INS	Immigration and Naturalization Service
IRB	Immigration and Refugee Board of Canada
IRRC	International Review of the Red Cross
JA	Judge of Appeal
MCI	Minister of Citizenship and Immigration / Ministre de la Citoyenneté et de l'Immigration
MEI	Minister of Employment and Immigration
MIEA	Minister of State for Immigration & Ethnic Affairs
MIMA	Minister of State for Immigration & Multicultural Affairs
MIMIA	Minister of State for Immigration and Multicultural & Indigenous Affairs
MMI	Minister of Manpower and Immigration
MSC	Maritime Safety Committee
NGO	Non-Governmental Organization
No.	Number
NZCA	Court of Appeal of New Zealand
NZwehrR	Neue Zeitschrift für Wehrrecht
OJEC	Official Journal of the European Union
Ors	Others
p./ pp.	page / pages
para.	paragraph
Ref. App.	Refugee Appeal
RES	Resolution
Res.	Resolution
RRT	Refugee Review Tribunal
RSAA	Refugee Status Appeals Authority
SAR	International Convention on Maritime Search and Rescue
SCC	Supreme Court of Canada
SCR	Supreme Court Reports, Canada
SOLAS	International Convention for the Safety of Life at Sea
SSHID	Secretary of State for the Home Department
TEC	Treaty establishing the European Community

TEU	Treaty on the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	Office of the United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States
USSC	Supreme Court of the United States
v.	versus
Vol.	Volume
VCLT	Vienna Convention on the Law of Treaties

2. Bibliography

- Anker, Deborah: Refugee Law, Gender, and the Human Rights Paradigm, in: *Harvard Human Rights Journal* 15 (2002), pp. 134 – 154.
- Bailliet, Cecilia: The Tampa Case and its Impact on Burden Sharing at Sea, in: *Human Rights Quarterly* 25 (2003), pp. 741 – 777.
- Bank, Roland / Hruschka, Constantin: Änderungen im Asylverfahren durch den Entwurf des Änderungsgesetzes zum Zuwanderungsgesetz aus der Sicht des Flüchtlingsrechts, in: Barwig / Beichel-Benedetti / Brinkmann: *Perspektivwechsel im Ausländerrecht?*, pp. 620 – 644.
- Barnes, Richard: Refugee Law at Sea, in: *International and Comparative Law Quarterly* 53 (2004), pp. 47 – 77.
- Battjes, Hemme: *European Asylum Law and International Law*, Leiden / Boston 2006.
- Bernhardt, Rudolf: *Encyclopedia of Public International Law*, Vol. 1, Amsterdam / Lausanne / New York / Oxford / Shannon / Singapore / Tokyo 1992.
- Bernhardt, Rudolf: *Encyclopedia of Public International Law*, Vol. 3, Amsterdam / Lausanne / New York / Oxford / Shannon / Singapore / Tokyo 1997.
- Binder, Andrea: *Frauenspezifische Verfolgung vor dem Hintergrund einer menschenrechtlichen Auslegung des Flüchtlingsbegriffs der Genfer Flüchtlingskonvention unter besonderer Berücksichtigung der schweizerischen, deutschen, kanadischen und amerikanischen Flüchtlings- und Asylpraxis*, Basel / Geneva / München 2001.
- Breuer, Marten: Völkerrechtliche Implikationen des Falls Öcalan, in: *Europäische Grundrechtszeitschrift* 2003, pp. 449 – 454.
- Brownlie, Ian: *Principles of Public International Law*, 6th ed., Oxford 2003.
- Bruin, Rene / Wouters, Kees: Terrorism and the Non-Derogability of Non-Refoulement, in: *International Journal of Refugee Law* 15 (2003), pp. 5 – 29.
- Bundesministerium des Innern: *Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration - Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika*, Pressemitteilung, September 2005, p. 2, available at www.bmi.bund.de (last visited August 2007).
- Carlier, Jean-Yves / Vanheule, Dirk / Hullmann, Klaus / Peña Galiano, Carlos (Eds.): *Who is a Refugee? A Comparative Case Law Study*, The Hague / London / Boston 1997.
- Carlier, Jean-Yves: General Report, in: Carlier / Vanheule / Hullmann / Peña Galiano: *Who is a Refugee? A Comparative Case Law Study*, pp. 685 – 717.
- Clark, Tom: Rights based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation, in: *International Journal of Refugee Law* 16 (2004), pp. 584 – 608.
- Committee Against Torture: *Concluding Observations: United States of America*, UN Doc. CAT/C/USA/CO/2 (25 July 2006).
- Coomans, Fons / Kamminga, Menno T. (Eds.): *Extraterritorial Application of Human Rights Treaties*, Antwerpen / Oxford 2004.
- Dahm, Georg (Begr.) / Delbrück, Jost / Wolfrum, Rüdiger: *Völkerrecht*, Vol. I/1, 2nd ed., Berlin / New York 1989.
- Davy, Ulrike: *Asyl und internationales Flüchtlingsrecht*, Vol. I: *Völkerrechtlicher Rahmen*, Wien 1996.
- Debenedetti, Sara: *Externalization of European Asylum and Migration Policies*, 2006, available at <http://www.iue.it/RSCAS/Research/SchoolOnEuro-MedMigration/2006pdfs/Paper%20Debenedetti%202006%20FINAL.pdf> (last visited August 2007).

- Deutscher Bundestag: Antrag der Abgeordneten Winkler, Nouripour, Roth und der Fraktion BÜNDNIS 90/DIE GRÜNEN für eine Initiative der Bundesregierung mit dem Ziel einer humanitären, kohärenten und nachhaltigen Ausrichtung der europäischen Flüchtlingspolitik, BT Drs. 16/3541 (22 November 2006).
- Deutscher Bundestag: Antwort der Bundesregierung auf die kleine Anfrage der Abgeordneten Winkler, Beck, Beck, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drs. 16/2542 –, BT-Drs. 16/2723 of 25 September 2006.
- Doehring, Karl: Völkerrecht, 2nd edition, Heidelberg 2004.
- Edwards, Alice: Human Rights, Refugees, and The Right “To Enjoy Asylum”, in: *International Journal of Refugee Law* 17 (2005), pp. 293 – 330.
- Edwards, Alice: Tampering with Refugee Protection: The Case of Australia, in: *International Journal of Refugee Law* 15 (2003), pp. 192 – 211.
- 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).
- Feld, Francine: The Tampa Case: Seeking Refuge in Domestic Law, in: *Australian Journal of Human Rights* 11 (2002), available at <http://www.austlii.edu.au/au/journals/AJHR/> (last visited August 2007).
- Feller, Erika / Türk, Volker / Nicholson, Frances (Eds.): *Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection*, Cambridge 2003.
- Feller, Erika: International Refugee Protection 50 years on: The protection challenges of the past, present and future, in: *International Review of the Red Cross* 83 (2001), pp. 581 – 606.
- Fischer-Lescano, Andres / Tohidipur, Timo: Die europäische Grenzschutzagentur Frontex, in: *Europäisches Asyl- und Migrationsrecht*, Beilage zum *Asylmagazin* 5/2007, pp. 19 – 28.
- Fitzpatrick, Joan: Revitalizing the 1951 Refugee Convention, in: *Harvard Human Rights Journal* 9 (1996), pp. 229 – 253.
- Frowein, Jochen Abr. / Peukert, Wolfgang: *Europäische Menschenrechtskonvention – EMRK-Kommentar*, 2nd ed., Kehl am Rhein / Straßburg / Arlington 1996.
- Frowein, Jochen Abr. / Zimmermann, Andreas: *Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts*, Köln 1993.
- Garlick, Madeline: The EU Discussions on Extraterritorial Processing: Solution or Conundrum?, in: *International Journal of Refugee Law* 19 (2007), pp. 601 – 629.
- Gerber, Bettina: *Die Asylrechtsharmonisierung in der Europäischen Union*, Frankfurt am Main / Berlin / Bern / Brüssel / New York / Oxford / Wien 2004.
- Goodwin-Gill, Guy S. / Mc Adam, Jane: *The Refugee in International Law*, 3rd ed., Oxford / New York 2007.
- Goodwin-Gill, Guy S.: The Haitian Refoulement Case: A Comment, in: *International Journal of Refugee Law* 6 (1994), pp. 103 – 109.
- Grabenwarter, Christoph: *Europäische Menschenrechtskonvention*, 2nd ed., München 2005.
- Grahl-Madsen, Atle: *The Status of Refugees in International Law*, Bd. I, *Refugee Character*, Leiden 1966.
- Grahl-Madsen, Atle: *The Status of Refugees in International Law*, Vol. II, *Asylum, Entry and Sojourn*, Leiden 1966.
- Grahl-Madsen, Atle: *Asylum, Territorial*, in: Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 1, pp. 283 – 287.
- Grote, Rainer / Marauhn, Thilo: *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Tübingen 2006.
- Haines, Rodger P.G.: Gender-related Persecution, in: Feller / Türk / Nicholson: *Refugee Protection in International Law*, pp. 319 – 350.

- Harvey, Colin / Barnidge, Robert: Human Rights, Free Movement, and the Right to Leave in International Law, *International Journal of Refugee Law* 19 (2007), pp. 1 – 21.
- Hathaway, James C. / Foster, Michelle: Membership of a Particular Social Group, Discussion Paper No. 4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002, in: *International Journal of Refugee Law* 15 (2003), pp. 477 – 491.
- Hathaway, James C.: *The Law of Refugee Status*, Toronto / Vancouver 1991.
- Hathaway, James C.: *The Rights of Refugees under International Law*, Cambridge 2005.
- Herdegen, Matthias: *Völkerrecht*, 3rd ed., München 2004.
- Heselhaus, Sebastian M. / Nowak, Carsten: *Handbuch der Europäischen Grundrechte*, München 2006.
- Human Rights Committee: Communication No. 106/1981: Uruguay, UN Doc. CCPR/C/18/D/106/1981 (31 March 1983).
- Human Rights Committee: Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (29 July 1981).
- 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).
- Human Rights Committee: Communication No. 1051/2002: Canada. 15/06/2004, UN Doc. CCPR/C/80/D/1051/2002 (15 June 2002).
- Human Rights Watch: *By Invitation Only: Australian Asylum Policy*, Washington / London / Belgium 2002.
- International Centre for Migration Policy: *Development, Irregular transit migration in the Mediterranean - some facts, futures and insights*, Wien 2004.
- Ipsen, Knut: *Völkerrecht*, 5th ed., München 2004.
- Jastram, Kate / Newland, Kathleen: Family Protection and Refugee Protection, in: Feller, Erika / Türk, Volker / Nicholson, Frances (Eds.): *Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection*, Cambridge 2003, pp. 555 – 608.
- Kälin, Walter: *Das Prinzip des Non-Refoulement – Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat im Völkerrecht und im schweizerischen Landesrecht*, Frankfurt am Main 1982.
- Kälin, Walter: Refugees and Civil Wars: Only a Matter of Interpretation?, in: *International Journal of Refugee Law* 3 (1991), pp. 435 – 451.
- Klug, Anja: Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?, in: *German Yearbook of International Law* 47 (2004), pp. 594 – 628.
- Knight, Lorna Sinclair / Varrod, Robert: *Collins Robert French Concise Dictionary*, 6th ed., New York 2006.
- Kourula, Pirkko: *Broadening the Edges. Refugee Definition and International Protection Revisited*, The Hague / Boston / London 1997.
- Kwakwa, Edward: Article 1 F (c): Acts Contrary to the Purposes and Principles of the United Nations, in: *International Journal of Refugee Law* 12, Special Supplementary Issue, (2000), pp. 79 – 81.
- Lambert, Héléne: The Conceptualisation of “Persecution” by the House of Lords: Horvath v. Secretary of State for the Home Department, in: *International Journal of Refugee Law* 13 (2001), pp. 16 – 31.
- Lauterpacht, Sir Elihu / Bethlehem, Daniel: The Scope and Content of the Principle of Non-Refoulement: Opinion, in: Feller / Türk / Nicholson: *Refugee Protection in International Law*, pp. 87 – 178.

- Lawson, Rick: Life after Bancovic: On the Extraterritorial Application of the European Convention on Human Rights, in: Coomans / Kamminga (Eds.), *Extraterritorial Application of Human Rights Treaties*, pp. 83 – 123.
- Legomsky, Stephen H.: The USA and the Caribbean Interdiction Program, in: *International Journal of Refugee Law* 18 (2006), pp. 677 – 695.
- Löhr, Tillmann: Die Qualifikationsrichtlinie – Rückschritt hinter internationale Standards?, in: Hofmann, Rainer / Löhr, Tillmann: *Migrationspolitik nach dem Amsterdamer Vertrag – Die Europäische Union zwischen völkerrechtlicher Verpflichtung und mitgliedstaatlichen Interessen* (*forthcoming*).
- Lutterbeck, Derek: Policing Migration in the Mediterranean, in: *Mediterranean Politics* 11 (2006), pp. 59 – 82.
- Macklin, Audrey: Refugee Women and the Imperative of Categories, in: *Human Rights Quarterly* 17 (1995), pp. 213 – 277.
- Magner, Tara: A Less than “Pacific” Solution for Asylum Seekers in Australia, in: *International Journal of Refugee Law* 16 (2004), pp. 53 – 90.
- Markard, Nora: Gendered Violence in 'New Wars' - Challenges to the Refugee Convention, in: van Walsum / Spijkerboer: *Women and Immigration Law - New Variations on Classical Feminist Themes*, New York 2007, pp. 67 – 85.
- Marx, Reinhard: *Handbuch zur Flüchtlingsanerkennung – Erläuterungen zur Richtlinie 2004/83 (Qualifikationsrichtlinie)*, Neuwied / Berlin, Loseblattsammlung, ed.: November 2006.
- Masing, Johannes: Methodische Grundlagen für die Auslegung der Genfer Flüchtlingskonvention, in: *Festschrift für Ernst-Wolfgang Böckenförde zum 65. Geburtstag*, pp. 51 – 80.
- Merriam-Webster Online Dictionary, www.m-w.com/cgi-bin/dictionary (last visited August 2007).
- Meyer-Ladewig, Jens: *EMRK, Handkommentar*, Baden – Baden 2003.
- Miltner, Barbara: Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception, *Fordham Int'l L.J.* 30 (2006), pp. 75 ff.
- Noll, Gregor: Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones, in: *European Journal of Migration and Law* 5 (2003), pp. 301 – 341.
- Nowak, Manfred: *U.N. Covenant on Civil and Political Rights*, Kehl am Rhein / Straßburg / Arlington 1993 (cited: Nowak, *CCCPR Commentary*).
- O’Boyle, Michael: The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life after Bancovic”, in: Coomans / Kamminga, (Eds.), *Extraterritorial Application of Human Rights Treaties*, pp. 125 – 141.
- Oxford English Dictionary, Online-Ausgabe, www.oed.com (last visited August 2007).
- Oxman, Bernard H.: Jurisdiction, in: Bernhardt (Ed.), *Encyclopedia of Public International Law*, Volume Three, pp. 55 – 60.
- Peters, Anne: *Einführung in die Europäische Menschenrechtskonvention*, München 2003.
- Refugee Council of Australia: Position Paper of 17 May 2006: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Glebe, NSW 2006, available at <http://www.refugeecouncil.org.au> (last visited August 2007)
- Roberts, Anthea: Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11, in: *European Journal of International Law* 15 (2004), pp. 721 – 749.
- Robinson, Nehemiah: *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, First published 1953, Reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees, Geneva 1997.

- Schwarze, Jürgen (ed.): EU-Kommentar, Baden-Baden 2000.
- Sitaropoulos, Nicholas: Judicial Interpretation of Refugee Status – In Search of a Principal Methodology, Baden-Baden 1999.
- Stein, Torsten / von Buttlar, Christian: Völkerrecht, 11th ed., Köln / Berlin / München 2005.
- Sternberg, Mark R von.: The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law. Canadian and United States Law Compared, The Hague / London / New York 2002 (cited: Sternberg, The Grounds of Refugee Protection).
- Streinz, Rudolf: EUV/EGV – Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, München 2003.
- UNHCR / IMO: Rescue at Sea. A guide to principles and practice as applied to migrants and refugees, Geneva / London 2006.
- UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007.
- UNHCR, Anmerkungen zur Mitteilung der Europäischen Kommission über eine gemeinsame Politik auf dem Gebiet der illegalen Einwanderung (KOM(2001) 672 final of 15 November 2001), Geneva 2001.
- UNHCR, Background Paper on the Protection of Asylum-Seekers and Refugees Rescued at Sea, Geneva, 18 March 2002.
- UNHCR: Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of third country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30 September 2004), Geneva, January 2005 (cited: UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004).
- UNHCR: Auslegung von Artikel 1 des Abkommens von 1951 über die Rechtsstellung der Flüchtlinge, Geneva, April 2001 (cited: UNHCR, Auslegung von Art. 1).
- UNHCR: Presseerklärung vom 30 April 2004: EU-Asylharmonisierung: UNHCR bedauert verpasste Chance, Geneva, 30 April 2004.
- UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005.
- 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, e, 31 January 1994 (cited: UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law).
- UNHCR: UN High Commissioner for refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, abgedruckt in *International Legal Materials* 32 (1993), pp. 1215 – 1216.
- Vanheule, Dirk: A comparison of the judicial interpretations of the notion of refugee, in: *Carlier / Vanheule: Europe and Refugees: A Challenge?*, pp. 91 – 106.
- Vermeulen, Ben / Spijkerboer, Thomas / Zwaan, Karin / Roel Fernhout, Karin: *Persecution by third Parties*. Commissioned by the Research and Documentation Centre of the Ministry of Justice of The Netherlands, Nijmegen 1998.
- Vitzthum, Wolfgang Graf: *Völkerrecht*, 4th ed., Berlin 2007.
- Von Thenen, Gabriele: *Geschlechtsspezifische Flucht- und Bleibegründe: Völkerrechtliche Verpflichtungen und innerstaatliche Rechtslage*, Frankfurt am Main 2004 (cited: von Thenen, *Geschlechtsspezifische Flucht- und Bleibegründe*).

- Weinzierl, Ruth, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders, German Institute for Human Rights, Berlin, Juli 2007.
- Weis, Erich: Langenscheidts Großwörterbuch Französisch, Teil I: Französisch-Deutsch. 9th ed., Berlin / München / Wien / Zürich / New York 1996.
- Wiefelspütz, Dieter: Bewaffnete Einsätze der Bundeswehr auf See, in: Neue Zeitschrift für Wehrrecht 2005, pp. 146 – 163.
- Young, Wendy: 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, available at <http://www.icva.ch/doc00000160.html> (last visited August 2007).

3. The issues

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 possessing 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 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 off² by border police requires debate and counter measures not only at national, but also at European level.³ On the one hand, a holistic approach is needed, including development 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 legal opinion 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. We therefore examine the relevant legal texts and evaluate 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 extraterritorially.

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: FRONTEX was created by Council Regulation 2007/2004/EC of 26 October 2004.⁴ At present, the agency has its own staff plus access via a central technical register to a total of 24 helicopters, 19 aircrafts, 107 boats as well as large quantities of mobile equipment.⁵ 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.⁶ 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 on-the-spot during joint FRONTEX operations, thus enabling them to support local border police; e.g. 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

¹ ICMPD, *Irregular Transit Migration in the Mediterranean*, passim.

² Lutterbeck, *Policing Migration in the Mediterranean*, in: *Mediterranean Politics* 11 (2006), p. 59.

³ See the 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 www.europarl.europa.eu/hearings/20070703/libe/programme_en.pdf.

⁴ OJEC No. L 349 of 25 November 2004.

⁵ See the recent answer of the Federal Government to a parliamentary question, BT-Drs. 16/5019 of 13 April 2007, answer to question 18.

⁶ 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, OJEC No. L 199/30 of 31 July 2007.

regulation, which entered into force on 20 August 2007 pursuant to its Art. 14,⁷ 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, too, are involved in measures to protect Europe's Mediterranean borders.

The following questions have been put to us:

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 3.1.)?
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 3.2.)?
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 3.3.)?

It is important to clarify our methodology before addressing these three questions. The relevant international treaties have been interpreted using the rules of interpretation written into the Vienna Convention on the Law of Treaties (VCLT)⁸ in order to answer questions of this nature.⁹ According to Art. 31 para. 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 Art. 32 VCLT, historical interpretation has, at most, subsidiary importance. Two distinctive features apply to these fundamental principles in practice. Firstly, literature,¹⁰ state practice,¹¹ UNHCR¹² and EXCOM¹³ have

⁷ 2006/0140 (COD).

⁸ BGBl. 1985 II p. 927.

⁹ Art. 4 VCLT must be referred to in conjunction with the customary law application of Art. 31 VCLT, cf. RSAA, Ref. App. No. 74665/03 (7 July 2004), § 45; Edwards, in: IJRL 17 (2005), p. 293 (306); Hathaway/Foster, in: IJRL 15 (2003), p. 478 (485); Lauterpacht / Bethlehem, in: Feller et al., Refugee Protection in International Law, p. 87 (103).

¹⁰ Hathaway, The Rights of Refugees under International Law, pp. 53 f.; idem, The Law of Refugee Status, pp. 107 and 101 ff.; Klug, in: GYIL 47 (2004), p. 594 (601); Markard, in: van Walsum / Spijkerboer, Women and Immigration Law, p. 67 (68); Carlier, in: Carlier / Vanheule / Hullmann / Peña Galiano, Who is a Refugee?, p. 685 (701 f.); idem, in: Nicholson / Twomey, Refugee Rights and Realities, p. 37 (38 f.); Anker, in: Harv.Hum.Rts.J. 15 (2002), p. 134 (134 ff.); Sitaropoulos, Judicial Interpretation of Refugee Status, pp. 217 f.; Lambert, in: IJRL 13 (2001), p. 16 (18 and 30); Binder, Frauenspezifische Verfolgung, pp. 79 f.; von Thenen, Geschlechtsspezifische Flucht- und Bleibegründe, pp. 72 ff.; Vanheule, in: Carlier / Vanheule: Europe and Refugees: A Challenge?, p. 91 (103); Edwards, in: IJRL 17 (2005), p. 293 (295 f.); Feller, in: IRRIC 83 (2001), p. 581 (581 ff., insbes. 594); Vanheule, in: Carlier / Vanheule, Europe and Refugees: A Challenge?, p. 91 (99); Macklin, in: Hum.Rts.Q. 17 (1995), p. 213 (224); Kälin, in: IJRL 3 (1991), p. 435 (447); Sternberg, The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law, pp. 2 ff.; Edwards, in: Feller / Türk / Nicholson, Refugee Protection in International Law, p. 46 (48 ff.); Haines, in: Feller / Türk / Nicholson, Refugee Protection in International Law, p. 319 (324); Battjes, European Asylum Law and International Law, 5.4.1.1 [289]; Kourula, Broadening the Edges, pp. 92 f. and 132; also already, Grahl-Madsen, The Status of Refugees in International Law; pp. 212-216.

¹¹ Canada (AG) v. Ward, [1993] 2 S.C.R. 689, 734 f., 1993 CanLII 105 (S.C.C.), per La Forest J, under explicit reference to Hathaway; see also Chan v. Canada (MEI), [1995] 3 S.C.R. 593, 634 f., 1995 CanLII 71 (S.C.C.); Ranjha v. Canada (MCI), 2003 FCT 637 (CanLII), § 38, per Lemieux J; Malik v. Canada (MCI), 2005 FC 1707 (CanLII), § 8 f., per

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 Parties¹⁴ and is thus binding on the contracting states to the Refugee Convention according to Art. 21 para 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.¹⁵ Secondly, interpretation must remain dynamic. Thus, changes to concepts occurring over time, as well as changes to the circumstances surrounding international law, must be taken into consideration.¹⁶ The ECtHR¹⁷ and the ICJ¹⁸ both emphasise the particular significance of these basic principles when interpreting human rights conventions. State practice¹⁹ and literature²⁰ have led this approach to be applied to interpreting the Refugee Convention, too. Therefore, the following analysis focuses on a dynamic human rights interpretation of the relevant conventions.

Dawson J; Weiss v. Canada (MCI), 2000 CanLII 15808 (F.C.), § 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 IJRL 13 (2001), p. 174 (191) f., per Lord Bingham; Islam v. SSHD, Ex Parte Shah, R v., [1999] UKHL 20 (25 March, 1999), printed in IJRL 11 (1999), p. 496 (510) f., per Lord Hoffmann; Sepet v. SSHD, [2003] 3 All ER 304 (HL), printed in IJRL 15 (2003), p. 276 (277), per Lord Bingham; RSAA, Ref. App. No. 74665/03 (7 July 2004), § 58 f.; RSAA, Ref. App. No. 71427/99 (16 August 2000), § 47; RSAA, Ref. App. No. 71404/99 (29 October 1999), § 67; RSAA, Ref. App. No. 2039/93 (12 February 1996), § 37 ff. and 56 f.; 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 February 1997), 142 A.L.R. 331, 333, per Brennan CJ.

¹² UNHCR, Interpretation of Art. 1, § 5; UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, Comment on Art. 9, p. 21.

¹³ 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).

¹⁴ 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 January 2002), Preamble, §§ 3 and 6; Operative paragraphs, §§ 1 and 2.

¹⁵ Feller, in: IRRC 83 (2001), p. 581 (594); Sitaropoulos, Judicial Interpretation of Refugee Status, pp. 217 f.; Binder, Frauenspezifische Verfolgung, pp. 22 ff., particularly p. 24; Hathaway, The Law of Refugee Status, p. 107, in Fn. 54, and p. 105, Fn. 41; see also UNHCR, interpretation of Art. 1, § 5; Lambert, in: IJRL 13 (2001), p. 16 (30 and 18, in Fn. 9); Haines, in: Feller / Türk / Nicholson, Refugee Protection in International Law, p. 319 (324).

¹⁶ Dahm / Delbrück / Wolfrum, Völkerrecht, Vol. I/3, p. 649; Stein / Stein / von Buttlar, Völkerrecht, para. 83; Brownlie, Principles of Public International Law, p. 604; Ipsen, Völkerrecht, § 11, para. 21; Frowein / Peukert, ECHR-Kommentar, Introduction, para. 10 f.

¹⁷ ECtHR, Judgement of 25 April 1978, Tyrer v. United Kingdom, Series A 26 (1978), p. 15, § 31; consenting, Bernhardt, in: GYIL Vol. 42 (1999), p. 11 (16); see also (“in the light of current circumstances”) ECtHR, Judgement of 24. 1. 1986, Rees v. United Kingdom, Series A 106 (1986), p. 19, § 47; ECtHR, Judgement of 24. 1. 1986, Rees v. United Kingdom, Series A 106 (1986), p. 19, para. 47; Judgement of 24 October 1979, Winterwerp, Series A 33 (1980), p. 16, para. 37; ECtHR, Judgement of 25 April 1978, Tyrer v. United Kingdom, Series A, Vol. 26 (1978), p. 16, § 32 f.; Judgement of 13 June 1979, Marckx v. Belgium, Series A 31 (1979), § 41; ECtHR, Judgement of 12 December 2001, Banković and Others v. Belgium & Ors, Reports 2001-XII, p. 333, § 57; see also, Judgement of 21 November 2001, Al-Adsani v. United Kingdom, Reports 2001-XI, p. 79, § 55.

¹⁸ Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 3 (111); ferner Kälin / Epiney, Völkerrecht, p. 40; Dahm, Delbrück, Wolfrum, Völkerrecht, Band I/3, p. 651; Bernhardt, in: BYIL 42 (1999), p. 11 (17); Grabenwarter, Europäische Menschenrechtskonvention, § 5, para. 13; Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Reports 1971, 4 (19); similar already in Right of Passage over Indian Territory (Preliminary Objections), ICJ Reports 1957, p. 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”.

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

²⁰ Feller, in: IRRC 83 (2001), p. 581 (594); Lambert, in: IJRL 13 (2001), p. 16 (18); cf. also Hathaway, The Rights of Refugees under International Law, p. 64 and 106; Binder, Frauenspezifische Verfolgung, p. 25.

3.1. Obligations under international law

In order to answer the question 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 opinion is structured following the maritime law provisions defining territorial jurisdiction. According to Art. 2 para. 1 of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS)²¹ land territory, internal waters and, in the case of coastal states, territorial sea, all form part of a state's sovereign territory. Under Art. 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.²² State territory ends 12 nautical miles out to sea.²³ This is the context for the following three-step analysis examining how far the relevant conventions are legally binding:

- firstly, vis-à-vis the territorial sea belonging to EU state territory (3.1.1.),
- secondly, vis-à-vis territory beyond the 12 mile zone, i.e. in the contiguous zone and on the high seas (3.1.2.) and
- thirdly, vis-à-vis the territory of third party countries including their territorial sea; refugees' countries of origin and transit countries; individuals entitled to subsidiary protection and migrants (3.1.3.).

3.1.1. 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.

3.1.1.1. United Nations Convention Relating to the Status of Refugees

Art. 33 para. 1 of the Refugee Convention²⁴ 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 on their own territory. For instance, Australia adopted a law in 2001²⁵ whereby various islands within the 12 mile zone are 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 indeed questioned as “offshore entry persons” by the UNHCR or Australian officials on regional islands and asked about their reasons for fleeing. But they are exposed to a malfunctioning asylum system and have access neither to legal protection nor

²¹ BGBl. 1994 II p. 1798.

²² Herdegen, *Völkerrecht*, § 31, para. 45; Gloria, in: Ipsen, § 52, para. 5; Graf Vitzthum, in: Graf Vitzthum, *Völkerrecht*, p. 420.

²³ 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.

²⁴ BGBl. 1953 II p. 560, in the version of the Protocol on the legal status of refugees of 31 Januar 1967, BGBl. 1969 II p. 1294.

²⁵ Migration Amendment (Excision from Migration Zone) (Consequential Provision) Act 2001, No. 127/2001.

to government information centres.²⁶ The Australian model resembles the French attempt to legislate in order to turn several harbour and airport zones into international zones. France's legislation enabled it to exercise state power in the zones concerned and evade its obligations under international law.²⁷

These approaches have been unanimously criticised by literature,²⁸ the UNHCR²⁹ and the EXCOM³⁰ as well as NGOs³¹ as legally irrelevant attempts to circumvent international obligations. The *non-refoulement* principle applies across the EU's entire territory including the 12 mile zone irrespective of conflicting domestic legislation. In the case of France, this principle was upheld regarding the ECHR by the ECtHR judgement on the Amuur case³². One must agree with this since, according to Art. 29 VCLT, all EU sovereign territory falls within the treaties' scope. So, the 12 mile zone is covered by Art. 2 para. 1 UNCLOS. Thus, the Australian and French models infringe the obligation under Art.29 VCLT to implement the Refugee Convention throughout the sovereign territory concerned.³³ Furthermore, the approaches depicted violate a principle of customary international law, stipulated in Art. 27 VCLT,³⁴ which says that a state may not get round 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 able *de facto* to control their sovereign territorial borders and not be subject to obligations applying on the mainland.³⁵

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

²⁶ Elaborate, Goodwin-Gill / Mc Adam, *The Refugee in International Law*, pp. 255 f.; Edwards, in: *IJRL* 15 (2003), p. 192 (208); cf. also Barnes, in: *ICLQ* 53 (2004), p. 47 (65 f.); Feld, in: *AJHR* 11 (2002), available at <http://www.austlii.edu.au/au/journals/AJHR/> (last visited August 2007).

²⁷ Regarding the facts, ECtHR, *Amuur v. France*, Judgement of 25 June 1996, Appl. No. 17/1995/523/609, §§ 6 ff., and 19 ff.

²⁸ Magner, in: *IJRL* 16 (2004), p. 53 (75); Hathaway, *The Rights of Refugees under International Law*, p. 321 and 172; Barnes, in: *ICLQ* 53 (2004), p. 47 (69); Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (111), § 67; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 253; Feld, in: *AJHR* 11 (2002), available at <http://www.austlii.edu.au/au/journals/AJHR/> (last visited August 2007); i.c. Feld emphasises that they emerge “at the latest” in this moment, which does not exclude the possibility of an earlier emergence, since this question is not addressed i.c.; likewise Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union’s External Borders*, p. 13.

²⁹ UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, § 33.

³⁰ 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.”

³¹ Refugee Council of Australia, Position Paper of 17 May 2006: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, § 6.

³² ECtHR, *Amuur v. France*, Judgement of 25 June 1996, 17/1995/523/609, § 52.

³³ Hathaway, *The Rights of Refugees under International Law*, pp. 320 ff.; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 253; Barnes, in: *ICLQ* 53 (2004), p. 47 (66 and 69).

³⁴ Barnes, in: *ICLQ* 53 (2004), p. 47 (68); Feld, in: *AJHR* 11 (2002), available at <http://www.austlii.edu.au/au/journals/AJHR/> (last visited August 2007).

³⁵ Barnes, in: *ICLQ* 53 (2004), p. 47 (69); see also with reference to ECtHR caselaw concerning *Amuur*, Hathaway, *The Rights of Refugees under International Law*, p. 321.

3.1.1.2. CAT

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT)³⁶ contains an explicit reference to *non-refoulement* in Art. 3 para. 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 3.1.1.1. The prohibition in Art. 3 para. 1 CAT consequently applies throughout a state's sovereign territory, including the 12 mile zone, irrespective of any conflicting domestic rules.

3.1.1.3. ICCPR

Art. 7 para. 1 of the International Covenant on Civil and Political Rights (ICCPR)³⁷ 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 Art. 3 ECHR.³⁸ The protection conferred by the treaty extends to all individuals within a contracting state's territory and jurisdiction, according to Art. 2 para. 1. Consequently, here, too, it is necessary to refer to the arguments listed under 3.1.1.1. Thus, the non-refoulement in Art. 7 para. 1 ICCPR applies, irrespective of any conflicting domestic rules, throughout the sovereign territory concerned, including the 12 mile zone.

3.1.1.4. ECHR

The wording of the European Convention on Human Rights (ECHR)³⁹ does not lead to a direct ban on deportation. Nevertheless, European Court of Human Rights case law has consistently prohibited extradition, expulsion or deportation to states where the person concerned faces torture or inhuman or degrading treatment.⁴⁰ The link in Art. 3 ECHR is the actual measure taken by the contracting state to terminate residence.⁴¹ Art. 1 of the ECHR binds the contracting parties in relation to “all persons within their jurisdiction”. The subject of the Amuur decision⁴² was a zone located on the mainland. However, a state's jurisdiction undisputedly extends over its entire territory which, according to Art. 2 para. 1 UNCLOS, includes its territorial sea, too. Hence, the principle established in Amuur undoubtedly applies inside the 12 miles zone too, especially since the arguments put forward in 3.1.1.1. 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.

³⁶ BGBl. 1990 II p. 247.

³⁷ BGBl. 1973 II 1534.

³⁸ Nowak, CCCPR Commentary, Art. 7, § 21.

³⁹ BGBl. 2002 II p. 1055.

⁴⁰ Consistent practice since ECtHR, Soering v. UK, Judgement of 7 July 1989, Appl. No. 14038/88, §§ 91 ff; in detail, Marx, Handbuch zur Flüchtlingsanerkennung, § 39, paras. 190 ff; additionally – although of less practical relevance – a ban on deportation comes into consideration if other ECHR rights are threatened, cf. ECtHR, Soering v. UK, *idem*, § 115.

⁴¹ Wollenschläger, in: Handbuch der Europäischen Grundrechte, § 17, para. 32. with further references; Marx, Handbuch zur Flüchtlingsanerkennung, § 39, para. 154 f. with further reference to Commission and Court jurisprudence; Bank, in: Grote/Marauhn, EMRK/GG Konkordanzkommentar, Kap. 11, para. 106.

⁴² ECtHR, Amuur v. France, Judgement of 25 June 1996, Appl. No. 17/1995/523/609, § 52.

3.1.2. 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, i.e. in the respective contiguous zone or on the high seas.

3.1.2.1. United Nations Convention Relating to the Status of Refugees

The current debate on legal policy has seen attempts to push 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 Government⁴³ 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 extraterritorial.”⁴⁴

The BMI and the Federal Government provide no source for the alleged state practice. By so doing they give a false impression, since EU member states do not all share the same legal opinion.⁴⁵ This is also the reason why the Commission announced in November 2006 that its planned study on International Maritime Law would address, among other issues, the question “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.”⁴⁶ State practice contains at most a few individual positions rejecting extraterritorial application of the Refugee Convention. The international debate centres on the United States Supreme Court's decision on 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 waters⁴⁷, stating that Art. 33 para. 1 Refugee Convention did not have an extraterritorial effect.⁴⁸ Australian⁴⁹ case law and some parts of British⁵⁰ case law subsequently upheld this interpretation. Yet it must be emphasised that judgements by a few domestic courts should, at most, be discussed as aspects of comparative law, but cannot claim to be binding under international law.⁵¹

⁴³ Answer of the Federal Government to the brief question put by Members of Parliament Winkler, Beck, Beck, further delegates and the Bündnis 90/Die Grünen parliamentary group – Drs. 16/2542 –, BT-Drs. 16/2723 of 25 September 2006, p. 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.”

⁴⁴ BMI, Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration, Press release, September 2005, p. 2, available at www.bmi.bund.de (last visited August 2007): “According to state practice and predominant legal conception the non-refoulement of the Refugee Convention does not apply on the high seas, which is extraterritorial space, towards persons who assert reasons for persecution.”

⁴⁵ For an identical assessment in light of the cited documents, see Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 36.

⁴⁶ Commission of the European Communities, Communication from the Commission to the Council of 30 November 2006, COM(2006) 733 final, § 34.

⁴⁷ Extensive background information, Legomsky, in: *IJRL* 18 (2006), p. 677 (679 ff.); Magner, in: *IJRL* 16 (2004), p. 53 (72).

⁴⁸ *Sale v. Haitian Ctrs. Council*, 509 US 155, 156 (USSC 1993).

⁴⁹ *MIMA v. Ibrahim*, [2000] HCA 55 (16 November 2000), § 136, per Gummow J; *MIMA v. Khawar*, [2002] HCA 14 (11 April 2002), § 42, per Mc Hugh and Gummow JJ; similarly, *Applicant A & Anor v. MIEA & Anor*, [1997] HCA 4 (24 February 1997), 142 A.L.R. 331, 366, per Gummow J, who refers to *Sale* l.c., does not, however, consider the extraterritorial application of the *non-refoulement* principle, but the question of a right to asylum under the Refugee Convention which he rejects.

⁵⁰ *Regina v. Immigration Officer at Prague Airport and Anor (Respondents) ex parte European Roma Rights Centre & Ors (Appellants)*, [2004] UKHL 55 (9 December 2004), § 68, per Lord Hope, I.Erg. possibly Lord Bingham as well, l.c., § 17.

⁵¹ 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.

The statement that, in addition to the alleged state practice, predominant legal opinion rejects extra-territorial 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.⁵² More recent literature⁵³, however, agrees with the UNHCR,⁵⁴ the EXCOM⁵⁵ and NGOs⁵⁶ that Art. 33 para. 1 Refugee Convention binds the contracting states outside their territory as well. This opinion is upheld by parts of, to date, inconsistent British case law⁵⁷ and by Judge Blackman in his Dissenting Opinion on *Sale v. Haitian Ctrs. Council*.⁵⁸ The Inter-American Commission on Human Rights, which found that United States practice towards Haitian boat refugees violated various rights of the American Convention of Human Rights⁵⁹, shares the UNHCR's opinion.⁶⁰

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

⁵² Grahl-Madsen, *The Status of Refugees in International Law*, Volume II (1966), p. 94; Robinson, *Nehemiah: Convention Relating to the Status of Refugees. Its History, Contents and Interpretation* (1953), Art. 33, § 5; as far as the Supreme Court refers in *Sale v. Haitian Ctrs. Council*, 509 US 155, 183 (USSC 1993), to *Aga Khan*, in: *Recueil des Cours* 149 (1976), p. 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*, cf. hereunto Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (109).

⁵³ Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (110), § 62; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, pp. 244 ff.; Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (103 ff.); Barnes, in: *ICLQ* 53 (2004), p. 47 (68); Bailliet, in: *Hum.Rts.Q.* 25 (2003), p. 741 (751); Roberts, in: *EJIL* 15 (2004), p. 721 (745 f.); Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (109); Fischer-Lescano / Tohidipur, in: *Europäisches Asyl- und Migrationsrecht*, Beilage zum *Asylmagazin* 5/2007, p. 19 (24 f.); Legomsky, in: *IJRL* 18 (2006), p. 677 (687 ff.); Debenedetti, *Externalization of European Asylum and Migration Policies*, p. 6; Hathaway, *The Rights of Refugees under International Law*, pp. 336 ff.; Magner, in: *IJRL* 16 (2004), p. 53 (71); Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 37; not explicitly, but eventually probably identical, Fitzpatrick, in: *Harv.Hum.Rts.J.* 9 (1996), p. 229 (248), who criticises the decision in *Sale* as "particularly stark and troubling".

⁵⁴ 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*, §§ 24 ff.; *idem*, *Background Paper on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, § 18; *idem*, *The Principle of Non-Refoulement as a Norm of Customary International Law*, § 30; *idem*, *UN High Commissioner for refugees responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, printed in *International Legal Materials* 32 (1993), p. 1215 (1215); *idem*, *Amicus Curiae Brief of 21 December 1992 submitted to the United States Supreme*, cited in *ILM* 32 (1993), p. 1215 (1215); UNHCR, *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 November 2001)*, § 12;

lastly see also, UNHCR/IMO, *Rescue at Sea*, p. 8: "If people rescued at sea make known a claim for asylum, key principles as defined in international refugee law need to be upheld."

⁵⁵ 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 the EXCOM has repeatedly referred to situations in which the 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, cf. EXCOM, *Conclusion No. 82 (XLVIII) (1997)*, § (d) (iii); *Conclusion No. 85 (XLIX) (1998)*, § (q); in this purpose, cf. the reference to the need of protection of stowaways on board of vessels, *Conclusion No. 53 (XXXIX) (1981)*, § (1).

⁵⁶ HRW, *By Invitation Only: Australian Asylum Policy*, p. 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*.

⁵⁷ *European Roma Rights Centre & Ors v. Immigration Officer at Prague Airport & Anor* [2003] EWCA Civ 666 (20 May 2003), § 34, per Simon Brown LJ.

⁵⁸ *Dissenting Opinion Blackmun J, Sale v. Haitian Ctrs. Council*, 509 US 155, 190 (USSC 1993).

⁵⁹ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), §§ 183 – 188.

⁶⁰ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., 550 (1997), § 157.

of state institutions or is affected by their actions.⁶¹ 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 areas declared as international zones.⁶² The United States Supreme Court's decision to the contrary has been criticised in exceptionally sharp terms⁶³ by advocates of the above approach as a purely politically motivated decision,⁶⁴ and rejected by them.⁶⁵

Indeed, the approach outlined above is already supported by the wording of the Refugee Convention, which follows the English and French versions of Art. 33 VCLT in conjunction with Art. 46 of the Refugee Convention. The English version of Art. 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 (...)” Already the formulation “in any matter whatsoever” covers any imaginable action exposing the person concerned to the risk of persecution.⁶⁶

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.⁶⁷ Such an assumption, though, runs counter to the common meaning of the term “return”⁶⁸ which includes “to send back”⁶⁹ or „to bring, send, or put back to a former or proper place”⁷⁰. The destination to which a person may not be sent back to is the sole geographical reference point. A geographical restriction regarding the place where this obligation emerges cannot be understood from the wording.⁷¹ The Supreme Court does concede that it chooses a narrower than customary interpretation of the wording, contrary to Art. 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.⁷² The Court's arguments are far from watertight and this is shown by the fact that the French press itself used the term *re-*

⁶¹ Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (110 f.), § 63 and 64; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 245; 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*, § 43.

⁶² Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (111), § 67; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 246; Fischer-Lescano / Tohidipur, in: *Europäisches Asyl- und Migrationsrecht, Beilage zum Asylmagazin 5/2007*, p. 19 (25).

⁶³ Cf. Goodwin-Gill, in: *IJRL 6 (1994)*, p. 103 (109): “The Court has merely compounded the illegality, itself becoming a party to the breach”; Hathaway, *The Rights of Refugees under International Law*, p. 337: “Of all of the Court’s Arguments, this is perhaps the most disingenuous”.

⁶⁴ Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 247: “essentially policy decision”.

⁶⁵ 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*, § 28; Legomsky, in: *IJRL 18 (2006)*, p. 677 (686 ff.); Hathaway, *The Rights of Refugees under International Law*, pp. 336 ff.

⁶⁶ Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 246; Goodwin-Gill, in: *IJRL 6 (1994)*, p. 103 (103); UNHCR: UN High Commissioner for refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, printed in *International Legal Materials 32 (1993)*, p. 1215 (1215); Legomsky, in: *IJRL 18 (2006)*, p. 677 (688); Magner, in: *IJRL 16 (2004)*, p. 53 (71); Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union’s External Borders*, p. 34.

⁶⁷ *Sale v. Haitian Ctrs. Council*, 509 US 155, 180 (USSC 1993).

⁶⁸ Hathaway, *The Rights of Refugees under International Law*, p. 337.

⁶⁹ Oxford English Dictionary, Online-edition, www.oed.com, Return, III. c., (last visited August 2007); see also Merriam-Webster Online Dictionary, Return, 3. a., www.m-w.com/cgi-bin/dictionary (last visited August 2007).

⁷⁰ Merriam-Webster Online Dictionary, Return, 2.a., www.m-w.com/cgi-bin/dictionary (last visited August 2007).

⁷¹ 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*, § 26 f.; Dissenting Opinion Blackmun J, *Sale v. Haitian Ctrs. Council*, 509 US 155, 193 (USSC 1993); Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union’s External Borders*, p. 34.

⁷² *Sale v. Haitian Ctrs. Council*, 509 US 155, 180 (USSC 1993).

fouler to describe the actions in question⁷³ and that “refouler” is equated with “repousser”⁷⁴ (to push back, to drive back⁷⁵) and “pousser en arrière”⁷⁶ (to push back, to move back⁷⁷).⁷⁸

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.⁷⁹ Considerable weight can be attached to this argument for three reasons.

- Firstly, 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.⁸⁰ 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.⁸¹ Any dynamic, human rights interpretation of the Refugee Convention needs to be in accordance with such developments.^{82 83}
- Thirdly, the opposing view would provide contracting states with the opportunity to circumvent their international commitments by shifting de facto border controls outside their

⁷³ Cf. *Le Monde* of 31 May/1 June 1992, *Le boubier haïtien*; cited pursuant to Blackmun J in his Dissenting Opinion, *Sale v. Haitian Ctrs. Council*, 509 US 155, 194 (USSC 1993); see also Legomsky, in: *IJRL* 18 (2006), p. 677 (690).

⁷⁴ Collins Robert French Dictionary, p. 453.

⁷⁵ Langenscheidts Großwörterbuch Französisch-Deutsch, p. 830.

⁷⁶ Collins Robert French Dictionary, pp. 399, 30.

⁷⁷ Langenscheidts Großwörterbuch Französisch-Deutsch, p. 59 and 747.

⁷⁸ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 29; idem, UNHCR: UN High Commissioner for refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, printed in *International Legal Materials* 32 (1993), p. 1215 (1215), with reference to the amicus curiae letter submitted in the same proceeding.

⁷⁹ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 29; idem, UNHCR: UN High Commissioner for refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, printed in *International Legal Materials* 32 (1993), p. 1215 (1215), with reference to the amicus curiae letter submitted in the same proceeding.

⁸⁰ Cf. 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 August 2000), § 46; Hathaway / Foster, in: *IJRL* 15 (2003), p. 461 (468); Cook, in: *Mich.J.Int'l L.* 23 (2002), p. 223 (243); von Thenen, *Geschlechtsspezifische Flucht- und Bleibegründe*, p. 71; the victim's point of view is acknowledged as the decisive argument against the requirement of an inner coherence at the interpretation of certain social groups, cf. *Islam v. SSHD and Anor, Ex Parte Shah, R v.*, [1999] UKHL 20 (25 March, 1999), printed in: *IJRL* 11 (1999), p. 496 (511), per Lord Hoffmann; lastly, the victim's point of view is one of the decisive arguments against the public character of the persecution, as is traditionally demanded, cf. RSAA, Ref. App. No. 71427/99 (16 August 2000), § 63; Mathew / Hathaway / Foster, in: *IJRL* 15 (2003), p. 444 (451).

⁸¹ Cf. hereunto below 3.1.2.2., 3.1.2.3., 3.1.2.4. and 3.1.3.2., 3.1.3.3. and 3.1.3.4.

Human Rights Commission: *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., 550 (1997), § 167.

⁸² Against this background also the reference of the House of Lords and the US Supreme Court to Grahl-Madsen, cf. *Regina v. Immigration Officer at Prague Airport and Anor (Respondents) ex parte European Roma Rights Centre & Ors (Appellants)*, [2004] UKHL 55 (9. December 2004), § 70, per Lord Hope; *Sale v. Haitian Ctrs. Council*, 509 US 155, 182 (USSC 1993), and to Robinson, UKHL l.c., § 17, per Lord Bingham; USSC l.c., is pointless. 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.

⁸³ Explicit reference to the Refugee Convention and the Human Rights Contracts as interacting systems at UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 34; Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (105); see also, with extensive presentation of the according approaches of the HRC and the ECtHR, Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (110 f.), §§ 64 ff.; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, pp. 244 ff.; Barnes, in: *ICLQ* 53 (2004), p. 47 (68); Fischer-Lescano / Tohidipur, in: *Europäisches Asyl- und Migrationsrecht, Beilage zum Asylmagazin* 5/2007, p. 19 (24 f.); Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (103); Roberts, in: *EJIL* 15 (2004), p. 721 (745 f.); Hathaway, *The Rights of Refugees under International Law*, p. 339.

territorial waters. Thus, states acting in bad faith would gain a possibility of thwarting the Refugee Convention's aims.

Finally, systematic considerations support extraterritorial application. The US Supreme Court actually refers to Art. 33 para. 2 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 para. 1 of this same provision. Thus, Art. 33 para. 1 of the Refugee Convention only refers to persons on state territory.⁸⁴ However, this objection is also groundless. Firstly, Art. 33 para. 1 and para. 2 Refugee Convention have an exceptional relationship to each other. The described approach is methodically wrong, taking the exception to infer the rule.⁸⁵ Secondly, no account is taken of the fact that the two provisions pursue different purposes.⁸⁶ The exception in para. 2 refers to danger emanating from the applicant. Yet the danger to the host country cannot emerge until the applicant is actually in the country concerned.⁸⁷ Given such danger, Art. 33 para. 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 presence⁸⁸ and legitimate residence on the state's territory⁸⁹. Conversely, states are banned from reading geographical restrictions into rules of the convention containing no such limitations.⁹⁰

Another argument often used against extraterritorial application is that it would be tantamount to a right to territorial asylum. Yet, such a right is not included in the Refugee Convention.⁹¹ This argument is basically correct, but fails to recognise that the right to asylum is different from the *non-refoulement* principle.⁹²

Lastly, in the *Sale* case, the Supreme Court draws upon drafting history,⁹³ as parts of British case law have done⁹⁴. The historical interpretation is still subsidiary according to Art. 32 VCLT.⁹⁵ Thus, it

⁸⁴ *Sale v. Haitian Ctrs. Council*, 509 US 155, 179 f (USSC 1993).

⁸⁵ Cf. in this purpose probably also the Dissenting Opinion Blackmun J, *Sale v. Haitian Ctrs. Council*, 509 US 155, 194 (USSC 1993): “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.”

⁸⁶ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 28.

⁸⁷ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 28; Legomsky, in: *IJRL* 18 (2006), p. 677 (689); Hathaway, *The Rights of Refugees under International Law*, p. 336; Dissenting Opinion Blackmun J, *Sale v. Haitian Ctrs. Council*, 509 US 155, 194 (USSC 1993).

⁸⁸ Art. 2: “in which he finds himself”; Art. 4: “refugees within their territories”, Art. 27: “any refugee in their territory”.

⁸⁹ Art. 15, 17 I, 19 I, 21, 23, 24 I, 28 I: “lawfully staying”; Art. Art. 18 and 32: “Refugee lawfully in their territory”; Art. 26: “refugees lawfully in its territory”.

⁹⁰ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 28.

⁹¹ *Applicant A & Anor v. MIEA & Anor*, [1997] HCA 4 (24 February 1997), 142 A.L.R. 331, 366, per McHugh J; *Regina v. Immigration Officer at Prague Airport and Anor (Respondents) ex Parte European Roma Rights Centre & Ors (Appellants)*, [2004] UKHL 55 (9 December 2004), § 17, per Lord Bingham, unter Berufung auf *MIMA v. Ibrahim*, [2000] HCA 55 (16 November 2000), § 142, per Gummow J; cf. i.c. in this meaning also §§ 137 ff.; cf. 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.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), § 72.

⁹² Cf. hereunto Goodwin-Gill, in: *IJRL* 6 (1994), p. 103 (109); hereunto cf. below, 3.3.1.

⁹³ *Sale v. Haitian Ctrs. Council*, 509 US 155, 184 to 187 (USSC 1993); but the Supreme Court admits a subsidiary application, cf. p. 187.

⁹⁴ *Regina v. Immigration Officer at Prague Airport and Anor (Respondents) ex parte European Roma Rights Centre & Ors (Appellants)*, [2004] UKHL 55 (9 December 2004), § 17, per Lord Bingham.

⁹⁵ Cf. 3.; also, Dissenting Opinion Blackmun J, *Sale v. Haitian Ctrs. Council*, 509 US 155, 194 f. (USSC 1993); Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union’s External Borders*, p. 35.

may have no bearing on the conclusion presented here. Moreover, the Supreme Court rests its decision purely upon the statements of two delegates,⁹⁶ who contradicted the contributions of a third delegate⁹⁷ and therefore do not prove an Assembly consensus.⁹⁸ Thus, it should come as no surprise that a very different view is taken of the drafting history by the UNHCR,⁹⁹ and that the relevant literature¹⁰⁰ can be described as equivocal, to say the least. However, there is no need for a conclusive evaluation of this controversy since Art. 32 VCLT renders it legally irrelevant. The *non-refoulement* referred to in Art. 33 para. 2 Refugee Convention therefore applies extr territorially.

3.1.2.2. CAT

The body given monitoring responsibility by the convention, the UN Committee against Torture, has confirmed the extr territorial scope of Art. 3 para. 1 CAT vis-à-vis the Guantánamo inmates.¹⁰¹ In addition, the Committee has stated that rules of the convention concerning the establishment of jurisdiction apply extr territorially if the State party exercises effective control over an area or a person.¹⁰² In the English version of the CAT, English being one of the official drafting languages,¹⁰³ the terms “expel, return (‘refouler’)” are used in addition to the term “extradite”. So, the English version uses the same terms as the prohibition in Art. 33 para. 1 Refugee Convention. Hence, the above-mentioned¹⁰⁴ 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, too, indicates extr territorial application. Consequently, Art. 3 para. 1 CAT applies extr territorially.

3.1.2.3. ICCPR

The literature¹⁰⁵ also assumes that the *non-refoulement* principle in Art. 7, clause 1, ICCPR applies extr territorially. 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 Art. 2 para. 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.¹⁰⁶ 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.¹⁰⁷ Accordingly, Art. 7, clause 1, ICCPR, too, applies extr territorially.

⁹⁶ Sale v. Haitian Ctrs. Council, 509 US 155, 184 f. (USSC 1993).

⁹⁷ Cf. 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 February 1950), § 54 f.; printed in: Takkenberg / Tahbaz, The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, Vol. I, p. 290 (295).

⁹⁸ Legomsky, in: IJRL 18 (2006), p. 677 (690); Goodwin-Gill, in: IJRL 6 (1994), p. 103 (104).

⁹⁹ UNHCR, Advisory Opinion on the Extr territorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, §§ 30 f.

¹⁰⁰ Dissenting Opinion Blackmun J, Sale v. Haitian Ctrs. Council, 509 US 155, 194 (USSC 1993); Hathaway, The Rights of Refugees under International Law, p. 337.

¹⁰¹ CAT, Concluding Observations: United States of America, UN Doc. CAT/C/USA/CO/2 (25.07.2006), § 20.

¹⁰² CAT, *ibid.*, § 15.

¹⁰³ Cf. Art. 33 CAT.

¹⁰⁴ Cf. above 3.1.2.1.

¹⁰⁵ Lawson, in: Coomans / Kamminga, Extr territorial Application of Human Rights Treaties, p. 83 (93); Fischer-Lescano / Tohidipur, in: Europäisches Asyl- und Migrationsrecht, Beilage zum Asylmagazin 5/2007, p. 19 (24).

¹⁰⁶ Human Rights Committee, Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (29.07.1981), §§ 12.1. – 12.3.; see also, Human Rights Committee, Communication No. 106/1981: Uruguay, UN Doc. CCPR/C/18/D/106/1981 (31 March 1983), § 5.

¹⁰⁷ 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.

3.1.2.4. ECHR

According to most of the literature, the *non-refoulement* principle in the ECHR applies beyond the 12 mile zone.¹⁰⁸ The ECtHR has repeatedly examined the ECHR's extraterritorial scope, as has the European Commission of Human Rights. However, application of the *non-refoulement* principle has not been the actual subject of any judgment.

The ECtHR judgments are strongly case-related. Bearing that in mind, the authors will briefly outline general developments in court case law before moving on to some specific judgments and examining the conclusions that may be drawn. Judgements always focus on whether the persons concerned are subject to the acting state's jurisdiction as defined in Art. 1 ECHR. The European Commission of Human Rights has acknowledged, in various decisions, that extraterritorial ECHR application is basically possible. In its view, "Within their jurisdiction" in Art. 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.¹⁰⁹ The ECtHR has confirmed this same point in many cases using near-identical wording and adding no further restrictions.¹¹⁰ Furthermore, in the *Loizidou*¹¹¹ case and other, subsequent cases,¹¹² 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* 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 peace-keeping mission –, ¹¹³ 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 extraterritorially when jurisdiction is exercised.

In 2001 this fundamental principle of extraterritorial ECHR applicability was made subject to certain restrictions by the strongly criticised¹¹⁴ *Bankovic* decision. The ECtHR did not regard the bombing of Yugoslavia by several contracting states to be an exercise of jurisdiction. The court now stressed the relationship between rule and exception, Art. 1 ECHR being the rule for a territorial concept of jurisdiction. Extraterritorial ECHR application could only be the exception, acceptable in particular

¹⁰⁸ Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 245; Fischer-Lescano / Tohidipur, in: *Europäisches Asyl- und Migrationsrecht*, Beilage zum *Asylmagazin* 5/2007, p. 19 (24); Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (111), § 66.

¹⁰⁹ ECtHR, *Cyprus v. Turkey*, Rep. 26 May 1975, Appl. Nos. 6780/74 and 6950/75, *Decisions and Reports* 2 (1975), 125, 136; ECtHR, *Hess v. UK*, Judgement of 28 May 1975, Appl. No. 6231/73, *Decisions and Reports* 2 (1975), 72, 73; ECtHR, *W.M. v. Denmark*, Judgement of 14 October 1992, Appl. No. 17392/90, § 2.

¹¹⁰ ECtHR, *Stocké v. Germany*, Judgement of 19 March 1991, Appl. No. 11755/85, § 166; ECtHR, *Drozd and Janousek v. France and Spain*, Judgement of 26 June 1992, Appl. No. 12747/87, § 91.

¹¹¹ *Loizidou v. Turkey*, 23 March 1995, Appl. No. 40/1993/435/514, § 62.

¹¹² ECtHR, *Cyprus v. Turkey*, Judgement of 10 May 2001, Appl. No. 25781/94, § 77; ECtHR, *Dijavit An v. Cyprus*, Judgement of 20 February 2003, Appl. No. 20652/92, §§ 18 – 23.

¹¹³ ECtHR, *Behrami v. France & Saramati v. France, Germany & Norway*, Appl. No. 78166/01 & 71412/01, Judgement of 31 May 2007, § 151.

¹¹⁴ Cf. Breuer, in: *EuGRZ* 2003, p. 449 (450); Lawson, in: Coomans / Kamminga, *Extraterritorial Application of Human Rights Treaties*, p. 83 (83 ff.).

circumstances for special cases.¹¹⁵ The grounds given in the Bankovic case have the principle of territoriality as their starting point, each state having unlimited sovereignty inside its territory.¹¹⁶ Here, the ECtHR emphasised that one state's extraterritorial exercise of sovereignty within the meaning of Art. 1 ECHR is subordinate to the territorial sovereignty of the other state. Furthermore, one state may, in principle,¹¹⁷ only exercise jurisdiction on foreign territory belonging to another state if the latter allows it to do so.¹¹⁸

Although this seemed to represent a severe restriction of extraterritorial scope at first, the court has repeatedly accepted extraterritorial application even after the Bankovic case.¹¹⁹ The decision, therefore, can on no account be cited as a general argument against extraterritorial application. Rather, the Court's judgement should be regarded as open to further development.¹²⁰ This applies all the more as the Court confirmed its preceding case law in principle during Bankovic,¹²¹ non-fulfilment being deemed purely due to the special circumstances of the case.¹²² The reasoning in Bankovic, 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 Art. 1 ECHR cannot emerge.

Having described the background, this opinion now goes on to examine what conclusions may be drawn from existing case law regarding extraterritorial scope. The schema followed is taken from Ruth Weinzierl's study published by the German Institute for Human Rights.¹²³

3.1.2.4.1. Maritime flag sovereignty as jurisdiction

The ECtHR explicitly affirms the extraterritorial effect of the ECHR aboard seagoing vessels.¹²⁴ One must agree with this as a direct consequence of Art. 92 UNCLOS which defines what is known as flag sovereignty. Although sovereignty of this kind cannot be equated with territorial sovereignty,¹²⁵ 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.¹²⁶ The ship's crew, therefore, is bound by the ECHR vis-à-vis every person on board.¹²⁷

¹¹⁵ Bankovic & Ors v. Belgium & Ors, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, §§ 59 ff.

¹¹⁶ Doehring, Völkerrecht, para. 808.

¹¹⁷ As exception are phrased situations of occupation l.c.

¹¹⁸ Bankovic & Ors v. Belgium & Ors, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, §§ 60 ff.; for further arguments cf. §§ 61 – 75.

¹¹⁹ ECtHR, Öcalan v. Turkey, Judgement of 12 March 2003, Appl. No. 46221/99, § 93; Öcalan v. Turkey, Judgement of 12 December 2005 (Grand Chamber), Appl. No. 46221/99, § 91; lastly identical, but dismissed due to the facts, Issa & Ors v. Turkey, Judgement of 16 November 2004, Appl. No. 31821/96, § 71 ff.

¹²⁰ See also Goodwin-Gill / Mc Adam, The Refugee in International Law, p. 246.

¹²¹ Bankovic & Ors v. Belgium & Ors, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, §§ 67 – 73.

¹²² Bankovic & Ors v. Belgium & Ors, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, §§ 74 ff.

¹²³ Weinzierl, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders.

¹²⁴ ECtHR, Bankovic & Ors v. Belgium & Ors, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, § 73, under reference to customary law and Treaty Obligations; also already the Commission, cf. ECtHR, Cyprus v. Turkey, Rep. 26 May 1975, Appl. Nos. 6780/74 and 6950/75, Decisions and Reports 2 (1975), 125, 136.

¹²⁵ Cf. Wiefelspütz, in: NZWehrR 2005, p. 146 (154).

¹²⁶ Röben, in: Grote/Marauhn, Konkordanzkommentar EMRK/GG, Kap. 5, para. 89; Oxman, in: Bernhardt, EPIL, Vol. II, Jurisdiction of States, p. 55 (58).

¹²⁷ Identically, Weinzierl, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders, p. 41.

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.¹²⁸ 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, i.e. in the state of destination only.¹²⁹ Consistent ECHR interpretation, therefore, requires the act of refoulement emanating 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.¹³⁰

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

3.1.2.4.2. Effective control over a person as jurisdiction

In various decisions subsequent to *Bankovic* the Court ruled in favour of extraterritorial application because there was effective physical control over a person.¹³¹ Effective control on the high seas can result when state vessels use their physical presence and strength in order to make smaller, less safe or less manoeuvrable vessels move back or return to ports in the country of origin or transit country by threatening or exerting or physical force. In such cases, jurisdiction is approved on the basis of effective control over the persons concerned.¹³²

3.1.2.4.3. Competence and control as jurisdiction

Lastly, the ECtHR confirmed in the *Bankovic* 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.¹³³ Both conditions are regularly met at sea by state border control authorities. Therefore, grounds for jurisdiction exist.¹³⁴

3.1.2.4.4. Fiction of jurisdiction resulting from the circumvention ban and the obligation to prevent zones with no human rights

¹²⁸ 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, cf. ECtHR, *Xhavara & Ors v. Italy and Albania*, Judgement of 11 January 2001, Appl. No. 39473/98. But the Court refused admissibility due to non-exhaustion of national remedies, without addressing Art. 1; the ECtHR explicitly refers hereunto in a posterior decision, ECtHR, *Bankovic & Ors v. Belgium & Ors*, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, § 81.

¹²⁹ Wollenschläger, in: *Heselhaus / Nowak, Handbuch der Europäischen Grundrechte*, § 17, para. 32. with further references; Marx, *Handbuch zur Flüchtlingsanerkennung*, § 39, para. 154 f. with further references from court rulings of the Commission and the Court; Bank, in: *Grote/Marauhn, EMRK/GG Konkordanzkommentar*, Kap. 11, para. 106.

¹³⁰ See also, Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 41.

¹³¹ *Öcalan v. Turkey*, Judgment of 12 March 2003, Appl. No. 46221/99, § 93; *Öcalan v. Turkey*, Judgement of 12 May 2005 (Grand Chamber), Appl. No. 46221/99, § 91.

¹³² Cf. Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 43.

¹³³ *Bankovic & Ors v. Belgium & Ors*, Judgement of 12 December 2001, Appl. No. 52207/99, Reports of Judgments and Decisions 2001-XII, p. 333, § 69, under reference to *Drozd and Janousek v. France and Spain*, Judgement of 26 June 1992, Appl. No. 12747/87, § 91.

¹³⁴ Also, Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 42 f.

In the Issa case, the ECtHR formulated a ban on circumventing human rights for extraterritorial action. Art. 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.¹³⁵ In addition, and elsewhere, the Court justified the extraterritorial 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.¹³⁶ If both approaches are combined, then, firstly, the forward displacement of border controls to extraterritorial areas would be considered a circumvention ban violation, should the state in question intend to get round ECHR obligations applying within its own territory and borders.¹³⁷ 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, Bankovic 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 extraterritorial obligations applying to Turkish state agencies on Iraqi territory.¹³⁸ The circumvention ban together with the need to prevent spaces devoid of human rights therefore constitute grounds for presumption of jurisdiction if states displace immigration controls to areas outside their territory.

3.1.2.4.5. 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 extraterritoriality and means that sovereign measures linked to border control activities fall within the ECHR's scope.¹³⁹

3.1.2.4.6. 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.¹⁴⁰

3.1.3. International obligations inside origin and transit countries' 12 mile zone

3.1.3.1. United Nations Convention Relating to the Status of Refugees

¹³⁵ ECtHR, Issa & Ors v. Turkey, Judgement of 16 November 2004, Appl. No. 31821/96, § 71.

¹³⁶ ECtHR, Cyprus v. Turkey, Judgement of 10 May 2001, Appl. No. 25781/94, § 78.

¹³⁷ Also, Weinzierl, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders, p. 43.

¹³⁸ Issa & Ors v. Turkey, Judgement of 16 November 2004, Appl. No. 31821/96, § 71.

¹³⁹ ECtHR, Xhavarra & Ors v. Italy & Albania, 39473/98, Judgement of 11 January 2001; European Commission of Human Rights, 14 July 1977, 7289/75 and 7349/76 (X & Y/Switzerland), p. 73; on the substantial reference in the context of extraterritorial application of European primary law, see ECJ, 30 April 1996, C-214/94, para. 14.

¹⁴⁰ Also, Weinzierl, The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders, p. 45.

A differentiated approach is required in order to evaluate *non-refoulement* application within the countries' of origin 12 mile zone. There is broad¹⁴¹ consensus that the people benefiting from Art. 33 para. 1 Refugee Convention are the same ones covered by Art. 1 A (2) Refugee Convention.¹⁴² It is undisputed, however, that only individuals outside their state of nationality can be refugees as defined in Art. 1 A (2) Refugee Convention.¹⁴³ Thus, literature¹⁴⁴ and state practice¹⁴⁵ 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 the coastal state and are still within its 12 mile zone. Thus, measures taken towards members of this category are not subject to Art. 33 obligations.¹⁴⁶ 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 the transit country. Consequently, the Refugee Convention is legally binding here in accordance with the principles described above¹⁴⁷. 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 gone through. Thus, within the 12 mile zone of transit states and states of origin the assumption must be that the *non-refoulement* principle in Art. 33 para. 1 Refugee Convention applies, an assumption that can only be disproved at a later stage of proceedings.

3.1.3.2. CAT

All the arguments outlined above¹⁴⁸ can be used in full vis-à-vis the CAT. The CAT applies extraterritorially.

3.1.3.3. 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. Art. 12 para. 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 Art. 33 para. 1 Refugee Convention. Literature¹⁴⁹ and the Human Rights Commission¹⁵⁰ have rightly

¹⁴¹ Admittedly Lauterpacht / Bethlehem, in: Feller / Türk / Nicholson, *Refugee Protection in International Law*, p. 87 (127 ff.) do have a different opinion, wanting to extend non-refoulement to cases of human rights violations which are not connected to a discrimination criterion, but cf. the critical examination of this approach in Hathaway, *The Law of Refugee Status*, pp. 304 ff.; cf. I.c., p. 307, see also, for persuasive arguments against the position of the USSC in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (USSC, 09 March 1987), which is too restrictive for its part.

¹⁴² Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 232; Hathaway, *The Law of Refugee Status*, p. 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 December 1987), [1988] 1 All ER 193, 202 f., 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 April 1998), 301, 306, 312, per Lord Lloyd o Berwick, Goff, Lord Nolan and Lord Hope; *AG v. Zaoui*, Dec. No. CA20/02 (NZ CA, 30 September 2004), § 36; *European Roma Rights Centre & Ors v. Immigration Officer at Prague Airport & Anor* [2003] EWCA Civ 666 (20 May 2003), § 31, per Simon Brown LJ.

¹⁴³ Respective stateless persons who are beyond the country in which they have their habitual residence.

¹⁴⁴ Hathaway, *The Law of Refugee Status*, p. 307.

¹⁴⁵ *European Roma Rights Centre & Ors v Immigration Officer at Prague Airport & Anor* [2003] EWCA Civ 666 (20 May 2003), § 31, per Simon Brown LJ; the UKHL in the same case as well, [2004] UKHL 55 (9 December 2004), § 18, per Lord Bingham.

¹⁴⁶ Hathaway, *The Law of Refugee Status*, pp. 309 ff.; Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 38.

¹⁴⁷ Cf. above 3.1.2.1.

¹⁴⁸ Cf. above 3.1.2.2.

¹⁴⁹ Hathaway, *The Law of Refugee Status*, pp. 309 ff.; Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 49.

¹⁵⁰ HRC, General Comment No. 27: Freedom of Movement (Art.12), UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999), § 10.

pointed out that arbitrary exit prevention by immigration authorities in the country of origin constitutes a possible infringement of Art. 12 para. 2 ICCPR. The state agencies involved are thus forbidden from arbitrarily curtailing freedom of exit. Restrictions have to be weighed against Art. 12 para. 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.¹⁵¹ Following on from this, shared responsibility for the arbitrary prevention of exit from countries of origin and transit ensues from Art. 16 of the ILC Draft Articles on Responsibility of States for internationally wrongful acts.¹⁵² The Draft Articles codify customary international law and classify aiding or assisting an internationally wrongful act itself as an internationally wrongful act and subject to the legal consequences of Art. 47 (ILC Draft Articles).

3.1.3.4. ECHR

With regard to the ECHR, all the arguments presented above¹⁵³ apply in full. Even though there is competing state territorial jurisdiction for measures taken in third countries' territorial waters, the Bankovic exception does not apply since border control measures are always territorially linked to the member states.

3.1.4. 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.

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.¹⁵⁴ 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 kicks in. 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

¹⁵¹ Details at Harvey / Barnidgein: IJRL 19 (2007), pp. 1 ff.

¹⁵² A/RES/56/83, 12 December 2001

¹⁵³ Cf. above 3.1.2.4.

¹⁵⁴ ECtHR, *Xhavara & Ors v. Italy & Albania*, 39473/98, Judgement of 11 November 2001.

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.¹⁵⁵ 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.¹⁵⁶ 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, Art. 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 European states that the third states they support do not meet international migration control standards.

¹⁵⁵ Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, pp. 63 ff.; cf. *Comment of the ILC on codification of State Responsibility (A/RES/56/83, 12 December 2001)*, Art. 47, p. 314.

¹⁵⁶ 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, ECtHR, *Matthews v. United Kingdom*, 24833/94, 18 February 1999, cypher 31.

3.2. Obligations originating in European law

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

3.2.1. European primary law

European primary law includes, in particular, the Founding Treaties. Particular reference should be made to Art. 63 *cif.* 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.¹⁵⁷ 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. Thus, Art. 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.¹⁵⁸ 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 Art. 19 CFR, which prohibits collective expulsions (para. 1) and refers to non-refoulement (para. 2), creates an obligation for European border authorities to provide active protection.¹⁵⁹ Art. 51 CFR, which regulates the CFR's scope, does not take territory into account, only the authority responsible.¹⁶⁰ There is no reason why consideration of the right to asylum under community law, the ICCPR as a source of fundamental legal principle¹⁶¹ and the reference in Art. 6 para. 2 TEU to the ECHR should be restricted to substantive law. Rather, the basic principles of extritorial 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 Art. 299 TEC regarding the geographical scope of European fundamental rights. For according to established ECJ practice (the decision was issued pursuant to Art. 227 TEC, old version), the article “does not preclude Community rules from having effects outside the territory of the Community”,¹⁶² 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.

¹⁵⁷ Bank / Hruschka, in: Barwig / Beichel-Bendetti / Brinkmann, *Perspektivwechsel im Ausländerrecht?*, p. 620 (622); Weiß, in: Streinz, *EUV/EGV*, para. 6; Gerber, *Die Asylrechtsharmonisierung in der Europäischen Union*, p. 119; Wiedmann, in: Schwarze, *EU-Kommentar*, Art. 63, para. 5; Löhr, in: Hofmann / Löhr, *Migrationspolitik nach dem Amsterdamer Vertrag* (forthcoming); Garlick, in: *IJRL* 19 (2007), p. 601 (622).

¹⁵⁸ ECtHR, case C-432/05, *Unibet*, para. 37; case C-303/05, *Advocaten voor de Wereld*, para. 46; identically already before, ECJ, case T-54/99, *Maxmobil/Kommission*, *Slg.* 2002, II-313, para. 48, 57.

¹⁵⁹ Instead of all, cf., Norbert Bernsdorff, in: Jürgen Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 2. Aufl., Baden-Baden 2006, Art. 18 para. 11 and Jost Delbrück, *Die Universalisierung des Menschenrechtsschutzes: Aspekte der Begründung und Durchsetzbarkeit*, in: Albrecht Zunker (Ed.), *Weltordnung oder Chaos?*, FS für Klaus Ritter, Baden-Baden 1993, pp. 551 ff. (556 ff.).

¹⁶⁰ Martin Borowsky, in: Jürgen Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 2. Aufl., Baden-Baden 2006, Art. 51, para. 16 ff.

¹⁶¹ Lastly, ECJ, 27 June 2006, C-540/03, *Family Reunification Directive*, para. 37; see, already, ECJ, case 4/73, *Rec.* 1974, 491, para. 13 (Nold/Kommission).

¹⁶² ECJ, 30 April 1996, C-214/94, para. 14.

3.2.2. 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 extr territorially.

3.2.2.1. Qualification and Asylum Procedures Directives

The so-called Qualification Directive was adopted in 2004¹⁶³ and harmonises substantive refugee law. It covers both refugee protection, in accordance with the CFR, and subsidiary protection. Art. 21 para. 1 of Directive 2004/83/EC obliges the member states to “respect the principle of non-refoulement in accordance with their international obligations”. Art. 21 para. 1 of the Qualification Directive must therefore be interpreted in line with the above assessment of international law regarding *non-refoulement* and its extr territorial scope. Furthermore, the directive, like the Refugee Convention,¹⁶⁴ explicitly refers to this when it links rights and obligations to residence.¹⁶⁵ Art. 21 para. 1 Qualification Directive consequently has extr territorial effect.

According to the wording of Art. 3 para. 1 of the Asylum Procedures Directive (Directive 2005/85/EC),¹⁶⁶ 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 extr territorial application cannot, therefore, be inferred from the directive. Nonetheless, the primary law ranking of Art. 63 TEC means that the procedural rights implicit in international law, on the basis of Art. 33 para 1 of the. Refugee Convention, do apply.¹⁶⁷

The extr territorial 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.¹⁶⁸

3.2.2.2. 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 Art. 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.¹⁶⁹

¹⁶³ Directive of the Council 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJEC No. L 304/12 of 30 September 2004.

¹⁶⁴ Cf. above 3.1.2.1.

¹⁶⁵ Cf. Recital (9); Art. 2 i) and j); Art. 31; Art. 32.

¹⁶⁶ Directive of the Council 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

¹⁶⁷ Cf. below 3.3.1.

¹⁶⁸ Europäische Kommission, SEC (2007) 691, pp. 13 f.

¹⁶⁹ Cf. the first extensive elaboration to the significance of the Schengen Borders Code regarding the question at issue, Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 32.

3.2.3. Interim Conclusion: Obligations under European law in the case of extraterritorial 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 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.

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

The following subsections will start by analysing which obligations arise in general from the *non-refoulement* principle (3.3.1.), and will then go on to specify the obligations for state bodies vis-à-vis persons at sea or on board vessels (3.3.2. -3.3.3.).

3.3.1. Obligations to act under refugee and human rights law

3.3.1.1. Access to proceedings: a right implicit in the *non-refoulement* principle

Art. 33 para.1 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^{170 171}.

Nonetheless, the UNHCR,¹⁷² EXCOM¹⁷³ and literature rightly point out that the *non-refoulement* in Art. 33 para. 1 Refugee Convention means that governments are obliged to provide access to official proceedings if they are to be able to verify refugee status. Art. 33 para. 1 Refugee Convention thus includes the implicit right to access to proceedings,¹⁷⁴ which must be organised as an individual procedure to investigate the circumstances of the case in question.¹⁷⁵ 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 Art. 1 A (2) Refugee Convention, is adequately examined.¹⁷⁶

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".¹⁷⁷ 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.

¹⁷⁰ Grahl-Madsen, in: Bernhardt, EPIL, Vol. I: Asylum, Territorial, pp. 283 ff.; elaborate on the concept, Goodwin-Gill / Mc Adam, The Refugee in International Law, pp. 355 ff.

¹⁷¹ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 8.

¹⁷² UNHCR, Background Paper on the Protection of Asylum-Seekers and Refugees Rescued at Sea, Geneva, 18 March 2002, § 19 f.; idem, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005, Comment to Art. 3 (1), p. 5.

¹⁷³ EXCOM, Note on International Protection, UN Doc. A/AC.96/882 (2 July 1997), § 14; Conclusion No. 8 (XXVIII), § (vii).

¹⁷⁴ Edwards, in: IJRL 17 (2005), p. 293 (301); idem, in: IJRL 15 (2003), p. 192 (197); Hathaway, The Rights of Refugees under International Law, pp. 279 ff.; Goodwin-Gill / Mc Adam, The Refugee in International Law, pp. 215 ff.

¹⁷⁵ Lauterpacht/Bethlehem, in: Feller / Türk / Nicholson, Refugee Protection in International Law, p. 87 (11), § 100; EXCOM, Conclusion No. 30 (XXXIV), 1983, § (e) (i).

¹⁷⁶ Edwards, in: IJRL 17 (2005), p. 293 (301).

¹⁷⁷ Extensively on the proposals in recent European debate – which need to be rejected – Noll, in: EJML 5 (2003), p. 303 ff.

3.3.1.2. Access to effective legal protection: a right implicit in the *non-refoulement* principle

In addition, the UNHCR¹⁷⁸ and literature¹⁷⁹ rightly state that *non-refoulement* from Art. 33 para. 1 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.¹⁸⁰ Consequently, Art. 33 para. 1 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 Art. 2 para. 3 vis-à-vis Art. 7 clause 1 ICCPR,¹⁸¹ but also by the ECtHR regarding the *non-refoulement* principle of Art. 3 ECHR in connection with Art. 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.¹⁸² Indeed, the remedy need not take the form of an actual court appeal. Administrative or parliamentary supervisory committees may suffice, subject to stringent conditions.¹⁸³ However, the possibility to seek redress must be effective and efficient, both legally as well as in actual fact.¹⁸⁴ It should be remembered that, for the question at hand, effectiveness must be measured against the gravity of the alleged Convention infringement.¹⁸⁵ Since *Soering*, the Court has continually emphasised in its case law that, even in an Art. 15 ECHR state of emergency, no deviation from Art. 3 ECHR is possible. An absolute right, Art. 3 ECHR thus embodies a fundamental value of the democratic societies assembled in the Council of Europe.¹⁸⁶ Consequently, the Court measures the effectiveness requirement in the case of an imminent Art. 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."¹⁸⁷ 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, the UNHCR pointed out in 2004 that such was the case for 30 to 60 % of all recognised refu-

¹⁷⁸ UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005, Kommentar zu Art. 38 (3), p. 53; cf. also the Comment to Art. 4, p. 8, Art. 30, p. 41, 35A, p. 48.

¹⁷⁹ Noll, in: EJML 5 (2003), p. 301 (332); Hathaway, *The Rights of Refugees under International Law*, p. 279; Edwards, in: IJRL 15 (2003), p. 192 (210); Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 22.

¹⁸⁰ UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005, Comment to Art. 38 (3), p. 53.

¹⁸¹ Human Rights Committee: Communication No. 1051/2002: Canada. 15/06/2004, UN Doc. CCPR/C/80/D/1051/2002 (15 June 2002), § 12.

¹⁸² Grabenwarter; *Europäische Menschenrechtskonvention*, § 24, para. 164; Meyer-Ladewig, EMRK, Art. 13, para. 1; Richter, in: Grote / Marauhn, *Konkordanzkommentar EMRK/GG*, Kap. 20, para. 19 ff.

¹⁸³ Richter, in: Grote / Marauhn, *Konkordanzkommentar EMRK/GG*, Kap. 20, para. 56.

¹⁸⁴ ECtHR, *Kaya v. Turkey*, Judgement of 19 February 1998, Appl. No. 158/1996/777/978, § 106; Paul and Audrey Edwards v. Turkey, Judgement of 14 March 2002, Application No. 46477/99, § 96.

¹⁸⁵ ECtHR, *Kaya v. Turkey*, Judgement of 19 February 1998, Appl. No. 158/1996/777/978, § 106; Paul and Audrey Edwards v. Turkey, Judgement of 14 March 2002, Application No. 46477/99, § 96; *Anguelova v. Bulgaria*, Judgement of 13 June 2002, Appl. No. 38361/97, § 161.

¹⁸⁶ Established practice of the courts since ECtHR, *Soering v. UK*, Judgement of 7 July 1989, Appl. No. 14038/88, § 88;

¹⁸⁷ ECtHR, *Jabari v. Turkey*, Judgement of 11 July 2000, Appl. No. 40035/98, § 50.

gees in some European states.¹⁸⁸ Art. 33 para. 1 Refugee Convention contains an implicit right to effective legal protection. On the basis of the arguments in 3.3.1.1, this must be understood as access to effective legal protection on an EU member state's territory.

3.3.1.3. Temporary entry into state territory: a right implicit in the *non-refoulement principle*

Finally, the UNHCR,¹⁸⁹ the EXCOM¹⁹⁰ and literature rightly say that at least temporary entry into state territory must be granted.¹⁹¹ 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 requirements¹⁹² mean that permission for temporary residence is indispensable.¹⁹³ Such permission is an explicit right under European secondary law. The Asylum Procedures Directive stipulates in Art. 7 para. 1 and Art. 35 para. 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 3.3.1.1. and 3.3.3.2, Art. 7 para. 1 and Art. 35 para. 3 lit. a) of the Asylum Procedures Directive therefore lay down an obligation to grant temporary access to EU member state territory.

3.3.1.4. No exceptions to residence granted by a safe third country

In the study referred to previously,¹⁹⁴ Weinzierl rightly alluded to the problem of so-called safe third countries and the obligations under discussion here. Art. 33 para. 1 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 international debate to take up 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”¹⁹⁵ concept, as it is known, has been adopted in Art. 36 para. 2 of the Asylum Procedures Directive along the lines of German third country rules. However, the concept is controversial in international law,¹⁹⁶ particularly since a country's “safe” status can be revoked. Criticism of the con-

¹⁸⁸ UNHCR, Press release of 30 April 2004: European Union asylum legislation: UNHCR regrets missed opportunity to adopt high EU asylum standards.

¹⁸⁹ UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005, Comment on Article 3 (1), p. 5; idem, Background Paper on the Protection of Asylum-Seekers and Refugees Rescued at Sea, Geneva, 18 March 2002, § 25.

¹⁹⁰ EXCOM, Conclusion No. 85 (XLIX), 1998, § q.

¹⁹¹ Edwards, in: IJRL 17 (2005), pp. 293 (301); dies., in: IJRL 15 (2003), p. 192 (197); Hathaway, *The Rights of Refugees under International Law*, p. 279 ff.; Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 215 ff.; Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, p. 15 and 19.

¹⁹² Cf. above 3.3.1.2.

¹⁹³ UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Geneva, 10 February 2005, Comment to Art. 38 (3), p. 53.

¹⁹⁴ Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders*, pp. 20 f.

¹⁹⁵ Goodwin-Gill / Mc Adam, *The Refugee in International Law*, p. 400.

¹⁹⁶ Cf. Hathaway, *The Rights of Refugees under International Law*, p. 327 ff.; Goodwin-Gill / Mc Adams, *The Refugee in International Law*, p. 399; cf. also, against the background of the amendments to the German right of asylum under constitutional law, Frowein / Zimmermann, *Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts*, Köln 1993; UNHCR: Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), Genf, 10 February 2005, Comment on Art. 35 A, p. 48 ff.;

cept is justified but, for practical reasons, the authors of this opinion forego examination of it. Even if the rules in Art. 36 para. 2 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 Art. 36 para. 3 Directive 2005/85. Apart from non-EU members Norway and Iceland¹⁹⁷, which participate in the Dublin II-system, and Switzerland,¹⁹⁸ which will participate as from 2008, there are currently no third countries that meet the criteria of Art. 36 para. 2 Directive 2005/85. Consequently, there can be no exception to the above obligations.¹⁹⁹

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

Worthy of note is the fact that Art. 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.²⁰⁰

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 arguments²⁰¹ 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 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.²⁰² However, precisely because the Refugee Convention does not incorporate any right to asylum, stand-alone significance must be attached to the wider formulation of Art. 18 CFR. So, 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.²⁰³

3.3.2. Obligations under the law of the sea

¹⁹⁷ Decision of the Council of 15 March 2001, (2001/258/EC).

¹⁹⁸ BBl. (Switzerland) 2004, 6447.

¹⁹⁹ 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*, p. 20 f. 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 3.3.1.1. – 3.3.1.3., 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 jurisdiction 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 January 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 January 1967 (BGBl. 1969 II p. 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 the 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)).

²⁰⁰ Weiß, in: Streinz, EUV/EGV, para. 5; Jarrass, EU-Grundrechte, § 23, para. 12; Bernsdorff, in: Meyer, Charta der Grundrechte der Europäischen Union, Artikel 18, para. 13; Wollenschläger, in: Heselhaus / Nowak, Handbuch der Europäischen Grundrechte, § 16, para. 32.

²⁰¹ Wollenschläger, in: Heselhaus / Nowak, Handbuch der Europäischen Grundrechte, § 16, para. 34.

²⁰² Weiß, in: Streinz, EUV/EGV, para. 5; Wollenschläger, in: Heselhaus / Nowak, Handbuch der Europäischen Grundrechte, § 16, para.32.

²⁰³ Cf. hereunto Grahl-Madsen, in: Bernhardt, EPIL, Vol. I: Asylum, Territorial, p. 283 ff.

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 Art. 98 UNCLOS²⁰⁴ 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, i.e. the International Convention for the Safety of Life at Sea (SOLAS)²⁰⁵ and the International Convention on Maritime Search and Rescue (SAR)²⁰⁶ including the important amendments that entered into force on 1 July 2006.²⁰⁷ 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 cif. 2.1.10). The SAR Annex, an integral part of the Convention and, as such, legally binding, clarifies in cif. 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.²⁰⁸ Indeed, a great many institutions have already adopted such guidelines.²⁰⁹ It is not possible to reflect the debate in full here. Nonetheless one point should be made concerning the EXCOM's view that asylum seekers should be taken to the “next port of call”.²¹⁰ 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, cif. 6.17 of the guidelines stipulates: “The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded

²⁰⁴ BGBl. 1994 II p. 1798.

²⁰⁵ International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 UNTS 278.

²⁰⁶ International Convention on Maritime Search and Rescue (SAR), 1979, 1405 UNTS 97.

²⁰⁷ See the announcement of these amendments in the BGBl. of 11 July 2007, BGBl. 2007 II, 782 ff.

²⁰⁸ “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).

²⁰⁹ See the inventory taking at International Maritime Organization/UNHCR, Rescue at Sea – A Guide to Principles and Practice As Applied to Migrants and Refugees, 2006.

²¹⁰ UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, 18 March 2002.

fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.²¹¹

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 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”.²¹²

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”.²¹³ 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.

3.3.3. 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 – i.e. 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 SAR²¹⁴ any more than procedural rules for human rights and refugee law can be observed on

²¹¹ 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; cf. 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).

²¹² UN GA, A/RES/61/222, 16 March 2007, Resolution cypher 70.

²¹³ Hereunto comprehensively, Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, Fordham Int'l L.J. 30 (2006), p. 75 ff.

²¹⁴ 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...”

board. Asylum seekers and migrants who are taken in at sea or 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.

4. Summary

The international obligations arising, in particular, from the Refugee Convention, the ECHR, the ICCPR, the UN Convention against Torture 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 extr territorially. 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.

Frankfurt am Main, 7 September 2007

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