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International and European Protection Obligations and EU Border Control.

**Does the Legal Framework of Joint Maritime Operations coordinated by Frontex comply
with the Principle of Non-Refoulement?**

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List of Abbreviations

AI	Amnesty International
CAT	Convention against Torture
CSR	1951 Geneva Convention Relating to the Status of Refugees as amended by the New York Protocol of 31 January 1967
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
ExCom	Executive Committee of the High Commissioner's Programme
FRA	Fundamental Rights Agency
FR Strategy	Frontex Fundamental Rights Strategy
GR	General Report
HRW	Human Rights Watch
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights
IMO	International Maritime Organization
IOM	International Organization for Migration
JHA	Justice and Home Affairs
JO	Joint Operation
NGO	Non-governmental Organisation
PoW	Programme of Work
SBC	Schengen Borders Code
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

In search of a better life more and more people try to enter the EU, not seldom in risky ways. For instance, from the North African shores, migrants in particular from Asia and Africa, cross the Mediterranean in small, often unseaworthy boats in the hope of reaching the Southern European Borders. In reaction to these migratory processes the control of the common external borders – alongside with the abolition of the internal borders – has turned into the focus of the EU migration strategy. Border control constitutes a key area of Justice and Home Affairs (hereinafter: JHA) policy and is framed by the EU strategy on integrated border management (hereinafter: IBM) which promotes the shift of control measures to areas beyond the territorial borders and the development of operational cooperation between the Member States in implementing border control measures. Measures are implemented by Member States either individually or in joint operations (JO) under the coordination of Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Frontex was particularly expected to combat illegal migration at the southern maritime borders. Even though illegal immigration into the EU does not happen predominantly through illegal crossing of the southern maritime borders¹ (di Pascale 2010: 283), the reinforcement of this immigration gate has become a focus of EU migration policy. The impact of the work of maritime joint operations (hereinafter: JO) coordinated by Frontex is successful in terms of significantly dropping numbers of irregular crossings of the Mediterranean Sea towards the EU, since the operationalisation of Frontex. At the same time, criticism on the EU migration and border policy and in particular on Frontex grows loud²: Considering maritime borders, border checks and surveillance take shape in the form of maritime interception which intends either the diversion of migrants or

¹ Di Pascale (2010: 283) notes that the main source of illegal residence in the EU results from visa or “permit” overstayers, i.e. persons that enter the EU legally but remain in the territory after their visa or permission has expired. Moreover, illegal arrivals by sea appear to be marginal. For instance, individuals who arrived by sea in Italy between 2004 and 2007 represented about 10-13% of the total of irregular migrants.

² Criticism of non-governmental organisations and scholars is presented in chapter 1.2.

their forced return to the port of embarkation. Given the development of 'mixed flows' in the Mediterranean, i.e. migrants, asylum seekers and refugees make use of the same illegal mode of travel³, pre-border control can directly impact on the availability of international protection. Moreover the intensification of such pre-border control risks to undermine the functioning of the Common European Asylum System: According to Article 78 (1) of the Treaty on the Functioning of the EU (hereinafter: TFEU), the EU develops a common policy on asylum, subsidiary and temporary protection, in order to grant protection to all third country nationals in need of international protection. However, this policy aim seems hardly realisable if EU maritime interception denies access to the EU to those in need of international protection.

Maritime interception implies hence a contradiction between the right to international protection of the individual and the sovereign right of states to control their borders (European Council on Refugees and Exiles [ECRE] 2003). The United Nations High Commissioner for Refugees (hereinafter: UNHCR) advocates therefore that maritime interception must be in accordance with international law, in particular international refugee law (International Organization for Migration [IOM] & UNHCR 2001: para. 20). Regarding expulsion and admission, most notably, the principle of non-refoulement is crucial. It prohibits any action “attributable to the State or other international actor, which have the foreseeable effect of exposing the individual to a serious risk of irreversible harm, contrary to international law” (Goodwin-Gill 2011: 2). Despite the controversy among scholars of international law, the majority argues for the full extraterritorial effect of the principle of non-refoulement (see e.g. Brouwer 2010; den Heijer 2010; Miltner 2006; Weinzierl 2007). This means that the scope of protection extends to persons intercepted beyond the territorial sea of Member States. This principle affects considerably the means of states for border control, and in that clearly limits the scope of states' lawful action.

³ This development is attributed to a mismanagement of both migration and asylum issues: on the one hand asylum seekers resort to illegal travel modes as legal channels are closed for them as a result of a migration control policy in disregard of this group (Lax 2008). On the other hand illegal migrants might use the asylum channel as a chance for them to stay in the territory (ExCom 2001: para.5).

1.1 Problem Definition

Exact data and statistics on the number of persons in need of international protection travelling in mixed flows across the Mediterranean are missing. However, based on the number of persons who have reached the EU and have been granted asylum, it can be inferred that persons in need of international protection are among the intercepted people. For instance, 75% of persons arriving by boat in Italy in 2008, have requested asylum and of those 50% have been granted some form of protection (Human Rights Watch [HRW] 2009: 27)⁴. Also from Frontex information it becomes clear that protection seekers are among the intercepted people, as Frontex declares that persons asking for asylum are not interviewed upon arrival⁵ (den Heijer 2010: 190⁶). According to the UNHCR report on 'Asylum Levels and Trends in Industrialized Countries 2010' (UNHCR 2011: 5) the Southern European countries, in particular Italy, Greece and Malta, have reported the largest relative decrease in their annual asylum levels in 2010 among the European regions. In the case of Italy, the report relates this drop directly to the conclusion of an agreement in 2009 between Italy and Libya, which regulated the return of boats carrying irregular migrants to the latter state (ibid.: 9).

Considering the emerging practice of migrants and protection seekers travelling in mixed flows, the question is whether maritime JOs comply with the principle of non-refoulement. Frontex-led sea operations are in the focus of criticism by non-governmental organisations (hereinafter: NGO) such as Migreurop⁷, HRW or the European Council on Refugees and Exiles (hereinafter: ECRE)⁸ for not respecting the principle of non-refoulement and obstructing the right of access to asylum procedures.

⁴ It is worth to note that HRW believes that not “all, or even most” of the migrants seeking to enter the EU would qualify as refugees, but it emphasises that all migrants have human rights (HRW 2009: 10f.)

⁵ Frontex interviews migrants that have reached a Member State for the purpose of gathering information on facilitation networks and details of the crossing (see Frontex News Release of 17 February 2009, 'HERA 2008 and Nautilus 2008 Statistics': retrieved 17 July, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art40.html).

⁶ Den Heijer refers to the Frontex News Release of 17 February 2009, 'HERA 2008 and Nautilus 2008 Statistics' (see note 5).

⁷ See e.g. migreurop (2008) “Open letter about the tragedies occurring at the sea”: <http://www.migreurop.org/article1300.html>

1.1 Problem Definition

In a speech to the European Parliament's Commission of Civil Liberties, Justice and Internal Affairs in 2007, Migreurop Board member Pierre-Arnaud Perrouy deplors that the policy on combating illegal migration is conceived in disregard of the rights of protection seekers. He criticises that on the one hand only after the operationalisation of Frontex the need for protection safeguards for persons in need of international protection has been acknowledged by the EU and that on the other hand legislation does only provide for general commitments on human rights, but lacks further protection provisions on how this commitment could be fulfilled (Migreurop 2007: 1). Baldaccini (2010: 229f.) notes that human rights concerns arise, because the guarantees and protections under the EU legal framework find no adequate application to maritime JOs and as it is not clear how compliance with international obligations during maritime JOs can be monitored. This leads inevitably to the infringement of rights. For instance, in the report 'Pushed Back, Pushed Around' published by HRW in 2009 on the forced return of boat migrants by Italy to Libya and the mistreatment of asylum seekers and migrants in Libya, the NGO accuses Frontex of having participated in interdiction and push back of migrants to Libya (HRW 2009: 37).

Criticism refers also to the conduct of operations. The EU legal framework for maritime JOs is still under development, but despite this legal uncertainty operations are taking place under the national law of each participating state (Klepp 2010: 213). This is of particular relevance given the current development of EU integrated border management and the focus on operational cooperation coordinated by Frontex. In particular maritime pre-border control finds no explicit legal basis in Community law. If during JOs the responsibility between the participating states is not clarified, the situation of legal uncertainty of the intercepted persons is further aggravated. The lack of transparency during operations further exacerbates any attempt to establish liability (Baldaccini: 230; ECRE 2007: para. 2.2).

The EU has acknowledged several times that concerns arise from a lack of a clear legal framework for JOs⁸. Therefore the European Council has requested the Commission in

⁸ See e.g. ECRE (2007) "Defending Refugees' Access to Protection in Europe": <http://www.ecre.org/topics/areas-of-work/access-to-europe.html>

⁹ See the communication presented by the European Commission on the 'Reinforcement of the management of the Southern Maritime Borders' (COM (2006) 733 final) and the 'Study on the

1.1 Problem Definition

the Stockholm Programme, the multiannual programme of JHA of 2010-2014, to conclude proposals in order to “clarify the mandate and enhance the role of Frontex”. These proposals may include “clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows” (European Council (2010): para. 5.1).

1.2 Scope of Thesis

The thesis aims to contribute to the discussion on the compatibility of joint maritime operations with the principle of non-refoulement and with international protection obligations in general. The limited availability of information on JOs such as reports, evaluations or operational plans, does not allow a sufficient examination of compliance during operations on the ground. Therefore the legal framework guiding joint maritime operations will be at the focus of the analysis. By shedding light on the protection safeguards provided therein the analysis will allow to draw conclusions on their probable effect on compliance in practice.

In order to analyse the compliance of maritime operations coordinated by Frontex with the principle of non-refoulement two aspects are of importance: the obligations arising from the principle of non-refoulement and the protection safeguards provided in the legal framework of maritime JOs.

Based on these two aspects, the guiding questions of the thesis are:

- What is the scope of protection of the principle of non-refoulement within the EU refugee regime?
- What are the obligations for maritime JOs that arise from the scope of protection?
- What is the legal framework governing Frontex-led sea operations?
- Does this legal framework provide adequate protection safeguards that ensure the observance of the principle of non-refoulement?
- Does it clearly define who is responsible for providing the protection when several Member States are engaged in the operation?

international law instruments in relation to illegal immigration by sea' (SEC (2007) 691).

- What are the improvements that can be expected from actual political and legal developments?

In order to answer these questions, the thesis is structured as follows: The following section outlines the legal basis of maritime interception and defines the term of maritime interception. Then the regulations guiding JOs are presented and an overview of maritime JOs is given (chapter 2). In the third chapter the principle of non-refoulement will be defined in order to establish a set of criteria that must be respected during maritime interception operations (chapter 3). The fourth part defines the legal framework of maritime JOs and examines whether the legal framework can ensure adequate protection for intercepted people with regard to their right to non-refoulement. In view of recent political and legal developments the prospect for an endorsement of the respect of international protection during maritime JOs shall be analysed (chapter 4). Finally some conclusions on the compliance of maritime JOs with the principle of non-refoulement will be drawn (chapter 5).

2 Joint Maritime Operations coordinated by Frontex

This chapter serves to clarify the nature of maritime JOs. Therefore the legal basis in international maritime law for control rights will be outlined and then maritime interception defined as falling within the scope of the thesis. Then the regulations guiding operational cooperation coordinated by Frontex are presented and an overview of maritime JOs is given.

2.1 Control Rights in International Maritime Law

Maritime interception finds no explicit reference in international law. However, the United Nations Convention on the Law of the Sea (hereinafter: UNCLOS) defines a right of control at sea. The international law of the sea distinguishes between internal waters, the territorial sea, the contiguous zone and the high seas (Weinzierl 2007: 32f.). Only the internal waters and the territorial sea fall under state sovereignty, hence, in these waters the state can exercise its right of control (Art. 2 (1) UNCLOS)¹⁰. The

¹⁰ In the territorial sea state sovereignty is restricted by the right of innocent passage defined in Articles 17 and 19 of UNCLOS.

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contiguous zone is part of the high seas, but according to Article 33(1) UNCLOS the coastal state “may exercise the control necessary to: (a) prevent [and (b) punish] infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”.

Considering that interception operations take mostly place in areas beyond the territorial sea, the rights of control of a state in the high seas and the territorial sea of third states are of relevance. In principle, on the high seas all ships flying a flag enjoy freedom of navigation (Art. 87, 90, 92 UNCLOS). A state can therefore only exercise a limited right of control in certain instances. If a ship is flying without a flag a state enjoys a 'right of visit' (Art. 110 (1) (d) UNCLOS), i.e. it can approach and board the ship in order to effect a 'vérification du pavillon'¹¹ (Moreno Lax 2011: 186). It should be noted that most migrants cross the Mediterranean Sea in little boats without a flag and can therefore be controlled by states within the terms of Article 110 (1) (d) UNCLOS (ibid.). The same Article provides for the principle of flag state consent, i.e. the interception of ships flying a flag would be lawful with the consent of the flag state, e.g. by means of a treaty. For instance, the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)¹², supplementing the United Nations Convention against Transnational Organised Crime of 2000, authorises all states who have ratified the protocol¹³ to intercept flag ships on the high sea upon the flag state's individual approval (Art. 8 (2); Obokata 2010: 158f.; Weinzierl 2007: 35). The notion of state sovereignty (Obokata 2010: 159) defines also the possible scope of control of a state in the territorial sea of a third state. In this case the intercepting state depends on the consent of the coastal state, as the latter enjoys full sovereignty over its territorial sea. The EU attaches therefore high priority to the cooperation with third states in order to realise its policy on border control of the southern maritime borders.

¹¹ For a discussion on whether the 'right of visit' implies further powers of seizure, see Moreno Lax 2011: 186ff.

¹² The Smuggling Protocol was adopted by General Assembly resolution A/RES/55/25 and entered into force on 28 January 2004 (see: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>).

¹³ For the status of ratification see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en.

Interception

2.2 Definition of Maritime Interception

A universal definition of interception does not exist (Miltner 2006: 79), therefore reference is made to a definition by the Executive Committee of the High Commissioner's Programme (hereinafter: ExCom) and of the EU. In 2003 the ExCom¹⁴ (ExCom 2003) defined interception broadly as any measure employed by states that intends the prevention of travelling and embarkation, when a person does not have the required documentation or valid permission to enter. This includes also the control of vessels that are suspected of transporting persons in breach of international or national maritime law. The explicit reference to physical interception in the maritime context shows the importance that maritime interception has gained (Miltner 2006: 84). Recently, the EU has defined maritime interception in the Council Decision supplementing the Schengen Borders Code (hereinafter: Council Decision)¹⁵. Accordingly, interception comprises several measures that are taken during surveillance operations against a ship that is suspected of carrying persons intending to circumvent the checks at border crossing points (Annex, Part I, para. 2.4 Council Decision). They may take place in the territorial sea, the contiguous zone and the high seas (ibid.: para. 2.5). Possible measures are the request of information and documentation (ibid.: 2.4. (a)), the stopping, boarding and searching of the ship and questioning of persons on board (ibid.: (b)) and information on their non-authorized border crossing (ibid.: (c)). Furthermore, it implies seizing the ship and apprehending persons on board (ibid.: (d)), the diversion of the ship so that it does not enter the contiguous zone or territorial sea (ibid.: (e)) or the direct conduct to a third country or handing over the ship or persons to the authorities of a third country (ibid.: (f)). Finally the ship or persons can be conducted to the host Member State or to any other Member State participating in the operation (ibid.: (g)). Moreno Lax (2011: 188) criticises that actions such as seizing and apprehending persons on board or their conduct to a third country do not follow from the applicable treaties which only allow a right of visit (see. chapter 2.1).

¹⁴ See note 36.

¹⁵ Council Decision 2010/252/EU. The Council Decision will be discussed in detail in chapters 4.1. and 4.2.1. See also note 56.

Interception

Maritime interception must be distinguished from rescue operations. Besides a limited right of control at sea, international law establishes a duty for the state to intervene in situations of distress at sea (Weinzierl 2007: 35). In both cases actions must be measured against the principle of non-refoulement and other obligations under international law (ibid.: 39). While rescue is guided by humanitarian grounds, interception follows migration policy objectives. This is confirmed by IOM, according to the organisation “[M]any States [...] find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies” (IOM & UNHCR 2001: para. 14).

2.3 The Frontex Regulations

Since Frontex has become operational in 2005 a range of maritime JOs have been launched along the southern maritime borders. These operations are guided by the Frontex Regulation¹⁶, according to which Frontex shall ensure the coordination of Member States' actions in the implementation of measures relating to the management of external borders (Art. 1). To this end the Regulation sets out further tasks in Article 2 (1) which regard the establishment of common training standards (b), carrying out risk analyses (c) and the assistance of Member States in circumstances requiring increased technical and operational assistance at external borders (e). JOs can be initiated by Member States or by the Agency itself (Art. 3 (1)) and are preceded by risk analysis. Furthermore Frontex can cooperate with the competent authorities of third countries and facilitate operational cooperation with third countries (Art. 14). Since assistance provided by Frontex in emergency situations was considered to be insufficient, the Rabbit Regulation¹⁷, adopted in 2007, further extended the Agency's competences. It enables Frontex to coordinate the set-up, training and deployment of so called Rapid Border Intervention Teams (Rabit mechanism) that shall come into action upon the request of

¹⁶ Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union (FRONTEX).

¹⁷ Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the task and powers of guest officers.

the concerned Member States¹⁸. Furthermore the Rabbit Regulation amended the Frontex Regulation with regard to the tasks and powers of guest officers during JOs¹⁹. Currently a third amendment to the Frontex Regulation is negotiated by the Council and the Parliament. The amendment shall clarify the mandate of the Agency and make its functioning more effective by an increase in its competences²⁰.

2.4 An Overview of Joint Maritime Operations

In the following section the major JOs shall be described with regard to their operational area and the measures taken vis à vis intercepted migrants and in particular people seeking international protection. If information is available it shall be referred to agreements with third states that underpinned a JO. Information on maritime JOs provided by Frontex are scarce and of technical character and do not refer to the issue of international protection. Frontex does not collect any data on asylum seekers and states that asylum seekers are not interviewed. In order to present a comprehensive picture, information available from the Frontex home page²¹ and from NGOs will be used. To this end also the policy approach in combating illegal migration followed by the EU and the approach of Frontex will be taken into consideration.

2.4.1 *Maritime JOs according to Frontex*

Frontex defines four main sea routes for illegal migration in the South. Accordingly the southern maritime borders are divided into the West, Central and Eastern Mediterranean area and the Atlantic sea in front of the West African coast (Frontex press pack 2011: 6).

JO Hera covered the West African route and intended to stem illegal movements towards the Canary Islands. This JO, starting in 2006, was the first operation that was carried out in the territorial waters of third states, namely of Senegal and Mauritania,

¹⁸ See Article 2 (1) (g) and 8a Frontex Regulation as amended by the Rabbit Regulation.

¹⁹ See Article 10 Frontex Regulation as amended by the Rabbit Regulation.

²⁰ COM (2010) 61 final. Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

²¹ See generally the Frontex home page <http://www.frontex.europa.eu/>: Press releases, Programmes of Work and General Reports.

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and conducted in close cooperation with local authorities (General Report [GR] 2006: 12). All migrants intercepted within the contiguous zone of the third states were returned immediately to their port of embarkation. Those intercepted beyond this zone were brought to the Canary Islands (Moreno Lax 2011: 181). This course of action was only possible due to bilateral agreements between Senegal, Mauritania and Spain, which is also the host Member State of this operation. JO Hera was turned into a permanent operation and will continue to be carried out throughout 2011 (Programme of Work [PoW] 2011: 44).

JO Minerva and Indalo in the West Mediterranean are just as well hosted by Spain and aim at combating migratory flows from North African countries towards Spain. For JO Indalo (2007) no diversions are documented (GR 2007: 21). In 2009 the detection of more than 750 migrants was reported, but no reference is made to diversions. Likewise, it is not specified where operations have taken place. However, in view of the sea border control agreement between Morocco and Spain regarding the Canary Islands and the Strait of Gibraltar in 2003, on the basis of which both countries started to collaborate in joint naval patrols (Wolff 2008: 263; IOM 2008: 12), it can be suggested that the operational area of Frontex-led operations might have extended to the territorial sea of Morocco. However official information on these JOs is too scarce.

Regarding the Central Mediterranean, JO Nautilus, starting in 2006, aimed at controlling the migration route from Libya and Tunisia to Malta and Italy (GR 2007: 23). As a response to continuous migratory flows this JO also became a longer term operation after 2007. At the same time JO Hermes was launched focusing on illegal migration to Italy. From both operations no diversions are reported. Italy has signed bilateral agreements on readmission and police cooperation with Tunisia since 1998 and with Libya since 2000 (di Pascale 2010: 296f.). However, these are not mentioned in the context of JOs in the Central Mediterranean. In 2008 migrants rescued within the

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Libyan Search and Rescue Area²² were to be taken to Libya²³, however this plan failed due to refusal by Libya to receive migrants. Eventually, intercepted migrants were brought either to Italy or to Malta. In 2009 Italy and Libya started common push-back operations outside the framework of the Agency. Frontex, while denying participation in these operations, stated that JOs Nautilus and Hermes have profited from those in terms of fewer arrivals from Libya and fewer casualties at sea (GR 2009: 50; HRW 2009: 37; Moreno Lax 2011: 184). JO Nautilus was not continued after 2009. Recently, the launch of JO Hermes 2011 was requested by Italy in view of the high numbers of illegal arrivals on Italian territory from Tunisia and Libya as a consequence of the political uprisings in both states, and the subsequent breakdown of Libyan and Tunisian border controls²⁴. The operational area covers the Pelagic Islands, Sicily and the Italian mainland²⁵ and has later on been extended to include also Sardinia²⁶. Patrols shall prevent illegal border crossing, but diversion of boats back to Libya or Tunisia is not mentioned.

JO Poseidon controls the Eastern Mediterranean route. The JO consists of a sea and a land border operation (GR 2006: 11). During JO Poseidon Sea, open sea border checks were carried out (GR 2007: 26), however there is no indication on interception operations in the coastal area of Turkey. According to Baldaccini (2010: 241; ECRE 2007: 12²⁷), in 2007, in a first stage of operation 88 illegal immigrants were diverted to the country of departure and during a second stage 248 illegal immigrants were diverted

²² The International Maritime Organization (IMO) has divided the sea into 13 search and rescue zones. Within these zones, the countries concerned have delineated search and rescue regions for which they shall guarantee the rescue of persons in distress at sea. The Search and Rescue Area is not limited to the territorial sea of a state (Weinzierl 2007: 36). See also the IMO website.

²³ Frontex News Release “Go ahead for Nautilus 2008”. Retrieved July 20, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art36.html

²⁴ Yaghmaian (2011) states that the “political turmoil in North Africa has ended the ‘friendship act’ [with Libya] and Italy’s pact with Ben Ali.” Both cooperation agreements on border control are regarded as crucial for the curb of irregular migration flows to the EU.

²⁵ Frontex News Release “Update to Joint Operation Hermes 2011”. Retrieved July 20, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art102.html

²⁶ Frontex News Release “Hermes Operation Extended”. Retrieved July 20, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art103.html

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back to the Turkish coast. The General Report of 2009 (p.12) states that in the year most detections have been made at six islands close to the Turkish coast. Also JO Poseidon has turned into a permanent operation. This year, in view of the (potential) migratory flows from North Africa, its operational area has been extended to include also Crete²⁸.

From the information available at the Frontex home page it can be concluded that only JO Hera extended to the territorial sea of third states and resulted in the diversion of boats to the port of departure. It seems that basically intercepted migrants have been disembarked on EU territory and subsequently identified²⁹. This conclusion is striking if one considers that close cooperation with third countries in border control has been pronounced by the EU since the reinforcement of border protection and management along the EU southern maritime borders has been envisaged³⁰. The further shift of surveillance measures to the territorial sea of the relevant third states (of origin and transit) was reiterated by the Stockholm Programme (European Council 2010: para. 6.1.1). Considering that the Council Decision supplementing the Schengen Borders Code establishes that maritime interception implies, inter alia, the conduct of a ship suspected of carrying illegal migrants to a third country, one would expect more operational cooperation with third countries and more practices of diversion and conduct to the port of embarkation. Frontex itself states that the establishment of operational cooperation with third countries is an integral part of the Frontex mission. The Agency seeks to develop structured operational cooperation with neighbouring Mediterranean countries and entered into negotiation with e.g. Turkey, Libya, Morocco, Senegal, Mauritania and Egypt. Frontex can also facilitate operational cooperation already in place between Member States and third countries. However, with regard to maritime JOs explicit reference is only made to JO Hera³¹.

²⁷ Both authors refer to the 2007 Frontex statement: http://www.frontex.europa.eu/examples_of_accomplished_operati/art8.html.

²⁸ Frontex News Release “Update to Joint Operation Poseidon 2011”. Retrieved July 20, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art104.html

²⁹ Most of the above mentioned JOs were accompanied by a second operational phase where assistance in identification and conducting interviews was provided (see e.g. GR 2006 on JO Hera (p. 12)).

³⁰ See Council of the European Union, 15445/03: para. 30f.

³¹ http://www.frontex.europa.eu/external_relations/. Retrieved August, 24, 2011

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2.4.2 Maritime JOs according to other Sources

It is then necessary to consider reports from NGOs on maritime JOs, as they help to clarify the fragmentary picture one gets based on Frontex official information. Most notably, NGOs interview persons seeking international protection and therewith provide information on their treatment by Frontex officers during interception operations. The German NGO Pro Asyl for instance has revealed cases of refoulement at the Greek border in 2007 (Pro Asyl 2007), however the report does not refer to any Frontex operations. Perrouty from Migreurop refers in its speech (Migreurop 2007) to people that did not have the possibility to claim asylum in Lampedusa, Malta, Ceuta and Melilla and the Canary Islands. HRW (2009: 4f.) conducted interviews with migrants, refugees and asylum seekers who have arrived either in Italy or in Malta, in order to shed light on joint Italian-Libyan push back operations. Most notably, HRW (2009: 37) holds that Frontex has assisted a push back operation. As mentioned above, Frontex has denied participation in any diversion operations to Libya. It is lastly not possible to get neutral information on what actually happens during JOs on the high seas or in the territorial sea of third states, if the only source is on the one hand Frontex and on the other hand NGOs. In view of the many claims of NGOs on human rights abuses and also criticism in the literature, it must be assumed that the rights of protection seekers are not always respected during maritime interception operations coordinated by Frontex.

3 The Principle of Non-Refoulement

After this examination of JO practice, the thesis will now turn to the obligations arising from the principle of non-refoulement during joint maritime operations in consideration of the specific context in which they take place. This requires first the definition of the relevant legal sources of the principle and their scope of protection.

Non-Refoulement within the EU Refugee Regime

3.1 Legal Sources of the Principle of Non-Refoulement within the EU Refugee Regime

The principle of non-refoulement is solidly grounded in international human rights and refugee law, most notably in the Geneva Convention relating to the Status of Refugees³² (CSR). The CSR is the first instrument of the refugee regime and functions as the cornerstone of refugee protection (Kaunert & Leonard 2010: 124). Since its adoption in 1951 the convention has been supplemented by refugee and subsidiary protection regimes in several regions and was also complemented by human rights law³³ (UNHCR 2010; Hathaway 2005: 110, 120). Other legal sources of the principle are the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) (Miltner 2006: 98) and in a regional context, the European Convention on Human Rights (ECHR). The principle of non-refoulement is widely accepted as an established principle of customary law (UNHCR 2010: 4), thus requiring compliance even by states that are not bound by the above mentioned human rights and refugee instruments (Miltner 2006: 98). It should be considered though, that the scope, application and possible limitations to the principle vary according to the legal sources considered.

In the context of the EU refugee regime, the CSR and the ECHR are considered as the relevant legal sources. All Member States are signatories to both instruments. Furthermore explicit reference is made to them in the EU treaties³⁴, therefore they should be considered as sources of the general principles of EU law (Peers 2006: 65)³⁵. The particular importance of the ECHR for the EU is also revealed by the jurisprudence

³² In the version of the Protocol on the legal status of refugees of 31 January 1967.

³³ According to Hathaway (2005: 110) the development of international human rights law has been more progressive than that of refugee law. The rights defined in the CSR are therefore complemented by the “treaty-based system of international human rights law”.

³⁴ See Article 78 (1) TFEU on a common policy on asylum, subsidiary protection and temporary protection; Article 18 CFREU on the right to asylum; Article 6 (3) TEU on the general principles of EU law.

³⁵ Article 78 (1) TFEU refers next to the CSR and the related Protocol to “other relevant treaties”. These are regarded to comprise next to the ECHR, the ICCPR and the CAT (Peers 2006: 65). They should be considered therefore equally as sources of the general principles of EC law.

3.1 Legal Sources of the Principle of

Non-Refoulement within the EU Refugee Regime

of the Court of Justice of the EU (CJEU). In its jurisprudence the CJEU refers particularly to the ECHR as general principles of Community law and takes account of the jurisprudence of the ECtHR (ibid.; Weinzierl 2007: 43). EU secondary law therefore has to comply with the provisions in both instruments, as an infringement of the provisions would amount to an infringement of the Treaties (Peers 2006: 65). The Treaty of Lisbon finally provides the legal basis for the accession of the EU to the ECHR (Art. 6 (2)). Upon accession acts of EU bodies would be subject to direct review by the ECtHR, whereas until now the Court exercises a form of indirect review (Peers 2006: 66). Moreover, since the Charter of Fundamental Rights of the European Union (CFREU) is provided with the same legal value as the Treaties through its incorporation as a protocol to the Lisbon Treaty (Galetta 2009: 234), it constitutes an additional legal source for the principle of non-refoulement.

3.2 The Scope of Protection of the Principle of Non-Refoulement

3.2.1 *The Scope of Protection under the CSR*

The interpretation of the scope of the protection is based mainly on conclusions of ExCom³⁶. The principle of non-refoulement is expressly defined in Article 33 (1) of the CSR.

Art. 33

Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

³⁶ ExCom is the UNHCR's governing body which devises the content of existing standards of rights protected under the CSR. Although this is done in the form of non-binding resolutions, the conclusions of the body “have strong political authority” (Hathaway 2005: 115).

Principle of Non-Refoulement

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The Article establishes a negative duty that prohibits states to conduct any measure resulting in the return of a refugee to the frontiers where he fears threat to life or freedom on account of a protected ground, i.e. race, religion, nationality, membership of a particular social group or political opinion.

First the personal scope shall be defined. The protection from refoulement applies to all persons that would qualify as refugees according to Article 1 A (2) CSR regardless of a formally recognised refugee status (Hathaway: 279, 303f.; ExCom 2000: para. 21). Article 1 A (2) CSR³⁷ requires a refugee to be a person outside of his country of nationality or former habitual residence. Consequently, persons that are intercepted in the territorial sea of their own state would not be protected by the CSR (Hathaway 2005: 307; Moreno Lax 2008: 6, 2011: 206) and could not enjoy the right of non-refoulement. In view of the current state practice of intercepting persons already in the territorial sea, the CSR would be of no avail. It should be also considered that the asylum acquis of the EU, namely the Qualification Directive³⁸ provides for subsidiary protection, i.e. it covers persons who do not fall within the meaning of Article 1 A (2) CSR, but would “face a real risk of suffering serious harm” (Art. 2 (e) Qualification Directive) if they would be returned to their country of origin. This protection is

³⁷ “For the purposes of the present Convention, the term “refugee” shall apply to any person who: (2) [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of this nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of this former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

³⁸ The European Union 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, Official Journal L 304, 30/09/2004 P. 0012 – 0023.

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regarded to be complementary and additional to the refugee protection under the CSR (recital 24 *ibid.*). The criteria for recognising a person as eligible for subsidiary protection is to be based on “international obligations under human rights instruments and practices existing in Member States” (recital 25 *ibid.*)³⁹. In view of the specific personal scope of the CSR it is necessary to consider the ECHR as a complementary legal source of the principle of non-refoulement within the EU refugee regime. A second restriction to the personal scope results from Article 33 (2) CSR, which provides for an exemption of the prohibition of non-refoulement, if the person “constitutes a danger to the community of that country”. However, UNHCR explicitly states that the provision of Article 33 (2) must be applied in respect to the host state's non-refoulement obligations under international human rights law (UNHCR 2007: para. 11). This means that EU Member States must ensure that actions under this Article are in conformity with the ECHR.

Next to the personal scope it is also necessary to define whether a positive duty to grant access to state territory follows from the principle of non-refoulement. Hathaway states that the principle is “the primary response of the international community to the need of refugees to enter and remain in an asylum state” (Hathaway 2005: 300). However, it does not oblige states to grant protection within their territory and analogically does not “entail a right of the individual to be granted asylum in a particular State” (UNHCR 2007: para. 8; Fischer-Lescano 2009: 284, Hathaway 2005: 301). International human rights law in general and the CSR in particular do not establish an obligation for states to receive a person, including a refugee (Cholewinsky 2002: 108; Fischer-Lescano 2009: 289; Hathaway 2005: 300f., note 113). Nevertheless, scholars, UNHCR and ExCom agree that the principle of non-refoulement implicitly obliges a state to verify in an asylum procedure the status of a person in order to expel him safely (Moreno Lax 2011: 211⁴⁰, Fischer-Lescano 2009: 284f.). In its Advisory Opinion, the UNHCR

³⁹ Article 15 of the Qualification Directive defines the term 'serious harm' which consists of death penalty or execution (a), torture or inhuman or degrading treatment or punishment (b) and indiscriminate violence in situations of international or internal armed conflict (c).

⁴⁰ Moreno Lax refers to the UNHCR 'Handbook on Procedures' which states that in order to enable states parties to the Convention to implement their provisions, refugees have to be identified (see UNHCR (1992). 'Handbook on Procedures and Criteria for Determining Refugee Status': para. 189).

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declares that “as a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol” states are required to give persons seeking international protection access to “fair and efficient asylum procedures” (UNHCR 2007: para. 8).

Weinzierl (2007: 45) argues that exceptions to this positive duty under the principle of non-refoulement are only justified if removal to a safe third country is possible, i.e. to a country that would grant access to the asylum seeker and where he would not fear persecution. In the same vein, UNHCR (2007: para. 8) argues that states who are not willing to grant asylum to asylum seekers “must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger” on account of a Convention's ground. According to UNHCR this might be the conduct to a safe third country, or the granting of some other form of protection (ibid.). The concept of the safe third country is however not only controversial in international law (Fischer-Lescano et al. 2009: 287) but also lacks sometimes practical feasibility with respect to the existence of such alternative safe countries for the refused asylum seeker. In this regard the ExCom has pointed out in several conclusions that the removal of a person to a third country that will subsequently send the person to a place where he fears persecution amounts equally to an infringement of the principle (ExCom 2000: para. 22; ExCom 2003: (a) (iv)). This constitutes indirect refoulement and several states may be jointly responsible for this action (ExCom 2000: para. 22).

If non-admission does not forcibly result in indirect refoulement, it can turn the person into a 'refugee in orbit', i.e. no state feels responsible for the examination of his application (Barbou des Places 2004; Hathaway 2005: 279). In view of the unknown final destination that is provoked by refusal of entry, Miltner argues for a de facto duty of states to receive the person. The scope of protection of the principle of non-

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refoulement under the CSR establishes hence not only the negative duty not to return a refugee, but also to examine his claim. As this protection refers solely to a Convention refugee, the thesis will now turn to the scope of protection under the ECHR.

3.2.2 *The Scope of Protection under the ECHR*

The ECHR does not define a specific personal scope of protection, but covers all human beings. It does not explicitly pronounce the principle of non-refoulement. However, an implicit prohibition of refoulement can be inferred from the overall purpose and objective defined in Article 1 ECHR:

“Contracting States must respect within their jurisdiction the rights and freedoms defined in section I of the Convention of each individual”.

From this results that states' decisions relating to entry and expulsion “are subject to the protective framework of the ECHR” (Cholewinsky 2002: 108). It is necessary to consider the case law of the ECtHR in order to define the scope of protection. In the context of expulsion the ECtHR has established the particular importance of the protection guaranteed by Article 3 (protection from torture, inhuman or degrading treatment) and Article 8 (right to respect for private and family life) (ibid. : 108⁴¹). Other relevant Articles are Article 2 (right to life), Article 6 (right to a fair trial) and Article 34 (right of individual application to the ECtHR) (Weinzierl 2007: 46f)⁴². Currently a ruling by the Grand Chamber is expected on the case *Hirsi and others v. Italy*⁴³. The application has been lodged with the ECtHR in 2009 by 24 migrants who claim that their interception in international sea by Italian authorities and subsequent conduct to Libya resulted in the breach of Articles 3 and 13 (right to an effective remedy) of the ECHR and of Article 4 of Protocol No. 4 of the Convention (prohibition

⁴¹ Regarding case law on Article 3 reference is made to e.g. *Soering v. United Kingdom* (1989), *Chahal v. United Kingdom* (1996); regarding case law on Article 8 reference is made to e.g. *Moustaquim v. Belgium* (1991), *Beldjoudi v. France* (1992). For further cases see Cholewinsky 2002: 108.

⁴² Case law on Article 6: *Soering/United Kingdom* (1991); case law on Article 34: *Mamatkulov and Askarov/Turkey* (2005).

⁴³ Grand Chamber hearing: *Hirsi and others v. Italy* (Application No. 27765/09). See press release ECHR 064 (2011).

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of collective expulsion of aliens)⁴⁴. The case is regarded as landmark. For the first time the ECtHR will pronounce a judgement on the extraterritorial application of the principle of non-refoulement, which is expected to have a considerable impact on the interpretation of the scope of protection under the ECHR and hence on states' protection obligations during pre-border controls. The importance of the case is apparent as the chamber has relinquished jurisdiction in favour of the Grand chamber according to Article 30 ECHR⁴⁵ and as the UNHCR intervenes as a third party in this case (Schenkel 2010). A positive judgement in the *Hirsi* case could set a precedent for other European countries in combating illegal migration (*ibid.*). Moreover investigation by the Court on the common push-back operation of Libya and Italy will also contribute to the clarification of the role of Frontex in the affair. The defendant government is demanded by the Court to disclose the agreements signed by Italy and Libya of 27th December 2007 and of 4th February 2009. Furthermore Italy shall give information on the relation between the operations envisaged by the agreements and Frontex (*Exposé des Faits* 2009).

By means of dynamic interpretation of the ECHR⁴⁶ the ECtHR has developed three major lines of jurisprudence on the interpretation of the scope of protection of the principle of non-refoulement (Weinzierl 2007: 46). First, it is not relevant whether the receiving state is directly or indirectly responsible for the violation of protected rights (*ibid.*: 47⁴⁷). A risk of violation of protected rights can also emanate from persons or groups who are not public officials provided that the state cannot provide appropriate

⁴⁴ For more detailed information on this incident see the 2009 HRW report 'Pushed Back, Pushed Around'.

⁴⁵ Article 30 ECHR states: "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgement previously delivered by the Court, the Chamber may, at any time before it has rendered its judgement, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects."

⁴⁶ Article 32(1) ECHR empowers the ECtHR to authoritative and authentic interpretation and further development of the ECHR (Weinzierl 2007: 46).

⁴⁷ Weinzierl refers to two case laws: ECtHR Judgement of 29 April 1997 (*H.L.R. / France*), Application No. 24573/94, p. 163, para. 40; ECtHR Judgement of 17 December 1996 (*Ahmed / Austria*), Application No. 25964/94, paras. 43 ff.

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protection for the individual. Furthermore the ECtHR has established an absolute prohibition of torture and inhuman or degrading treatment (Article 3), which extends to the implicit principle of non-refoulement. The principle of non-refoulement on grounds of Article 3 prevails therefore over the argument of public danger (*ibid.*: 48⁴⁸). From this follows that if the removal of a refugee would result in the breach of his rights under Article 3 of the ECHR, Article 33 (2) CSR can find no application (UNHCR 2007: para. 11). A third line of jurisprudence endorses liability of the Contracting Party also in case of indirect refoulement⁴⁹.

While the ECtHR has not (yet) pronounced a judgement on the implicit obligation to grant access to fair and efficient procedures following from the principle of non-refoulement, the explicit obligation of Contracting Parties to ensure that none of their actions will directly or indirectly infringe the ECHR is clearly stated. This obliges them to examine the status of persons seeking international protection prior to return, if otherwise the duty to protect cannot be fulfilled.

It is worth mentioning that Fischer-Lescano et al. (2009: 288f.) argue that Article 18 CFREU grants a right to asylum and consequently the right to enter EU territory. The CFREU might therefore improve the rights of intercepted persons by the EU.

3.3 Obligations arising from the Principle of Non-Refoulement during JOs at Sea

Against this background it is necessary to consider the context within which EU maritime interception takes place in order to establish when conduct to the port of embarkation or interdiction of access and diversion to the open sea respectively would amount to refoulement. The neighbouring states south of the Mediterranean Sea are the

⁴⁸ Weinzierl (2007) refers to the ECtHR Judgement of 15 November 1996 of the case *Chalal v. United Kingdom* (Application No. 22414/93), para. 80.

⁴⁹ This regards also removal to a ECHR-state (Weinzierl 2007: 47). Most recently in 2011 the Court has delivered a judgement on indirect refoulement, where it concluded that both Belgium and Greece have violated the claimant's rights under the ECHR (Art. 3 and 13). Belgium had violated Article 3 because it exposed the applicant to risks in breach of Article 3 by extradition to Greece, although knowing of the deficiencies of the asylum procedure in Greece (Grand Chamber judgement *M.S.S. v. Belgium and Greece* (2011, Application No. 30696/09)). Further case law: *T.I./United Kingdom*, Application No. 43844/98, at para. 15; *K.R.S. v. UK*, at para. 16 (Moreno Lax 2011: 212; Weinzierl 2007: 47).

3.3 Obligations arising from the

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West African and North African countries and Turkey in the Eastern Mediterranean. The North African states mostly function as transit states for asylum seekers and refugees from sub-Saharan Africa and are not major source countries of asylum seekers. Equally Turkey functions as a transit country for protection seekers from Asia⁵⁰ (UNHCR 2010: 17). Therefore the conduct to the point of embarkation would mostly not result in direct refoulement. Nonetheless each of the measures taken in the course of an interception operation premises that a safe third country is available in the area of interception, i.e. in one of the riparian states south of the Mediterranean Sea.

The EU has introduced the concept of the safe third country in the Procedures Directive⁵¹. Article 36 (2) states that a third country can be considered safe if it has ratified the CSR without any geographical limitations (a), provides an asylum procedure prescribed by law (b) and has ratified the ECHR and observes its provisions (c). However, the Council of the European Union has not yet concluded a common list of safe third countries, as provided for in paragraph 3 (Fischer-Lescano et al. 2009: 287). If Member States have individually defined safe third countries on the criteria (a), (b) and (c) established in Article 36 (2), they can exclude persons who have entered their territory from a safe third country from full or any examination of their asylum application (Art. 36 (7) Procedures Directive). However, Weinzierl (2007: 14) argues that there are no states outside the EU that fulfil the requirements of the European safe third country. Also with regard to the Mediterranean neighbours and the West African States it would not seem probable to qualify them as safe third countries in the medium-term. Beyond all, the criteria established by Article 36 (2) (c) is hard to satisfy by non-European countries.

As safe third countries do not exist, any act of diversion or interdiction is likely to result in indirect refoulement. It follows that the EU cannot return people claiming

⁵⁰ In 2010 the five major countries of origin of asylum applications lodged in 44 industrialized countries were Serbia, Afghanistan, China, Iraq and the Russian Federation. Turkey ranked at 13 and from the North African countries only Egypt ranked at 34 (UNHCR 2010: 17).

⁵¹ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. L 326/13. Currently under recast. The Commission has amended its proposal (COM (2011) 319 final) and now a response by the Council is awaited (2009/0165 (COD); http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=198716)

Principle of Non-Refoulement during JOs at Sea

international protection without having examined their protection status, i.e. a de facto duty to admit those persons exists. This is despite the conclusion of readmission agreements and informal agreements of the EU and the Member States with countries at the other side of the Mediterranean. The formal respect of human rights does not relieve the sending state from liability (ibid.: 47f.). Furthermore in the maritime context the danger of the sea is added, especially if the vessel is unseaworthy. Persons seeking international protection therefore have to be allowed to go aboard the intercepting ship or the whole intercepted boat must be allowed to disembark on EU territory. Upon arrival persons asking for international protection must be afforded a procedure examining their request in accordance with the EU Procedures Directive⁵² and national law.

4 Protection Safeguards under the Legal Framework of JOs

The analysis will turn now to the question whether the legal framework of maritime JOs comes up to the protection obligations under the principle of non-refoulement, as defined above. First the legal framework will be defined and then an examination of its protection safeguards will follow.

4.1 The Legal Framework of Maritime JOs

The legal framework of JOs carried out beyond the territorial sea is still under discussion and deserves therefore closer attention. Ambiguity concerns the mandate of Frontex. As described above (chapter 2.3) JOs are framed by the Frontex Regulation as amended by the Rabbit Regulation. Article 1 of the Frontex Regulation states that the Agency is established “with a view to improving the integrated management of the external borders of the Member States of the European Union” (1). It is further clarified that it shall “facilitate and render more effective the application of existing and future Community measures relating to the management of external borders” (2). This clearly limits Frontex' scope of action to the implementation of Community measures.

⁵² See Weinzierl (2007: 75f.) for an examination of the rights granted under the Procedures Directive and Moreno Lax (2011: 212, 214) for an examination on the right to suspensive effect of the expulsion demand in the EU.

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Controversy arises because extraterritorial border control finds no explicit legal basis therein.

In 2006 the Council adopted the “Regulation establishing a Community Code on the rules governing the movement of persons across borders” (Schengen Borders Code [SBC]) which replaced the Schengen Convention provisions on external borders and other relevant documents on border control (Peers 2006: 145f.; recital 3 SBC). It serves therefore as the main legal basis for Frontex activities. The Frontex Regulation does not refer to the SBC, as it has been adopted only after the adoption of the Frontex Regulation. The SBC defines Frontex as the responsible actor for the management and coordination of operational cooperation and assistance between Member States in relation to border control (recital 13 SBC). Equally the subsequent Rabbit Regulation (recital 16 SBC) and the Commission proposal on the amendment to the Frontex Regulation (Art. 1(1)) clarify that all activities are subject to the SBC. The Frontex Regulation states also that the Agency shall improve the integrated border management. This is a concept that only has been formally defined by the JHA Council in 2006⁵³ (Baldaccini 2010: 233). Accordingly it consists of three specific components: a common corpus of legislation (with a special reference to the SBC), operational cooperation between the Member States and under the Agency and solidarity (External Borders Fund). Furthermore IBM consists of several dimensions, border checks and surveillance being one of them⁵⁴. The Lisbon Treaty has defined the establishment of IBM as a policy aim (Art. 77 (1) (c) TFEU), providing it with a legal basis in primary law. However Community measures have not been concluded in this regard. Therefore the SBC remains the primary legal instrument on common border control.

Yet, some authors argue that extraterritorial controls fall outside the scope of the Borders Code and are therefore subject to the law of the sea and relate exclusively to the

⁵³ Conclusion of JHA Council meeting of 4-5 December 2006, see Press Release 15801/06 (Press 341): 26.

⁵⁴ The others are the detection and investigation of cross border crime, the four-tier access control model, which defines several areas of control (in third countries, including the cooperation with third countries, at the EU external border and within the free movement area), inter-agency cooperation for border management and international cooperation and the coordination and coherence of the activities of Member States and institutions and bodies at the EU level (see note 53).

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jurisdiction and national legislation of the flag state of each vessel (Baldaccini 2010: 245⁵⁵). According to this view, maritime pre-border control would also exceed the mandate of Frontex. The argumentation draws on the definition of border control in geographical terms in the Borders Code (Moreno Lax 2011: 210). Border control, comprising border checks and surveillance, is defined as an activity that takes place at a border (Art. 2 (9) SBC) and external borders are clearly related to territory (Art. 2 (2) SBC). Furthermore, Article 3 limits the application of the SBC to persons that cross the internal or external borders of Member States (den Heijer 2010: 178). It may follow from these definitions that the SBC cannot provide a legal basis for extraterritorial border control.

On the other side, there are also authors advocating the extraterritorial scope of the SBC. First it is referred to “the existence of forms of pre-border control” (den Heijer: 178f.) in the Code itself. Annex VI of the Code establishes “specific rules for the various types of borders and the various means of transport”. For maritime borders the general checking procedures on maritime traffic (para. 3.1 SBC) allow for checks carried out in the territory of third states. It determines that “in accordance with the agreements reached on the matter, checks may also be carried out during crossings or upon the ship's arrival or departure, in the territory of a third country”. This specific rule is in line with the practice of the individual Member States and reflects also the focus on cooperation with third states in the EU policy on migration control. Furthermore, it is argued that one should refrain from a “too narrow geographical understanding” of border controls in order to take account of the “functional description of the core concepts relating to border controls” (den Heijer: 179) that is provided by the Code. Den Heijer refers to Article 2 SBC, from which the following functional descriptions can be inferred: border checks serve to ensure that only authorised persons enter the territory (or leave it) (Art. 2 (10) SBC) and border surveillance shall “prevent persons from circumventing border checks” (Art.2 (11) SBC). According to this functional understanding, pre-border controls, having the same intention, would fall under the

⁵⁵ Baldaccini refers to the House of Lords European Union Committee, 9th Report of Session 2007-2008, FRONTEX: the EU external border agency: para. 142; den Heijer (p. 177, note 35) refers to J. Rijpma and M. Cremona.

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scope of the SBC. Finally the CJEU has endorsed that Community law may apply to extraterritorial activities (Baldaccini 2010: 245) and notably the Commission has concluded drawing on a functional understanding that surveillance operations regardless of their operational area fall under the scope of the SBC (Moreno Lax 2011: 210).

In April 2010 the Council adopted the Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the management of operational cooperation at the external borders of the Member States of the EU (Council Decision)⁵⁶. The purpose of the Council Decision was to respond to the perceived lack of clear guiding rules for maritime operations coordinated by Frontex (recital 2 Council Decision). Though it does not explicitly extend the definition of border control to encompass also pre-border control, it clearly defines interception as a surveillance measure that takes place beyond the territorial sea (para. 2.2 of Annex, Part I, *ibid.*). Hence it provides a clear legal basis for maritime interception beyond the territorial sea. It is therefore concluded that the SBC in connection with the Council Decision applies to extraterritorial border control and that consequently the protection safeguards guaranteed therein must apply also to JOs on the high sea or in the territorial sea of a third state. Whether they are sufficient in order to guarantee protection from refoulement shall be examined now.

⁵⁶ The European Parliament is challenging the Council Decision before the CJEU, because it holds that the Council has exceeded the implementing powers set out in Article 12 (5) SBC by introducing rules on 'interception', 'search and rescue' and 'disembarkation' which exceed the scope of 'surveillance' as defined by Article 12 of the SBC. The modification of such essential elements would have required an adoption through legislative procedure. However, the effect of the contested Council Decision is, upon request of the European Parliament, maintained until it has been replaced (ECRE 2010: 17; [2010] OJ C 246/34; see: Case C-355/10 European Parliament v. Council of European Union).

4.2 Protection Safeguards within the Legal Framework

4.2.1 General Protection Safeguards in the SBC

The Procedures Directive does not apply to applications made beyond the territory of the Member States (except for the contiguous zone⁵⁷). In this regard it is very important to grant access to the territory of a Member State because otherwise the person cannot enjoy the procedural rights under the Directive. In the following it will be examined whether the SBC and the Council Decision have filled the legal loophole that has arisen through the shift of border control.

The SBC mainly provides for general references to the respect of international protection obligations. In the preamble the Regulation commits itself to respect fundamental rights and to observe in particular the principles recognised by the CFREU. The paragraph also stresses that the Regulation must “be applied in accordance with the Member States' obligations as regards international protection and non-refoulement” (recital 20 SBC). However, in the Regulation itself there are no provisions explicitly stating a right of the person seeking international protection or establishing an obligation on the part of the Member States or the border guard respectively (Weinzierl 2007: 57). Still, Article 5 (4) enables states to derogate from normal entry requirements on account of humanitarian considerations and international obligations (ECRE 2010: 16). Furthermore, the Regulation provides for exemptions from border control for persons seeking international protection. Article 3 (b) SBC states that the Regulation applies to all persons without prejudice to persons seeking international protection and the principle of non-refoulement. Similarly Article 13 (1) maintains that refusal of entry shall not happen in disregard of the right of asylum. To sum up, there is a body of guarantees respecting the international protection obligations of the states and the EU. However, these guarantees have only little impact on the ground, as they remain too general in their wording.

The Council Decision sets out clearer obligations in this regard. It lays down guidelines and rules that govern the surveillance operations of the sea external borders in situations

⁵⁷ Weinzierl 2007: 16, see also SEC (2007) 691.

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where border guards encounter persons claiming international protection. It is provided for in Annex, Part I, para 1.2 that no person shall be handed over to the authorities of a country in contravention of the principle of non-refoulement, including indirect refoulement. Therefore intercepted or rescued persons “shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement”. Part II, para. 2.2 prescribes further “[T]hat the coordination centre should be informed of the presence of persons within the meaning of paragraph 1.2 of Part I”. It shall then inform the competent authorities of the host Member State which shall decide on follow-up measures in accordance with the operational plan. However, whereas Part I establishes “[R]ules for sea border operations [...]” with a legal effect, Part II provides for “[G]uidelines for search and rescue situations and for disembarkation [...]” that produce no legal effect (Moreno Lax 2011: 217). Finally these provisions do not guarantee a legal procedure to the intercepted person who claims asylum as it would be granted under the Procedures Directive (ibid.: 217f.; Keller, Lochbihler & Lunacek 2011: 25). They do not explicitly guarantee access to a Member State's territory but refer to the operational plan, which shall include the rules and the guidelines provided for in the Annex (Art. 1 Council Decision). This is striking because the Council Decision only prescribes that the operational plan shall spell out the modalities on disembarkation with no further reference to persons in need of international protection (Part II, 2.1.). Disembarkation shall follow international law and shall take into account any applicable bilateral agreements. In principle disembarkation shall take place in the third country from where the intercepted boat left or whose territorial waters or search and rescue region the boat has transited. If this is not possible the host Member State shall be responsible for disembarkation (ibid.). While the Council Decision pinpoints the rules governing maritime JOs under the international law of the sea (UNCLOS), it only clarifies to a limited degree the obligations stemming from the principle of non-refoulement.

4.2.2 Specific Protection Safeguards in the Frontex Regulations

Next to the Community measures it is also necessary to examine to what degree the Frontex Regulations themselves define rules with regard to international protection obligations during JOs. In particular it is relevant whether the Regulations lay down rules on the allocation of responsibilities among the Member States for the examination of an asylum claim or the disembarkation of persons seeking international protection. According to the Frontex reports priority is always given to the disembarkation of rescued persons in the closest safe port (as also stipulated by international and humanitarian law of the sea) and if this is not possible persons are disembarked on the territory of the host Member State. As Frontex gathers no information on international protection seekers, it can neither be said how border guards deal with them nor how the responsible state is defined. It should be mentioned that according to the Regulations, Frontex holds a coordination function between the host and other participating Member States and that the Member States remain responsible for the control and surveillance of the external borders (Art. 1 (2) Frontex Regulation). Also in the proposal for a recast of the Frontex Regulation this distribution of responsibilities is maintained. This is particularly reflected in the general allocation of responsibilities to the host Member States. It is also the host Member State's national law which is applicable to the JO (Art. 10 Frontex Regulation⁵⁸). The same line has been adopted by the Council Decision to the Borders Code, which states that priority should be given to disembarkation in the host Member State, if disembarkation is not possible in a third country (Annex, Part II, para. 2.1).

The Frontex Regulation (recital 22) does not define explicit rules on human or refugee rights and declares merely in the preamble its commitment to respect fundamental rights and the principles as recognised by Article 6 (2) TFEU and the CFREU. The Rabbit Regulation (recital 17) refers explicitly to Member States' obligations as regards international protection and non-refoulement. Furthermore the Regulation states that it shall contribute to the correct application of the SBC, consequently all protection obligations of the SBC are effective for measures under the Regulation. This is

⁵⁸ The Rabbit Regulation refers also to the Community law as the applicable law during the exercise of tasks and powers laid down in Article 6 (1) (Art. 9 (1)).

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confirmed once more by Article 10 (1) Frontex Regulation as amended by the Rabbit Regulation regarding the refusal of entry which must be decided on in accordance with Article 13 SBC. Although Frontex states that the respect of human rights are at the core of its operations⁵⁹, there is a clear lack of protection provisions in the Regulations. Fischer-Lescano et al. (2009: 292) criticise that a general reference to the respect of the founding values of the EU cannot come up to binding law as long as human rights and the obligations ensuing from it are not defined.

The gap in clear rules in this regard might be filled by the operational plan that is drawn prior to a JO. However, as concluded above on the Council Decision, also the Regulations do not prescribe explicitly that the plan must contain any agreement on the measures to be taken when persons in need of international protection are intercepted, on the responsible state for disembarkation and for the examination of the asylum claim (Art. 8e Frontex Regulation as amended by the Rabbit Regulation). In any case, operational guidelines remain non-binding, as they are not legislative acts (Baldaccini 2010: 250). Furthermore the plans are not accessible for the public (Moreno Lax 2011: 184) which makes it hardly possible to verify whether they take account of international protection.

4.3 Prospects with Regard to Legal and Political Development

The Frontex Regulations, the SBC and the Council Decision declare the commitment to international protection obligations. Nevertheless the provisions cannot be regarded to be sufficiently detailed in order to ensure compliance. Compliance necessitates a comprehensive improvement with regard to the operational plan, monitoring and evaluation of JOs, judicial and political mechanisms of control and more transparency on JOs. Furthermore training of border guards on human rights and international protection is regarded to be essential. This must be endorsed by law, most importantly in the Frontex Regulation. In this regard several developments in the political and legal context can be observed: the current recast of the Frontex Regulation, the adoption of

⁵⁹ Frontex News Release “Management Board Endorses Frontex Fundamental Rights Strategy”. Retrieved August 10, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art105.html.

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the “Frontex Fundamental Rights Strategy”⁶⁰ (hereinafter: FR Strategy) by the Agency and finally, the adoption of the Lisbon Treaty. In the following it shall be examined to what degree these developments may converge and lead on the one hand to a strengthening of the legal position of intercepted persons, in particular persons in need of international protection and on the other hand to a better monitoring of Frontex-led maritime JOs..

The Commission has adopted a proposal for a regulation amending the Frontex Regulation. The proposal is currently under discussion and agreement shall be reached within the year 2011. The NGOs ECRE and Amnesty International (AI), have delivered an opinion on the Commission proposal. Therein they ask the EU legislator to lay down a clear definition of obligations under international human rights and refugee law and to set up an independent monitoring system with a clear fundamental rights focus. In their regard the current proposal does not come up to these requirements. They criticise that independent monitoring and evaluation is not possible, if Frontex itself or the Member States hold the monitoring function (ECRE 2010: 15). Furthermore they demand that the regulation should prescribe that operational plans contain clear guidelines on how to react when persons in need of international protection are encountered (ibd.: 14). They must guarantee that those persons can explain their situation and if necessary are given access to an asylum procedure. This also presupposes that a qualified personnel is available during JOs and that an adequate place of disembarkation is determined in the operational plan (ibd.: 18).

The Fundamental Rights Strategy adopted in March 2011 by the Management Board⁶¹, fills the gaps in the current proposal in some respects. It constitutes an engagement to fully integrate fundamental rights at each level of Frontex activities including risk analysis, training, enforcement, and evaluation (para. 1). As regards the enforcement of JOs, on the one hand the operational plan is required to provide guidance on how to address identified fundamental rights challenges (para. 15). On the other hand, “persons with a qualified fundamental rights expertise” shall be deployed in JOs that are

⁶⁰ Frontex Fundamental Rights Strategy. Retrieved August 22, 2011, from http://www.frontex.europa.eu/newsroom/news_releases/art105.html

⁶¹ See note 59.

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beforehand defined by risk analysis as particularly challenging with regard to fundamental rights. Furthermore, a JO shall be terminated once compliance with fundamental rights could not be ensured any more (ibid.) and all participating parties shall take measures, which are, however, not further defined, in case of a breach of protected rights (ibid.). While monitoring is regarded as essential, it shall be carried out by the participating officers and Frontex staff members. It is, however, also pointed out that external stakeholders shall be involved in monitoring (para. 17). This would much increase the validity and quality of monitoring. Furthermore it is envisaged that violations of fundamental rights obligations are followed up (para. 19). A clear statement is made on cooperation with external actors, such as UNHCR, IOM and the EU Agencies, the Fundamental Rights Agency (FRA) and the European Asylum Support Office (EASO) in the different areas of Frontex activities⁶². The involvement of external actors should also serve to reduce the degree of secrecy that characterises the work of Frontex.

It remains to be seen what impact the FR Strategy will have on the protection of persons in need of international protection on the ground. The Strategy shall be turned into an action plan and shall be integrated into the 2012 Programme of Work⁶³. The FR Strategy is regarded as a further step in the process of integrating fundamental rights in Frontex activities and its effective implementation is regarded to be crucial for the “credibility and reputation of Frontex and the entire EU border-guard community” (para. 33). This Strategy, which was conceived in consultation with Member States and external partners, definitely constitutes a big step forward, it remains however, non-binding. At the same time the Agency has stressed until now that information on asylum seekers during operations are not gathered. This is a statement quite contradictory to the Agency's stated continuous commitment to international protection obligations and a practice that has to change if proper monitoring and evaluation shall take place. Frontex pronounces that policy makers have a crucial function in promoting this Strategy (para.

⁶² The strategy refers to the involvement in operational activities (FR Strategy: para. 21), formulation of guidelines related to the observance of fundamental rights in the operational plan (ibid.: para. 22), the conceiving of training standards (26) and as mentioned above in monitoring (ibid.: para. 17).

⁶³ See note 59.

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34) and therefore it would be advisable to take into account its objectives in the process of the recast of the Frontex Regulation.

The Frontex specific developments are backed up by the greater degree of scrutiny on the work of the Agency introduced by the Lisbon Treaty. On the one hand, the CJEU's competence has been extended to comprise also jurisdiction over acts of agencies (Art. 263, 265, 267 TFEU). The CJEU can hence review acts of the Agency on compliance with fundamental rights as they ensue from Union law. On the other hand, as mentioned above, the Treaty provides for the accession of the EU to the ECHR. Upon accession the Agency would have to consider in its actions not only the case law of the CJEU but also that of the ECtHR. In view of the pending case on the legality of Italian-Libyan push-back operations before the Grand Chamber of the ECtHR, an accession is assumed to have far-reaching impact on the scope of legal action of the Agency.

5 Conclusion

The UNHCR has stated that the existing refugee law and human rights instruments in conjunction with the Palermo Protocol would provide a “useful framework for the adoption of practical safeguards by States” (ExCom 2000: 8) for undertaking interception. The thesis aimed at analysing whether joint maritime operations coordinated by Frontex are in accordance with these instruments, in particular with the principle of non-refoulement. The examination of major Frontex-led maritime operations revealed that due to a high lack of transparency sufficient information on those operations is not available. Drawing on other sources such as NGOs and scholars allows to assume that during Frontex-led operations the principle of non-refoulement is not duly observed. In the analytical part the scope of protection of the principle of non-refoulement was examined and the obligations arising from it for maritime JOs defined. Then it was analysed whether the safeguards provided in the legal framework of maritime JOs could guarantee abidance by these obligations. Truly, the principle of non-refoulement comes with clear protection obligations. Most notably, that no one claiming for international protection can be diverted or conducted to the port of embarkation, unless the safety of the place can be guaranteed. This implies that their claim must be

examined and access to EU territory must be granted. Nevertheless, it must be concluded that the legal framework of maritime JOs does not guarantee the necessary protection that must be afforded to protection seekers that are encountered during maritime interception operations. Frontex-led operations are guided by both the Frontex Regulations and the Community measures on border control. While both the SBC and the Council Decision as well as the Frontex Regulations commit themselves to the respect of fundamental rights and the principle of non-refoulement respectively, currently protection safeguards provided are so far not translated into operational details. A problem arises also from the lack of clear allocation of responsibilities among the participating Member States on protection during JOs. Moreno Lax (2011) argues that states must refrain from the fragmentary interpretation of their maritime obligations. From a human and refugee rights perspective it is therefore necessary that the EU legislator spells out clear protection obligations and that moreover the allocation of responsibility for embarkation and examination is regulated.

While the recent political and legal developments might bring about a realignment of surveillance operations towards the very basic protection rights, it is necessary on the one hand to pursue also the other dimensions of the comprehensive approach to migration, namely the provision of legal migration channels and the tackling of root causes in cooperation with the relevant third countries. On the other hand it will also be of importance to make solidarity tangible during border control. Solidarity is an aim promoted by the IBM as well as by the Common European Asylum System. It will be necessary to introduce burden sharing as regards the examination of the protection claims, as Member States will be more willing to adhere to protection obligations knowing that not all burden will lastly weigh on them. In this regard it is interesting to observe how the cooperation between Frontex and the EASO will develop.

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