**European Union under the influence of the current migration crisis​.
An institutional and legal approach. Some remarks from the daily migration crisis management**

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**1st remark :**

In June 2007, the European Commission presented the “Green Paper on the future common European asylum system that declares an intention to create “a single protection area for refugees” in which the “full and inclusive application of the Geneva Convention” is guaranteed.

With this the European Commission expresses its support for the goal of high-level legal harmonization and declares itself prepared to explore ways “for increasing the EU‘s contribution to a more accessible, equitable and effective international protection regime”.

The reality at the EU’s external borders is far from this stated goal. With the primacy of repulsing illegal migration, border-control measures are shifting further beyond state borders – into the high seas or into the

sovereign area of third states.

This occurs without appropriate systematic observation of the obligations arising from human and refugee rights beyond state borders.

New supranational and international structures of border security are being established, but without similarly precise formulation of the associated human- and refugee-rights requirements or their accompaniment in procedural law or institutions.

This discrepancy has dramatic consequences for numerous

people whose lives are lost or whose human rights are

abused.

This new legal framework adopts a reference to the

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

Although only a small percentage of migrants seek entry to the European Union (EU) through the external maritime border, dramatic pictures and reports of refugee boats on the Mediterranean shape the idea of the

situation at the robustly secured external border of the EU.

The UN High Commissioner for Refugees reminds that persons requiring international protection because they face persecution, torture or inhumane treatment in their country of origin must be enabled access to protection in the EU; in light of current events in the Mediterranean, he has compared Europe with the Wild West, where a human life no longer has value.

Which human rights obligations must be observed in border protection? Who is responsible: “the EU”, the individual EU states on the external border, the EU-Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)?

Additionally, special questions arise for human rights protection in connection with the protection of maritime borders.

How can it be prevented that thousands of people drown in the

attempt to reach the EU?

How can such small island states as Malta manage the onset?

How should persons be handled who are intercepted on high seas?

How can it be guaranteed that persons in need of international protection find access to the EU?

How must an EU border management policy look that is in conformity with human rights?

Who is responsible for human rights and refugee protection when EU and

non-EU states conduct joint control measures?

In November 2006 the European Commission presented a Communication on “Reinforcing the management of the European Union‘s Southern Maritime Borders”.

From this it is evident that there is disunity within the EU over which obligations arise from EU fundamental rights and international human rights and refugee law, and how these obligations relate to the international law of the sea.

Our presentation tries to contribute to clarifying the obligations

for border management arising from human rights and maritime law.

This will include treatment of general human rights obligations that are also applicable for border controls at land borders and airports.

Additionally, we will examine the special questions of human rights and maritime law that arise in connection with the protection of maritime borders.

The human rights obligations for migration-control measures conducted on the dry land of a third state will not be addressed.

**Τhe first part of our exposé** will present current border problems and occurrences, principally on the basis of press reports and reports of non-governmental organisations.

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

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

Especially, **part three** describes the obligations arising from the international law of the sea.

**Part four** analyses the human rights obligations for the management of the EU’s external border.

This analysis is conducted by applying the standards of fundamental and human rights; namely the European Convention on Human Rights (ECHR), EU fundamental rights and UN human rights treaties by which the EU or its Member States, respectively, are bound.

The Geneva Refugee Convention, as the fundamental body of regulations for refugee protection binding both the EUand its Member States, is naturally also a standard for consideration.

Existing EU law is measured against these standards.

**Our Part five** deals with the question of who bears responsibility for human rights protection when several states conduct joint actions of border or migration control, or rescue at sea.

**On the one hand**, it will be examined whether next **to the Member States’ obligations** arising from international law, **the EU has its own obligation** to enact norms protecting human rights with respect to border and migration controls.

**On the other hand,** the EU and its Member States carry a share of the legal responsibility for human rights violations committed in the course of joint actions with non-EU states.

Currently at EU level, we try to clarify the obligations regarding persons encountered in interception, control and rescue measures at and beyond the EU’s southern maritime border.

This intention is the subject of discussions in the Council of the EU and the European Commission.

In the background to this are pre-border migration controls, which are already being conducted on the basis of the EU border management strategy developed in the Council.

Such pre-border migration controls beyond state borders also take place in the framework of joint EU operations that are coordinated by the EU border protection agency, FRONTEX.

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

From a human rights perspective, **two fundamental sets of problems can be identified in connection with management of the EU’s external borders.**

**One is the endangerment of the health and life of many migrants**

**who are trying to reach the EU.**

There are daily media reports of deaths, especially at the southern maritime borders.

In a legal regard, this set of issues is not exclusively, but fundamentally formed by the international law of the sea, including its duty to rescue at sea.

**The second problem concerns access to international protection in the EU.**

In many cases this is prevented, or at least made considerably more difficult.

On the basis of the EU border management strategy and/or EU law, controlling and securing the borders has been bolstered, pre-border migration controls have been established in areas beyond the EU’s external border, and states of origin and transit have been integrated

into migration control measures.

Reports of abuse in EU states and deportations in violation

of international law affect the life and health of migrants as well as the realization of their possible right to international protection.

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

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

We come to the conclusion that the legal obligations regarding rescue at sea are fundamentally undisputed.

However, there is disunity over the important question of whether in choosing the place of safety to bring rescued persons, criteria of human and refugee rights should be applied, or whether it suffices that temporary accommodation and basic medical care are guaranteed at the place of safety.

There are two basic causes for why in many cases private vessels do not carry out rescue at sea.

**First is the overburdening of private ship owners, who in taking aboard shipwrecked persons can expect large financial losses, especially if coastal states in the region cannot agree on where on land the shipwrecked persons may disembark**.

**Second is the uncertainty of ship masters in the face of criminal trials against crews who rescued** shipwrecked persons in accordance with their dutyunder the international law of the sea and broughtthem to land without entry papers.

 Under the internationallaw of the sea, the responsibility for the enforcementof the duty to conduct rescue at sea lies withthe states.

Additionally, the states concerned have theduty under international law to agree as fast as possibleon which ports the vessels concerned will be

allowed to enter.

In the coordination and cooperation of the states concerned, the statutory goal is to carry out the disembarkation of the rescued persons as

quickly as possible with minimum diversion from the planned route.

In practice, the required coordination among EU states with regard to port of safety and the rapid rescue of shipwrecked person by state border-control or rescue vessels is poor.

This can fundamentally be attributed to the overburdening of such EU Member States as Italy and Malta at the EU’s maritime borders.

 The over proportional burden on these states under EU law together with the lack of an internal EU burden-sharing system often results in actual overburdening, and in any case a reduction in political will to pick up shipwrecked persons and people seeking protection.

Additionally, disunity over obligations regarding persons encountered beyond maritime borders who are seeking international protection hinders joint actions of EU Member States in the FRONTEX framework that could contribute to the saving of lives and providing of persons in need of protection with such protection in the EU.

Among steps to support the implementation of the international duty to rescue at sea, and therefore the saving of many human lives, legislative measures could be taken up at EU level.

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

1. **Formation of state services for rescue at sea and sea monitoring**

The international law of the sea obligates states to establish search and rescue centres in dedicated zones.

On the exact formation and form of coast and sea monitoring, as well as the rescue services within the search and rescue zones, the international law of the see provides no binding guidelines.

Although indications of far-reaching radar and satellite surveillance of the Mediterranean exist, little is known about the – in part, certainly military – structures of this surveillance.

Information on the position of vessels in distress gained through surveillance can provide a starting point for duties to rescue, which are grounded in the international law of the sea and human rights

law.

Currently, the extent to which the locating of vessels in distress leads to rescue at sea is unclear. In this context, creating transparency with regard to surveillance structures would be of crucial importance.

Questions that must be clarified at EU level are the extent of human rights obligations to protect and duties to rescue in connection with the planned creation of a European coast guard and a European Surveillance

System for Borders.

**II. Access to international protection**

**1. The requirements of human rights and EU fundamental rights**

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

Persons seeking international protection in the territorial seaor at maritime borders, independent of the situation and the form of protection sought, are to be handled the same as persons who apply for protection

on land.

This arises from Article 3 of the EU-Asylum Procedures Directive **(**Directive 2005/85/EC)and the prohibitions of refoulement.

The principle of non-refoulement forbids the expulsion, deportation, rejection or extradition of a person to a state in which he or she would face threats of elementary human rights violations.

Different prohibitions of refoulement derive from international customary

law, EU fundamental rights, the European Convention on Human Rights (ECHR), Article 33(1) of the Refugee Convention, Article 3(1) of the UN Convention against Torture and from Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR). In this respect, states are also obligated to examine whether the said dangers pose a threat through chain deportation.

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

his or her right to remain.

A right to remain that protects the applicant’s elementary human rights in effect can only be guaranteed within the state’s territory.

This is also the assumption of the EU-Asylum Procedures Directive, which, as a rule, grants applicants have the right to remain in the Member State at its border or in its transit zone until their applications are examined.

Against the background of the principle of non refoulement, other approaches would be theoretically conceivable only where and insofar as a country exists that accepts the applicant, and in which none of the

discussed elementary violations of human rights threaten the applicant.

This constellation corresponds to the safe third-country concept in the variant of so-called “super-safe countries”, which, taking the German

example of a third-country arrangement as a model, has found entry into the Asylum Procedures Directive.

UNHCR and international literature in the field remain very critical of the conformity of such third-country arrangements with international law –

especially against the backdrop of jurisprudence of the European Court of Human Rights (ECtHR) that requires an individual examination of each application for international protection.

In any case, however, the representatives of the Member States in the Council have not yet succeeded in assembling a binding list of such super-safe third countries as foreseen by the Asylum Procedures Directive because currently no states outside the EU exist that fulfil the requirements for the necessary safety of the third country and are not already attached to the Dublin system.

Therefore, on no account is return or rejection to a third country outside of the EU without any examination of the application currently under consideration.

With a view to the Mediterranean neighbours and West African

states, this also will not change in the medium-term.

**International Human and EU fundamental rights** require that the enforceability of the non-refoulement principles be secured through procedural law and rights to effective legal remedy.

Especially required then, are

* a thorough, individual, and substantive examination of the application for international protection;
* the right to legal representation;
* the right to contact the UNHCR; and
* an effective legal remedy with suspensive effect that enables a stay in-country pending a decision on the remedy.

Because from a human rights perspective the severity and potentially irreversible nature of the harms through expulsion are decisive, there is no room for a limitation of the guarantees of procedure and legal remedy at the border.

For practical reasons, these requirements for procedures and legal remedy can not be observed on a ship.

For that reason, if applications for international protection are submitted at the maritime border or in the territorial sea of a coastal state, the applicants are to be allowed disembarkation and a stay on dry land

pending a decision on legal remedy.

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

The establishment of pre-border and migration controls in areas beyond state borders at sea is part of the EU border management strategy.

They are implemented by individual Member States and in joint operations, including those involving multiple EU states and/or third states, coordinated by the EU border control agency FRONTEX.

Member States have different interpretations of which obligations arise from human and EU fundamental rights in interception, control and rescue measures beyond state borders.

**For this question that is fundamental for persons seeking protection having access to international protection**, the European Commission

and apparently the Council plan to develop guidelines without binding legal character;

these are currently being negotiated at EU level.

We will examine which obligations exist in interception, control and

rescue measures arising from human rights and EU fundamental rights. Of central importance in this, the Geneva Refugee Convention, the ECHR and the UN human rights treaties are reference norms.

Weighty arguments exist for the acceptance of the validity of the principle of non-refoulement deriving from the Refugee Convention in situations of interception, control and rescue measures beyond state borders.

The arguments exist in the wording, as well as the Refugee Convention’s object and purpose.

As the international organisation for the defence and promotion of the Refugee Convention, the UNHCR also supports this argumentation. There is no legally relevant common practice and legal view among States Parties and no unambiguous historical interpretation that

would lead to the exclusion of extra-territorial validity.

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

rights treaties can be applied.

The ECHR and the UN human rights treaties are applicable on ships engaged in border protection or official rescue at sea, also those moving beyond their own territorial sea.

From this arises a duty of the states to respect all of the rights contained in these treaties.

Thus the actions of officials on ships may not lead to human rights violations.

In light of problems encountered in practice, it must especially be pointed out that beyond the duty of rescue at sea under the law of the sea, migration controls may not be carried out in such a way as to bring harm to people – for example through collisions with small refugee boats or through driving unseaworthy boats out to high seas.

EU Member States are bound in all of their measures by the prohibition

on discrimination, so that the differentiated treatment of migrants, for example on the basis of their ethnic or social origin, is in violation of human rights.

This obligation stemming from the prohibition on discrimination arises from the Schengen Borders Code, EU fundamental rights and the international law of the seas.

In connection with persons in need of international protection, the commitments from the prohibitions on refoulement in the Refugee Convention, the ECHR, the UN human rights treaties and EU fundamental rights are particularly important.

These prohibitions of refoulement are also applicable on high seas and in

the territorial sea of third countries.

The extra-territorial application of the human rights treaties can arise

from the jurisdiction in situations of interception, control or rescue measures.

This jurisdiction may be based on the nationality of the state ship, the accountability of actions of officials, effective control over persons, and/or the prohibition on the circumvention of human rights obligations.

The prohibitions of refoulement must be secured in accordance with the general guarantees of procedure and legal remedy arising from the human rights treaties.

This requires, for example, a thorough examination of whether a danger of human rights violations threatens in other states.

Additionally, a crucial requirement is the suspensive effect of a legal remedy against the rejection of applications for international protection. This cannot be ensured on a ship, which, in the absence of adequately safe third countries, means that protection seekers must have access

to a procedure in an EU state that examines their need for protection.

The liability of states is grounded in the action that causes the danger of human rights violation. Therefore not every omission beyond state borders triggers liability.

The Refugee Convention and the international human rights treaties do not give rise to a general duty to provide every person encountered at sea access to state territory for the examination of their applications for

international protection.

However, they prohibit exposing people to grave violations of human rights through actions beyond state borders.

When government ships carry out rescues at sea in accordance with their commitments stemming from the international law of the sea, they are bound by the obligation of the law of the sea to bring those shipwrecked

to a place of safety.

The bringing of those shipwrecked to a place of safety is an action that also must be measured against the prohibitions of refoulement.

This means that rescued persons, too, may not be brought to third countries without first having their applications for international protection examined in an EU state.

Duties also exist with regard to mixed groups of migrants who are not on a state ship, but are encountered in the course of border and migration controls, or actions of rescue at sea.

It is recognised that, as a rule, boats also contain persons in need of international protection, though not exclusively.

In light of this fact, grounds always exist to assume that the escorting or

towing back of a boat to states outside the EU could result in grave violations of human rights.

Thus it is incompatible with human rights for state ships engaged in border protection or rescue at sea to force ships with migrants to sail to third countries.

If government ships of an EU state are located near harbours of origin on the southern Mediterranean or West African coast, collaboration in emigration controls can additionally represent a violation of the human

right to leave and the right to seek asylum.

Furthermore, with regard to the access to refugee protection thus thwarted, a violation of the commitment to interpret the Refugee Convention in good faith can exist.

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

It is important to examine the conformity of relevant EU secondary

law with the above-mentioned demands of human rights and EU fundamental rights.

The result of this examination is that the EU acquis regulates the aforementioned human rights requirements only incompletely, and in some points explicitly or implicitly even permits actions of the EU Member States in violation of fundamental rights.

The Asylum Procedures Directive obligates the Member States to examine applications for international protection made in the territorial sea, at the border and during controls in the contiguous zone.

As a rule, the Directive guarantees the right of applicants to remain in-country pending an examination of the application, as well as fundamental procedural guarantees.

**Articles 35 (border procedures) and 39 (right to an effective remedy) of the EU-Asylum Procedures Directive are contrary to EU fundamental rights**.

Article 35 allows the Member States to maintain border procedures

that from a human rights perspective have completely inadequate procedural guarantees.

Article 39 contains the principle that applicants have effective legal remedy before a court or tribunal.

But the directive leaves to national regulation by the Member States

the form of legal remedy, including its suspensive effect and concomitant right to stay in the territory until a decision has been reached on the legal remedy.

It would be impermissible both according to international law, and with regard to EU fundamental rights, according to EU law – if the Member States actually reduce procedural guarantees in border procedures to

the minimum intended in the Directive, and do not provide for the suspensive effect of a legal remedy.

The EU acquis does not contain further provisions on how to deal with applications for international protection made during interception or search and rescue measures beyond state borders.

The Asylum Procedures Directive has no application beyond state borders, with exception of the contiguous zone.

The Schengen Borders Code is also applicable beyond state borders but

contains only a reference to the rights of refugees and persons seeking international protection, especially with regard to non-refoulement.

The obligations of the Member States deriving from those rights are not prescribed.

At the same time, while the Borders Code anticipates that a right of appeal against denials of entry must be guaranteed, it determines that such a right of appeal has no suspensive effect.

This provision conflicts with EU fundamental and human rights as far

as it is applicable to persons seeking international protection who are encountered beyond state borders during pre-border controls.

1. **The EU legislature’s duties to adopt legal norms**

There is a fundamental and human rights obligation to provide to persons seeking protection, taken up at or beyond state borders at sea, access to a procedure in an EU state that examines their need for protection.

The human rights of the protection seekers must be secured through procedural rights and a legal remedy with suspensive effect.

At the same time, EU fundamental and human rights prohibit the escorting or towing back of boats with a mixed group of migrants on board to states outside the EU, because this could result in grave violations of human rights.

Although EU law regulates border protection and refugee law and the EU border management strategy foresees pre-border migration controls, EU law does not regulate this obligation. Rather, it even or explicitly or implicitly permits actions in violation of EU fundamental and human rights. The duty to regulate in this regard, arising from EU fundamental rights, lies at the feet of the EU legislature. Due to the tightly interlocking actions of the Union and Member States in border protection and

the functional distribution of responsibility to overburdened EU border states, adequate protection of fundamental rights can only be efficiently guaranteed through

regulation under EU law.

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

If Member States are conducting joint border and migration controls with third countries, this raises the question of responsibility for possible human rights violations.

The actions of one state’s organs are only attributable to another state when these organs are made available to the other state in such a way that the other state exercises exclusive command and control, and when the actions of these state organs appear to be the sovereign actions of the other state. For joint patrols with third countries in the territorial sea and contiguous zones of these third countries, such effective control by other states does not exist. For this, the contractual transfer of individual control rights to which only the coastal states are entitled is insufficient.

Thus EU states in these cases remain fully responsible for human rights violations.

It is also significant that, even when a state’s action itself does not violate human rights, international law provides for human rights responsibility if the action constitutes an act of abetting a violation of human rights on the part of another state. Such an abetting act that triggers responsibility exists if the assistance is offered in knowledge of the circumstances of the violation of international law, and the abetting act supports the main action of the primarily acting state.

Such abetting acts can include the provision of infrastructure and financing, but also such political actions as declarations, assurances and the conclusion of contracts that support an act that violates international law. In this connection, joint patrols in the territorial sea of third countries and the support and advising of third countries must be considered critically, as these especially can constitute the abetting of violations of

[**Skills and labour market integration of immigrants and their children**](http://www.oecd.org/migration/mig/working-together-skills-and-labour-market-integration-of-immigrants-and-their-children-in-sweden-9789264257382-en.htm)says that in 2014-2015, Sweden saw the largest per-capita inflow of asylum seekers ever recorded in an OECD country. With a strong economy and well-developed integration infrastructure, Sweden is better equipped than many other OECD countries to integrate refugees, but the large number of arrivals is testing the efficiency of the reception and integration system.

"While innovative policies to speed the labour market integration of skilled migrants have been introduced, more needs to be done to help others, particularly women, people with low skills, and those who arrive around the end of compulsory schooling" said Stefano Scarpetta, OECD Director for Employment, Labour and Social Affairs, presenting the report in Stockholm with Sweden’s Minister for Employment, Ylva Johansson. “Helping all refugees acquire basic foundational skills and supporting employers in their use of migrant skills would help."

The shortage of housing has led to settlement delays that postpone the start of integration activities. Sweden’s highly-skilled labour market, where only 5% of the jobs require only low levels of skills, presents a challenge for new arrivals with low levels of education, who generally have difficulty fulfilling the requirements of more demanding positions.

The cornerstone of Swedish integration policy is a two-year introduction programme of education and labour market activities to promote job readiness. While the programme is often too long for highly-educated migrants, those lacking basic skills need a more flexible approach combining longer-term educational support with gradual labour market introduction. In 2015, only 28% of low-educated foreign-born men and 19% of low-educated women were in employment one year after the programme.

**Tight budgets will require efficiency improvements**

Stronger and more structured co-ordination between the Public Employment Service and the municipalities is required to ensure coherent pathways to employment and avoid duplication of services. Wage subsidies to promote employment of migrants are effective but they tend to be too complex and the burdensome administration has limited uptake; reforms are needed to ease the path into unsubsidised employment, the OECD report finds.

Many municipalities in Sweden have been reluctant to settle refugees, in part due to the high cost of social assistance for those who do not get jobs. After three years in Sweden, employment rates among low-educated refugees are less than half those seen among the medium- and highly**-**educated refugees and funding mechanisms should reflect expected costs.