



Refugee Protection or Irregular Migration Management?

Examining the international legal
principle of non-refoulement in
FRONTEX operations in the
Mediterranean

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Abstract

The titling question “refugee protection or irregular migration management?” attempts to point out the risk for fundamental refugee protection, as migration management might hinder the access to EU territory for people who are indeed in need of international protection. The non-refoulement principle is the core international legal obligation in refugee protection, ensuring that migrants are not sent back to places where their lives or freedoms could be threatened. EU legislation is explicitly linked to the international understanding of refugee protection and the related concepts “refugee” and “non-refoulement”. FRONTEX, the EU agency coordinating operational cooperation between member states in the field of external border management, is often criticized for violating the non-refoulement obligations. Therefore it remains interesting to seek understanding the extent to what the activities coordinated by FRONTEX respect the non-refoulement principle. On basis of information about a FRONTEX-led mission to Libya in 2007, the subsequent joint operation NAUTILUS II, and FRONTEX activities between the Canary Islands and Mauritania the existence of a lack of transparency in the set-up and the working of the agency FRONTEX is established. Moreover the mandate of FRONTEX to conclude bilateral agreements with third countries is evaluated critically; it is concluded that cooperation agreements comprise a shift of the direct border lines of the EU to a broader geographical understanding which allows avoiding the principle of non-refoulement. Nevertheless it is aimed to emphasize the clarity of existing legal obligations in this context as it was ruled by the EctHR in the case *Hirsi Jamaa and others v Italy*. It is argued that the applicability of the principle of non-refoulement is less dependent on the territorial aspect but much more on the member states effective power to act in FRONTEX operations. Thereby the states also possess a jurisdictional responsibility, and are obliged to ensure the unconditioned respect of the non-refoulement principle.

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List of abbreviations

AFSJ	Area of Freedom Security and Justice
CAT	Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRONTEX	Frontière Exterieur
ICCPR	International Covenant on Civil and Political Rights
IBM	Integrated Border Management
NGO	Non-Governmental Organization
SBC	Schengen Border Code
TEC	Treaty establishing the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

The topic of border management in the EU touches upon two sensitive competences of the member states; namely the sovereign control of entrance to territories and the ensuring of human rights. Garlick and Kumin notice that “[...] the attention being paid to migration by the European institutions and the member states presents both risks and opportunities for refugee protection. On the one hand, it provides new opportunities to bring international protection issues to the fore [...]. On the other hand, the high level of attention being devoted to migration control makes it increasingly difficult to maintain a focus on core values of international protection [...]”¹. In this context this study is devoted to the EU agency FRONTEX and more specifically the respecting of the non-refoulement principle within the agency regarding refugee protection.

With the entrance of the Lisbon Treaty 2009 and the involved abolishment of the pillar structure the Area of Freedom Security and Justice (AFSJ) of the European Union was extensively restructured in its institutional functioning. A shift from a rather intergovernmental to a more supranational approach was created by relocating all topics of the AFSJ under the general Treaty structure. The establishment of the regulatory agency FRONTEX (EU external border control agency) is one result. This EU regulatory agency constitutes a response to irregular migration issues and has therefore direct effect on fundamental rights of individuals. Regarding fundamental rights a number of international as well as European laws entail binding responsibilities on EU action. A study carried out by the Directorate General for internal policies investigates that the operational activities by FRONTEX pose a great risk to individual rights². Regarding the existence of a field of tension the main scope of this study is to provide a legal analysis of FRONTEX’s operations countering irregular migration in the Mediterranean, and more precisely, the relation of these operations with the duty to respect the principle of non-refoulement. As it is reflected in the academic literature as well as in the media, the topic of irregular migration and its relation to asylum seekers and the principle of non-refoulement is sensitive in many regards. Therefore, this study will tackle these issues in relation to EU and international legal obligations and will seek to understand the extent to which FRONTEX’s activities are respectful of the non-refoulement principle.

FRONTEX, which was established in 2004 to assist and coordinate operational cooperation between member states in border control issues³, is a much contested agency of the EU; some NGOs and scholars persist on the mentioned issue that FRONTEX course of action violates fundamental rights. Because FRONTEX operations are carried in a multidimensional context of actions taken in the high seas, third country territories, and because they affect mostly third country nationals, the question about the division of responsibilities and legal certainty is always central. The EU is legally bound to several treaties and conventions concerning refugee rights and obligations of state action at sea

¹ Garlick, M. & Kumin, J. (2008). Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control. In B. Martenczuk & S. Van Thiel (Eds.), *Justice, Liberty, Security: New Challenges for EU External Relations*. (pp 111-144). Brussels: Brussels University Press, p. 112.

² Directorate General for internal policies (2011). *Study on implementation of the EC Charter of Fundamental Rights and impact on EU Home Affairs Agencies (FRONTEX, EUROPOL, Asylum Support Office)*. European Parliament Directorate General for internal policies.

³ Council of the European Union. *Council Regulation on establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*. Brussels: European Union. OJ (L 349), 26.10.2004, No 2007/2004.

with regard to the principle of non-refoulement⁴, however it remains interesting to analyse the extent to which those obligations are actually respected.

This study aims at examining the selected principle of non-refoulement obligations and its influence on FRONTEX activities in the Mediterranean. After the elaboration on some relevant academic articles, reports and studies, the aim of this study is to investigate *to what extent the activities coordinated by FRONTEX respect the non-refoulement principle*. Accordingly, the first part of the study provides a brief insight in existing knowledge of the topic. The second part will introduce the concepts of refugee and non-refoulement in more detail. The third part places the principle of non-refoulement in the context of the European Union by looking at the process of Europeanization of EU border management and more particularly the agency FRONTEX. The fourth part investigates the impact of the non-refoulement principle in more detail by investigating FRONTEX-Libyan cooperation and the joint operation NAUTILUS II. The fifth part is an assessment whether the principle and its obligation are sufficiently respected and prepares for the sixth concluding part which aims at answering the question to what extent the activities coordinated by FRONTEX respect the non-refoulement principle.

1.1 Existing body of knowledge

The existing body of knowledge about the topic confirms the need for further clarification with regard to legal issues. Relevant to mention in this context is the study by Weinzierl and Lisson “Border Management and Human Rights – a study of EU law and law of the sea”⁵. The study aims at contributing to clarify the obligations for border management arising from human rights and maritime law. The two authors carry out an empirical study and discover two main problems: first of all they recognize that the health and life of many migrants trying to cross the Mediterranean is at risk. Second of all, they emphasize the problem of interceptions and expulsions at sea due to FRONTEX guards. On basis of their study as well as on legal sources they argue that generally international agreements do not lose their validity in international and third state territory.

Furthermore the research paper by Jeandesboz “Reinforcing the Surveillance of EU Borders – the future development of FRONTEX and EUROSUR”⁶ is concerned about the legal basis for FRONTEX operations. Jeandesboz argues that the evaluation by the EU agency FRONTEX is solely technically and does not include the dimension of fundamental right issues. The author criticises that the issue of fundamental rights in the undertakings carried out by FRONTEX is not emphasized enough in its assessment. Implicitly Jeandesboz claims for a balanced evaluation, quantitative and qualitative including the issue of fundamental rights.

After studying academic journal articles concerned with legal issues arising from maritime operations carried out by FRONTEX the following articles appear to be most relevant with regard to the principle of non-refoulement in respect of EU action in form of operations in the Mediterranean. The first one “Fortress Europe and FRONTEX: Within or Without

⁴ Geneva Convention Relating to the Status of Refugee Art. 33; Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment Art. 3; International Covenant on Civil and Political Rights Art. 6 and 7; European Convention on Human Rights; Charter of Fundamental Rights of European Union, Art.19.

⁵ Lisson, U. & Weinzierl, R. (2007). *Border Management and Human Rights – a Study of EU law and law of the sea*. Berlin: Deutsches Institut für Menschenrechte/German Institute for Human Rights.

⁶ Jeandesboz, J. (2008). *Reinforcing the Surveillance of EU Borders. The Future Development of FRONTEX and EUROSUR*.

International Law?” by Papastavridis⁷ is concerned about the variety of legal issues arising in the context of FRONTEX operations at high seas, especially the problem of interception of human beings and hence the possible violation of the principle of non-refoulement. The author analyzes the maritime operations of FRONTEX through the lens of law of the sea and other international principles. Papastavridis describes the agency FRONTEX in legal terms, mentioning the legal basis of the EU Treaties. He concludes that a lack of conformity exists and refers to article 1 of the European Convention of Human Rights: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”.

The second article “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea” by Moreno-Lax is also concerned about the application of EU law principles and international obligations in FRONTEX operations. She uses the principle of systemic interpretation to clarify the main obligations in international and European law applying to operations at sea⁸. The author argues that search and rescue obligations are interpreted inconsistently. She consequently emphasizes the need for clarification of the content of obligations for member states acting unitarily or under the cooperation of FRONTEX.

The third article “A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean” by Klepp is concerned about different actor practices in the Mediterranean. Klepp argues that the current policy practice about border management might cause in the long term a change in the legal basis and formal regulation of the EU refugee regime. Hence she argues that the principle of non-refoulement might be undermined or even abolished by the practice of FRONTEX operations⁹.

Finally it is worth mentioning the article by Den Heijer “Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights”¹⁰. Den Heijer investigates case law of the European Court of Human Rights with a focus on the application of the principle of non-refoulement. He challenges the assumption that only articles 2 and 3 bear the necessary relevance in cases of non-refoulement.

1.2 Problem statement

Taking into consideration the existing research and reports this study is an investigation of one particular principle, namely the principle of non-refoulement. While existing research investigated that a lack of clarity exists, this lack is noticed, but the focus is more specifically on the extent the principle influences the activities by FRONTEX in the context of irregular migration management in the Mediterranean. However, even though the review of existing knowledge establishes the impression that FRONTEX clearly violates fundamental rights, this study cannot take this impression for granted. Certainly a discussion about clarity exists, nevertheless in order to be critical this study does not presuppose that the principle of non-refoulement is violated. The added value of this study

⁷ Papastavridis, E. (2010). 'Fortress Europe' and FRONTEX: Within or Without International Law? *Nordic Journal of International Law*, 79(1), 75-111.

⁸ Moreno-Lax, V. (2011). Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2), 174-220.

⁹ Klepp, S. (2007). A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea. *European Journal of Migration and Law*, 12(1), 1-21.

¹⁰ Den Heijer, M. (2008). Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. *European Journal of Migration and Law*, 10 (2008), 277-314.

is a more specific investigation regarding the actual influence of the principle on FRONTEX strategies and activities in border control management.

2. Conceptualization and Framework

2.1 Refugee

Defining the notion ‘refugee’ in the context of irregular migration is crucial, since the principle of non-refoulement is about the protection of refugees. The 1951 Geneva Convention defines the status of refugees and is thereby a key legal document in addressing definitions for legal obligations and rights of states in this matter. A protocol added 1967 removed any restriction concerning geographical and temporal limitations of the Convention.

“A person who owing to a 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 his 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 his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹¹.

In the context of FRONTEX operations in the Mediterranean Sea, refugees are on the move and have not reached a destination yet. Therefore it is difficult to define their status as being officially refugee according to the international definition. Thereby it is helpful to take the ‘note on principle of non-refoulement’ established by the United Nations High Commissioner for Refugees (UNHCR) as a guiding document. The document provides further clarification to whom the principle applies.

*“In the case of persons who have been formally recognised as refugees under the 1951 Convention and/or the 1967 Protocol, the observance of the principle of non-refoulement should not normally give rise to any difficulty.
In this connection, particular regard should be had to the fact that a determination of refugee status is only of a declaratory nature. **The absence of formal recognition as a refugee does not preclude that the person concerned possesses refugee status and is therefore protected by the principle of non-refoulement.**
In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. **Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established**”¹².*

¹¹ Geneva Convention relating to the Status of Refugees (1951), Art. 1.

¹² UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, Retrieved 18.4.2012 from: <http://www.unhcr.org/refworld/docid/438c6d972.html>.

According to UNHCR, there are two instances: The first instance describes the case in which persons have been formally recognized as refugees; hence the principle of non-refoulement applies without any doubt. The second instance refers to the case in which persons may not have been formally recognized as refugees yet. Nevertheless the principle of non-refoulement still applies to those unidentified persons. As long as the country of origin has not been reliably determined, it must be assumed that the people of concern are refugees and are in need of international protection.

In the context of FRONTEX operations and the above mentioned difficulty of identifying people who are on the move this note has certain implications. It must be assumed in the first instance that the persons are refugees in order to provide protection stemming from the principle of non-refoulement. As it is mentioned “[...] without such a rule, the principle of non-refoulement would not provide effective protection for refugees [...]”. Even though the protocol added to the Convention in 1967 removing any restrictions concerning geographical and temporal limitations of the provisions (hence also on the principle of non-refoulement) Fischer-Lescano notices that “[...] governments occasionally argue that state border controls, particularly on the high seas, take place in a space where refugee and human rights law do not apply”¹³, hence refugees are not recognized as such and are unable to claim international legal protection. However, it was ruled in *Amuur v France* that international zones “must not deprive the asylum-seeker of the rights to gain effective access to the procedure for determining refugee status”¹⁴. Moreover, Hathaway as cited by Fischer-Lescano and Tohipidur emphasizes that the extra territorial applicability of the principle of non-refoulement is less dependent on the territorial aspect but much more on the jurisdictional responsibility¹⁵. Accordingly the area (own territory, international territory or third state territory) in which state is operating is less important, Klepp concludes on this issue that it is arbitrative that a state performs effective power to act, for instance through security agencies¹⁶. This conclusion would also apply to FRONTEX operations, since FRONTEX constitutes an official agency with the task to manage illegal migration flows towards the EU.

2.2 Non Refoulement

The non-refoulement principle protects refugees from being sent back to places (mostly the country of origin) where their lives or freedoms could be threatened. Thereby irregular migration movements across national frontiers raise the question of international legal protection of those who are in need of it. The international principle of non-refoulement is in this context indispensable, since it prohibits the simple expulsion or rejection of individuals by state authorities.

2.2.1 Definition

A very general description of the principle is given by the UNHCR:

“[...] this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from

¹³ Fischer-Lescano, A. Löhr, T. & Tohipidur, T. (2009). Border Controls at Sea: Requirements under International Human Rights and Refugee Law. *International Journal of Refugee Law*, 21(2), p.257.

¹⁴ ECHR, *Amuur v France*, Appl. No. 19776/92, 25 June 1996, p. 20.

¹⁵ Fischer-Lescano and Tohipidur, T. (2007). Europäische Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 67, p. 27.

¹⁶ Klepp, S. (2011). *Europa zwischen Grenzkontrolle und Flüchtlingsschutz. Eine Ethnographie der Seegrenze auf dem Mittelmeer*. Bielefeld: Transcript Verlag, p. 46.

*torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger*¹⁷.

A much more detailed examination of the scope and content of the principle is provided by Lauterpacht and Bethlehem¹⁸. The authors comment on the interpretation and application of the principle in general. Nevertheless, the scope of the principle is drawn more specifically. Lauterpacht and Bethlehem distinguish three elements of the principle. Firstly it applies to anybody having a well-founded fear to be subject to maltreatment in their home country, in this case states are not allowed to return the individual¹⁹. Secondly states must carry out an individual assessment of the claim and verify it²⁰. Thirdly the person claiming the need for international protection may not be sent back to an unsafe territory²¹. Moreover the individual may also not be sent back to a state which may subsequently expel the person to an unsafe territory. This was further fostered by the case *Adnan*²², in this case a Somali and an Algerian both seeking asylum in the UK, were not returned to France and Germany (the states of entry in the EU), because neither Germany nor France recognized the claim for asylum since both applicants were not threatened by their government but by private organizations. However, since the UK recognized the threat of persecution stemming from private organizations the return to Germany respectively France would have indirectly violated the principle of non-refoulement.

2.2.2 Legal sources

The principle of non-refoulement has several legal sources, always concerned about ensuring that states have an obligation not to simply return persons who might be in need of international legal protection. The appearance of the principle in different treaties links its applicability to different inhumane acts. Thereby international protection is granted accordingly. The general intent is to legally protect individuals from being exposed to different forms of persecution. In relation to EU law *qua* FRONTEX operations the clarification of the legal sources is necessary. It relates to the necessity to clarify the instances which are sufficient for a claim of international legal protection, hence the application of the principle of non-refoulement. In this context two conventions are relevant to mention: Firstly the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and secondly the International Covenant on Civil and Political Rights (ICCPR). However, as a first step it is appropriate to mention the principle of non-refoulement as it is originally enshrined in the Geneva Convention Relating to the Status of Refugees, article 33²³:

“PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

¹⁷UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

¹⁸ Lauterpacht, E. and Bethlehem, D. (2003). ‘The Scope and Content of the Principle of Non-Refoulement’ in E. Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection*. Cambridge: Cambridge University Press, 2003, 87-177.

¹⁹ *Id.*, p. 115

²⁰ *Id.*, p. 118

²¹ *Id.*, pp. 121

²² *Regina v Secretary of State for the Home Department, ex parte Adnan* [2001] 2 AC 477.

²³ Geneva Convention relating to the Status of Refugees (1951), Art. 33.

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 judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Certainly the principle constitutes a fundamental part in the Convention and therefore in the whole legal protection for people in need of international protection worldwide. This is also confirmed by Lauterpacht and Bethlehem who correctly emphasize: “[...] within the scheme of the 1951 Convention, the prohibition on refoulement in Article 33 holds a special place. This is evident in particular from Article 42(1)²⁴ of the Convention which precludes reservations inter alia to Article 33. The prohibition on refoulement in Article 33 is therefore a non-derogable obligation under the 1951 Convention. It embodies the humanitarian essence of the Convention”²⁵. The legal importance of the principle is further fostered by the fact of its incorporation in several other human right treaties. As mentioned, relevant for the link to EU law respectively FRONTEX operation is the consideration of the CAT article 3²⁶ and the ICCPR article 7²⁷. Furthermore the principle is enshrined in the Charter of Fundamental Rights of the European Union as well as in the European Convention on Human Rights (ECHR), and in EU asylum law. The Charter of Fundamental Rights of the European Union clearly states the prohibition of expulsion in article 19:

“Protection in the event of removal, expulsion or extradition 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”²⁸.

In the context of the ECHR the principle of non-refoulement can not expressly be found. However, the principle of non-refoulement can nonetheless be considered being expressed by articles 2 and 3 of the ECHR. Article 2 refers to the right of life and article 3 to the prohibition of torture²⁹. However, it is discussed whether only those two articles bear the reference to the principle of non-refoulement. Den Heijer even argues that the “belief that only articles 2 and 3 are relevant in the refoulement context has transformed into a self-fulfilling prophecy”³⁰. Furthermore he mentions it could be argued that “in principle all of the Convention rights can contain a prohibition of refoulement”³¹.

Hence the incorporation of the principle of non-refoulement in the ECHR is ambiguous. Therefore the relevance of this principle in the context of the ECHR emerges through the

²⁴ Art. 42(1) reads as follows: “At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”

²⁵ Lauterpacht, E. and Bethlehem, D. (2003), p. 107.

²⁶ Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, Art. 3.

Art. 3 reads as follows: “1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

²⁷ International Covenant on Civil and Political Rights, Art. 7.

Art. 7 read as follows: “No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

²⁸ Charter of Fundamental Rights of the European Union, Art. 19.

²⁹ European Convention on Human Rights, Art 2 and 3.

³⁰ Den Heijer, M. (2008), p. 278

³¹ Id., p. 279

case law of the Court more than from the text of the Convention. It is necessary to examine ECtHR case law in order to come to a more detailed conclusion about which human rights must be taken into account in the context of expulsion procedures. Den Heijer notices that only in the case *Bader v Sweden*³² the Court applied another article than article 3 in the context of expulsion³³. In *Bader v Sweden* the Court recognized that article 2 and 3 of the Convention would be violated in a case of return to Syria the country of origin of the complainant. In many other cases the complainants concerns were dismissed if they did not explicitly relate to article 2 or 3. For instance in *Mamatkulov v Turkey*³⁴ the complainant argued that he had no fair hearing before the criminal court since he was unable to be represented by a lawyer of own choice. The right on fair trial is enshrined in article 6 of the Convention; however, the Court dismissed the request in this case. Furthermore in *F. v United Kingdom*³⁵ the Court made an explicit distinction between article 2 and 3 and other provisions. The ruling stated: “[...] the Court observes that its case law has found responsibility attaching to contracting States in respect of expelling persons who are at risk of treatment contrary to articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice. Such compelling considerations do not automatically apply under the other provisions of the Convention [...]”³⁶. Accordingly the fundamental character of articles 2 and 3 allow for the application of the non-refoulement principle, and this is not automatically relevant for other provisions under the Convention. However, Den Heijer also notices that the “Court never explicitly exclude the possible role of other provisions than article 3 in the context of refoulement”³⁷. The importance of case law in this context becomes clear; nevertheless, it is also contested amongst scholars whether the distinction between articles 2 and 3 and other provisions due to the fundamental character is acceptable or whether all provisions contain a prohibition of refoulement.

Turning to EU asylum law, the principle is also incorporated in several directives. A more detailed list of the incorporation in EU asylum law is done in the third section of this paper under “Europeanization of the external border management”. Certainly the principle is enshrined in several legal sources; however, its application is not always straight forward. Its incorporation in EU legislation in the context of FRONTEX operations is subject of the investigation of this study.

2.2.2 Discussion

Since one of the aims of FRONTEX is to prevent illegal migration towards the EU in an operative manner³⁸ an interesting question is how the work of FRONTEX is in accordance with the principle of non-refoulement, which aims at protecting refugees no matter whether they are officially recognized as refugee or not (see above). Therefore Klepp considers the question how the work of FRONTEX is consistent with the principle of non-refoulement³⁹. She argues that there is no express reference to the principle for the operational level at sea with regard to non-refoulement. Whether this is in fact the case is

³² ECtHR, *Bader v Sweden*, Appl. No. 13284/04, 8.11.2005.

³³ *Id.*, p. 283.

³⁴ ECtHR, *Mamatkulov v Turkey*, Appl. No. 46827/99, 4.2.2005.

³⁵ ECtHR, *F. v United Kingdom*, Appl. No. 17341/03, 22.6.2004.

³⁶ *Id.*, p. 12.

³⁷ Den Heijer, M. (2008), pp. 283.

³⁸ Council of the European Union. *Council Regulation. Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*. Brussels: European Union. OJ (349), 26.10.2004, No 2007/2004/EC, Art. 2.

³⁹ Klepp, S. (2011), p. 67.

subject to this study, however, the same issue is also addressed by the EU Commission in its communication to the Council, which indicates that at least uncertainty indeed exists:

*“[...] another issue which merits attention is the extent of the States’ protection obligations flowing from the respect of the principle of non-refoulement, in the many different situations where State vessels implement interception or search or rescue measures. **More specifically it would be necessary to analyse the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim as a result of the application of international refugee law, in particular when engaged in joint operations or in operations taking place within the territorial waters of another State or in the high sea.** On issues that would not be subject to bilateral or regional agreements the development of practical guidelines could be a way forward in order to bring more clarity and a certain degree of predictability regarding the fulfilment by Member States of their obligations under international law”⁴⁰.*

Important to mention in this context is the fact that even though FRONTEX is the coordinating authority in joint operations, the member states remain in the relevant responsible position for obligations stemming from the principle of non-refoulement. In the Treaty on the Functioning of the European Union under Title V “Area of Freedom, Security and Justice” article 72 states: “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. Hence the responsibility also about border control and migration management remains with the member states and FRONTEX is indeed a coordinating agency. This is in accordance with Goodwin-Gill as cited by Moreno Lax states: “no state can avoid responsibility by outsourcing or contracting out its obligations, either to another state, or to an international organization”⁴¹. Moreover this is also confirmed, from an international law perspective, by the ruling of the ECtHR in the case *T.I. v UK*:

“[...] where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”⁴²

However, the fact that the responsibility of the obligations stemming from the principle of non-refoulement lies with the member states does not clarify the issue mentioned by the European Commission above (“[...]it would be necessary to analyse the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim [...]”). Hence, the matter of discussion lies with the definition of *circumstances*. Generally the term ‘circumstances’ is concerned about locations and persons of operations in which the principle of non-refoulement comes into play⁴³. The definition of those circumstances (locations and persons) is the main point of discussion in academic literature and has also become a political issue in the European Union. Moreover it is relevant to mention in this context that EU member states involved in FRONTEX

⁴⁰ European Commission. *Communication from the Commission to the Council. Reinforcing the management of Southern European Borders*. Brussels: European Union, 30.11.2006, COM (2006) 733 final.

⁴¹ Moreno-Lax, V. (2011), p. 201.

⁴² ECtHR, *T.I. v UK*, Appl. No. 43844/98, 7 March 2000, p. 15.

⁴³ Papastavridis, E. (2010), p. 81.

operations often establish bilateral agreements with third states respectively the cooperation in returning persons intercepted at sea.⁴⁴ Papastavridis sees those bilateral agreements as an opportunity to violate the principle: “[...] it is highly unlikely that European States concerned [about bilateral agreements], particularly in the context of FRONTEX operations, pay respect to this obligations [non-refoulement obligations] and do not return intercepted persons”⁴⁵. It becomes clear that the principle of non-refoulement appears in the field of tension between fundamental right claims and the interest of border control and public order.

2.3 Conclusion

It appears that the notion ‘refugee’ in the context of illegal migration in the Mediterranean can hardly be separated from the notion ‘refoulement’. The fact that non-refoulement aims to protect refugees requires a definition of the term refugee, nevertheless, the definition of refugee is closely connected to the issue of existing threats in the country of origin which is also connected to the principle of non-refoulement. The international understandings of ‘refugee’ and non-refoulement’ are clearly linked to EU law. Article 78(1) TFEU states:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with the view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28. July 1951 and the Protocol of 31. January 1967 relating to the status of refugees, and other relevant treaties”.

Certainly this links to the international perception of refugee protection, as it is stated that “appropriate protection shall be offered to any third-country national requiring international protection”. Furthermore it is referred to the principle of non-refoulement and to the Geneva Convention and the Protocol of 1967. Article 78 TFEU also includes under article 78(2) several claims for a common European asylum system. Therefore article 78(1) is relevant for the entire construction of the EU migration and asylum realm and hence FRONTEX operations.

3. The principle of non-refoulement in the European Union

3.1 Europeanization of external border management

As mentioned before the topic of border management on EU level touches upon sensitive competences of the member states. Garlick and Kumin notice that due to the fact that the 21st century is a time of human displacement triggered by various reasons, “[...] it is no surprise that that within the European Union, the management of migration has become a

⁴⁴ Spain and Senegal signed an agreement on 5.12.2006 on “cooperation in the field of prevention of migration by unaccompanied Senegalese minors, their protection and re-insertion”. Retrieved 12.06.2012 from http://www.congreso.es/public_oficiales/L8/CORT/BOCG/A/CG_A371.PDF,

Spain and Mauretania signed an agreement as it can be extracted from the BBC article 17.3.2006 Retrieved 12.6.2012 from <http://news.bbc.co.uk/2/hi/europe/4816312.stm>,

Italy and Libya signed several agreements, one of them was signed 2008 “Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist People’s Libyan Arab Jamhariyya”. For more information on Italy – Libya agreements see Fruehauf, U. (2011). *EU – Libya Agreements on Refugee and Asylum Seekers – The Need for a Reassessment*. Heinrich Böll Stiftung, p. 244.

⁴⁵ Papastavridis, E. (2010), p. 105.

more dominant political topic than asylum”⁴⁶. The authors evaluate also that migration management might have opportunities but also bears risks for refugee protection⁴⁷.

The Treaty of Amsterdam introduced the Area of Freedom Security and Justice aiming to “maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”⁴⁸. At the European Council meeting in Tampere 1999 the member states agreed on the aim to establish a common EU asylum and migration policy. One of the key areas as acknowledged by the Commission is “a common European asylum system based on the full and inclusive application of the Geneva Convention”⁴⁹. Following those events several binding measures were introduced regarding the further harmonization of standards in the EU. Those measures include the grant of temporary protection in the situation of mass influx⁵⁰, reception conditions for asylum seekers⁵¹, criteria for qualification for refugee status or other forms of protection⁵², and procedure for dealing with protection claims⁵³. According to Garlick and Kumin the adoption of those instruments marked the first step towards a Common European Asylum System⁵⁴ which was further developed in the Hague program on “Strengthening Freedom, Security and Justice in the European Union”⁵⁵ 2004. The Hague program constitutes a central part in the development of EU policy on border management, especially because the possibility of partnerships with third countries is extensively mentioned⁵⁶. The possibility to conclude agreements and establish partnerships with third countries is in particular relevant for the activities of FRONTEX, since it allows operating in third country territories and cooperation on return operations. Certainly the establishment of the Schengen Border Code (SBC)⁵⁷ 2006 marks another crucial point in the Europeanization of border management in the EU. The code was accepted in 2006 and assembled provisions from various instruments related to the governance of EU external borders. The scope of the SBC is provided by its article 3: “The regulation shall apply to any person crossing the internal or external border of Member States without prejudice to: the rights of persons enjoying the Community right of free movement [and] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement”⁵⁸. Furthermore it is referred to

⁴⁶ Garlick, M. & Kumin, J. (2008), p. 111.

⁴⁷ Id., p. 112.

⁴⁸ Treaty of Amsterdam, Art. 1

⁴⁹ European Commission. *Communication from the Commission to the Council and the European Parliament on an open method of coordination for the community immigration policy*. Brussels: European Union. 11.7.2001, COM (2001)387 final, p. 5.

⁵⁰ Council of the European Union. *Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof*. Brussels: European Union. OJ (L212), 7.8.2001, No 2001/55/EC.

⁵¹ Council of the European Union. *Council Directive laying down minimum standards for the reception of asylum seekers*. Brussels: European Union. OJ (L31), 6.2.2003, No. 2003/9/EC.

⁵² Council of the European Union. *Council Directive 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*. Brussels: European Union. OJ (L204), 30.9.2004, No 2004/83/EC.

⁵³ Council of the European Union. *Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status*. Brussels: European Union. OJ (L326), 13.12.2005, No 2005/85/EC.

⁵⁴ Garlick, M. & Kumin, J. (2008), p. 113.

⁵⁵ European Council. *The Hague programme: Strengthening Freedom, Security and Justice in the European Union*. Brussels: European Union. OJ (C53), 3.3.2005, No 2005/C53/01.

⁵⁶ Id., p. 5.

⁵⁷ Council of the European Union. *Council Regulation establishing a community code on the rules governing the movement of persons across borders*. Brussels: European Union. OJ (L105), 13.4.2006, No 562/2006.

⁵⁸ Id., Art 3

international obligations including the principle of non-refoulement in its article 5⁵⁹ and article 13⁶⁰ of the SBC.

With the adoption of the Treaty of Lisbon and the abolishing of the pillar structure the Area of Freedom Security and Justice was relocated under Title V in the Treaty of the Functioning of the European Union. The divisions of the competences of the member states and the EU are set out in several articles at the beginning of Title V. Article 72 TFEU states:

“This Title shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

Clearly, the member states remain in the responsible position. However, article 68 TFEU mentions: “The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice”. It appears that the EU has the power to formulate the norms and guiding principles while the member states are responsible for the implementation. The same is applicable for the FRONTEX agency. The regulation establishing FRONTEX⁶¹ refers to article 66 TEC⁶²: “The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission.” The Council provides the opportunity for cooperation between the member states relevant departments, however, finally the member states take the appropriate action. Furthermore as mentioned above article 78 TFEU concerns the common policy on asylum and forms of humanitarian protection. The article explicitly refers to the obligation for protection of third-country national who are in need of it, the guarantee of the non-refoulement principle and the duty to respect the Geneva Convention and the Protocol of 1967. Moreover the Lisbon Treaty provides three dimension of human rights protection under article 6 TEU. Article 6(1) TEU refers to the Charter of fundamental rights of the European Union and grants it the same legal value as the Treaties. Secondly article 6(2) mentions the accession of the ECHR to the EU. Thirdly article 6(3) mentions that those fundamental rights plus the constitutional traditions stemming from the member states shall constitute general principles of the EU’s law. Regarding the expressive and extensive reference to fundamental rights sources which obviously form a basic part of EU law, several related provisions must take those into consideration. This is also valid for the coordinating activities of the EU agency FRONTEX; even though the member states remain in the responsible acting positions, the guidelines set out in the Treaties are relevant and must be respected.

⁵⁹ Article 5 reads as follows: “[...] third-country nationals who do not fulfill one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations [...]”

⁶⁰ Article 13 reads as follows: “A third-country national who does not fulfill all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.”

⁶¹ Council of the European Union. *Council Regulation on establishing a European agency for the management of operational cooperation at the external borders of the member states of the European Union*. Brussels: European Union. OJ (L349), 26.10.2004, No 2007/2004.

⁶² Nowadays replaced by article 74 TFEU.

3.2 FRONTEX

Interestingly enough Klepp notices that the term “Integrated Border Management” (IBM)⁶³ was officially used for the first time by the Council of Ministers in 2006⁶⁴. Klepp defines this development as a “shift from border lines to border areas”⁶⁵. In this period the regulation establishing FRONTEX was developed⁶⁶. The establishment of the agency FRONTEX marks the institutionalization of EU border security management. FRONTEX was further fostered by the Council Decision supplementing the SBC with regard to surveillance at the sea external borders in the context of operational cooperation⁶⁷. As mentioned above, the legal basis for the establishment of FRONTEX is provided by article 66 TEC⁶⁸, nowadays replaced by article 74 TFEU. Interestingly however is the fact that there is no mention of the principle of non-refoulement in the initial regulation establishing FRONTEX. Nevertheless, even the principle is omitted it is obvious that it is nevertheless valid because of the existence of a number of primary law provisions of fundamental rights and hence also the principle of non-refoulement in EU law. Furthermore even though FRONTEX is the coordinating agency in operations, the member states remain in the responsible position; all EU member states signed the relevant treaties referring to the principle of non-refoulement. Hence the individual member states are fully accountable for ensuring the principle of non-refoulement, due to article 72 TFEU and their individual ratification of relevant international treaties referring to the principle of non-refoulement. Consequently in the situation a FRONTEX operation intercepts a boat of unidentified persons, the states acting have the responsibility to act in accordance with the EU treaties and international treaties.

Very recently several amendments on the FRONTEX regulation 2004/2007 have been made which entered into force in 2012⁶⁹. Most importantly the mandate concerning the cooperation of the agency with third countries has been fostered. Peer provides a regulation with all incorporated amendments⁷⁰. It appears that additionally to the power of FRONTEX to conclude cooperation agreements with third countries, the agency is now also empowered to install a liaison officer⁷¹ in partner third countries and engage in

⁶³ Integrated Border Management (IBM) is the term describing EU action in external border control. It is defined in the European Commission document 2009 “Training Manual on Integrated Border Management in EC external Cooperation” pp 9: “*IBM can be defined as “national and international coordination and cooperation among all the relevant authorities and agencies involved in border security and trade facilitation to establish effective, efficient and coordinated border management, in order to reach the objective of open, but well controlled and secure borders”.1 Borders should be open for trade, tourism and other forms of legitimate movement of persons and goods, but at the same time secure and controlled in relation to threats posed by illegal migration, trafficking in human beings, and other forms of trans-border crime.*”

⁶⁴ Klepp, S. (2011), p. 57.

⁶⁵ *Id.*, p. 58.

⁶⁶ Council of the European Union. *Council Regulation on establishing a European agency for the management of operational cooperation at the external borders of the member states of the European Union*. Brussels: European Union. OJ (L349), 26.10.2004, No 2007/2004.

⁶⁷ Council of the European Union. *Council Decision supplementing the Schengen Border Code with regard to surveillance at the sea in the context of operational cooperation*. Brussels: European Union. OJ (L111), 4.5.2010, No 2010/252/EU.

⁶⁸ Art. 66 TEC reads as follows: “The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission.”

⁶⁹ Regulation (EU) No 1168/2011 of 25 October 2011 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.

⁷⁰ Peer, S. (2012). *Statewatch Analysis – The FRONTEX regulation – Consolidated text after 2011 amendments*. Statewatch.

⁷¹ *Id.*, Art. 14 (3): “3. The Agency may deploy its liaison officers, which should enjoy the highest possible protection to carry out their duties, in third countries. They shall form part of the local or regional cooperation networks of Member States’ immigration liaison officers set up pursuant to Council Regulation No 377/2004.

technical cooperation with their competent authorities⁷². In the context of cooperation agreements with third countries, it is often argued in the literature that they provide an opportunity for violation of fundamental rights, including the principle of non-refoulement⁷³. Moreover 'Statewatch' mentions: "[...] Frontex does not limit its external relations to countries with which it has signed a working arrangement or those which have concluded bilateral agreements with certain EU member states. Cooperation follows the appetite of the Agency for the development of its own equipment. This, again, was largely facilitated in the new mandate which was negotiated over the past two years between the European Commission, the Council of the European Union and the European Parliament. The Agency has pointed out its lack of resources and the subsequent lack of autonomy which, it argued, was impeding its capacity to react to threats at the EU's external borders"⁷⁴. Certainly FRONTEX is an agency which heavily depends on the equipment necessary for operations. It is therefore argued that FRONTEX may use the opportunity to conclude working agreements with those countries which may offer the needed resources. Thereby concerns that FRONTEX may further challenge fundamental rights are strengthened.

In this context the importance of extraterritoriality becomes clear, since the establishment of bilateral agreements is necessary for FRONTEX activities outside the EU territory. FRONTEX has no mandate to operate beyond the external borders of the EU; this is provided by article 1(4) of the FRONTEX regulation⁷⁵. Consequently all operational activities coordinated by FRONTEX taking place beyond the borders of the EU are legally based on agreements with the third state respectively. Certainly fundamental rights must also be respected in those bilateral agreements. However, FRONTEX provides no official information on the content of the agreements; the same applies to agreements between member states and third countries in those matters⁷⁶. Thereby the legitimacy of the cooperation agreements is challenged. Known is that those agreements are about joint patrols in the coastal area of the third state, whereby FRONTEX provides the majority of the resources, and the third state grants the right for such operations in its territory. The ability of FRONTEX to establish such agreements surely enhances its legal possibilities to act in a broader geographical area. Even though the transparency of those agreements is undermined by the fact that the agreements are not available, it must be assumed that FRONTEX acts according to EU law, including the reference to fundamental rights.

Liaison officers shall only be deployed to third countries in which border management practices respect minimum human rights standards. Their deployment shall be approved by the Management Board. Within the framework of the European Union external relations policy, priority for deployment should be given to those third countries, which on the basis of risk analysis constitute a country of origin or transit regarding illegal migration. On a reciprocal basis the Agency may receive liaison officers posted by those third countries also, for a limited period of time. The Management Board shall adopt, on a proposal of the Executive Director, the list of priorities on a yearly basis in accordance with the provisions of Article 24.

⁷² Id., Art. 14.

⁷³ Papastavridis, E. (2010), p.105.

⁷⁴ Statewatch (2012). News. Retrieved 4.6.2012 from <http://www.statewatch.org/news/2012/mar/01frontex.htm>

⁷⁵ Art. 1(4) reads as follows: "For the purpose of this Regulation, references to the external borders of the member states shall mean the land and sea borders of the member states and their airports and seaports, to which the provisions of Community law on crossing of external borders by persons apply".

⁷⁶ Bilateral agreements between FRONTEX and third states or member states and third states are a necessary legal condition for FRONTEX operations beyond external borders of the EU. Papastavridis mentions that FRONTEX stated in a communication with him that "the pertinent operations are based on existing bilateral agreements of Spain with Mauritania and Senegal, without giving any further information" Papastavridis, E. (2010), p.88.

3.3 Conclusion

The principle of non-refoulement clearly has an impact on EU external border management since the Treaties impose the respect of the non-refoulement principle⁷⁷. Thus this existence of the legal obligation to respect the principle applies obviously to FRONTEX and all its activities. However, those legal obligations must also have a practical implication. On basis of the ‘note on the principle of non-refoulement’ established by the UNHCR it appears that the non-refoulement principle applies in all circumstances despite it has been reliably ascertained that no threats exists in the country of origin of the persons of concern (see above)⁷⁸. Thus it is a necessary condition to know at least the nationality of the persons of concern in order to conclude about the safety of their country of origin. Consequently it is necessary to identify the persons on a reliable method. If the nationality and identity of the persons is not clarified, no expulsion can be legally accomplished according to the applicability of the principle of non-refoulement. Moreover, operations must also guarantee that individuals intercepted can have the possibility to ask for international protection to the relevant authorities. As it is mentioned, by the UNHCR, “without such a rule, the principle of non-refoulement would not provide effective protection for refugees [...]”⁷⁹. Therefore the mere incorporation of the principle in EU law respectively the FRONTEX regulation is not enough, since the effective protection of refugees requires an active approach in the operations themselves. Therefore it is the aim of this study to investigate the extent to what the activities coordinated by FRONTEX respect the non-refoulement principle.

4. Impact of non-refoulement on FRONTEX operations

4.1 FRONTEX - Libya cooperation

From the 28th May until the 5th of June 2007 the EU agency FRONTEX undertook a technical mission to Libya on the issue of irregular migration. FRONTEX provides a detailed report on this mission in its report “FRONTEX-led EU illegal migration technical mission to Libya”⁸⁰. Under the chapter “Bilateral cooperation with FRONTEX” two main objectives for the mission were formulated: Firstly the aim was to encourage Libyan authorities to take part in the planned joint operation NAUTILUS in the Mediterranean⁸¹; secondly it was aimed to engage Libyan authorities towards operational and technical cooperation in a sustained way for the future⁸². Interestingly enough in this context is the fact that Libya is one of the few countries in the world which has not signed the Geneva Convention on the status of refugees. Hence no reference is made in the report on the mission, even though concrete matters concerning irregular migration management between FRONTEX and Libyan authorities are discussed⁸³. However, certainly FRONTEX has the mandate to conclude so called “working agreements” with third states and Libya appears to be a key country in terms of geographical matters, since many third country nationals from other African states use Libya as a transit country⁸⁴. However, not only the fact that Libya has not signed

⁷⁷ Art. 6 TEU and Art. 78 TFEU.

⁷⁸ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

⁷⁹ *Id.*

⁸⁰ FRONTEX. *FRONTEX-led EU illegal migration technical mission to Libya. 28 May – 5 June 2007.*

⁸¹ The joint operation NAUTILUS was planned for the summer 2007, thus a few month after the delegation undertook the mission to Libya.

⁸² *Id.*, p. 15.

⁸³ *Id.*, p. 17.

⁸⁴ This is also mentioned in the FRONTEX report on page 11: “Invariably, Libya is a clear destination and transit country for five main migration flows: the one originating in Sub-Saharan Western Africa (mainly Ghana, Burkina Faso, Nigeria, Mali via Niger-Algeria), a second one coming from the Horn of Africa region (Somalia,

the Geneva Convention on the Status of refugees, moreover Libya was in 2007 still a strongly authoritarian regime under the leadership of the dictator Muammar Gaddafi. Oppositions of the regime were not tolerated and human rights were not respected. Nevertheless in this context the FRONTEX delegation undertook its mission in Libya on illegal migration management. The report concludes with regard to the bilateral agreement efforts that “it is important for both sides to build on the operational contacts that have been made between Frontex and Libyan colleagues. The Agency will continue to argue that entering into a good functioning agreement on operational cooperation with Frontex serves Libya’s own interests in its goal to obtain valuable assistance from the EU to improve its border management and help combat successfully illegal immigration into its territory”⁸⁵.

Especially with regard to the precarious political situation in Libya this mission for technical cooperation on the issue of illegal migration was very sensitive. Due to the fact that the Libyan regime did not endure any political opposition, most people leaving the country might have had a valid claim in seeking international protection in Europe. This might have not only been true for Libyan nationals but also for nationals from other African countries with unstable political situations or other crisis circumstances, such as the Libyan neighbouring countries Tunisia, Sudan, Egypt, Chad, and Niger. FRONTEX regarded also the land borders of Libya as it is acknowledged that Libya is indeed a transit country for nationals from many other African countries. In the report recommendations for an improved border control for the southern borders of Libya are made. In this context the agency also offered help in providing equipment and operational plans⁸⁶. The strategy of FRONTEX in this matter seemed to combat illegal migration before it even appeared; borders of sub Saharan Africa are assessed in order to tackle migration flows to Libya and hence weaken Libya as a transit point from Africa to Europe. The principle of non-refoulement seemed to be strategically avoided, first of all since it is not mentioned in the report at all, secondly it might not be taken into consideration since as long as the potential refugees are still in Libyan territory the member states of the EU are not responsible for respecting the principle of non-refoulement. It remains interesting to see how cooperation with Libya will develop in the near future after the recent regime change. Even though no detailed information is available, FRONTEX at least mentions Libya as a potential country for cooperation next to others on its website⁸⁷.

4.2 Joint operation NAUTILUS II

According to FRONTEX the southern maritime border is considered as one of the most frequented routes for illegal migration; due to the fact that Libya is used as a transit

Eritrea, Ethiopia via Sudan), the west and east Northern Africa flows (mainly Morocco and Egypt, including air borders), a fourth one departing from the Middle East region (Syria, Palestine, Jordan via Egypt), and finally the migratory flow originating from the Indian Sub Continent (Bangladesh, Pakistan, India)”.

⁸⁵ Id., p. 18.

⁸⁶ Id., p. 17.

⁸⁷ “As of March 2012, Frontex had concluded working arrangements with the authorities of 16 countries: the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria and Armenia as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans. In addition, following mandates from its Management Board to enter into negotiations, the agency was in various stages of negotiations with the authorities of further nine countries: Turkey, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil, Tunisia and Azerbaijan. Based on a working arrangement, cooperation may be further structured so that both sides commit resources to specific planned activities over a given timeframe” Retrieved 13.6.2012 from <http://www.frontex.europa.eu/partners/third-countries>

country for migration flows coming from various countries in Africa⁸⁸. The operation NAUTILUS II took place in the period of 25th June until 14th October 2007 and formed a part of an operation which started in 2006 and ended in 2008. The member states involved were Germany, Greece, Italy, Malta, and Spain and they jointly contributed with equipment and personnel to carry out the mission. Italy played in this context a special role, since it maintained co operational activities with Libya since the late 1990s. Klepp investigates that in agreements between Italy and Libya migration control always played a central role⁸⁹. Unfortunately the bilateral agreements remain confidential and are not publicly available. However, due to the fact that in 2004 about 4000 third country nationals were returned from Lampedusa to Libya⁹⁰ it can be assumed that Italy and Libya included an agreement about returning migrants. However, Libya did not participate officially in the NAUTILUS II operation in 2007 and did also not allow entrance of FRONTEX patrols in its territorial waters.

The objective of the NAUTILUS operation was formulated as follows: “The joint operation aimed at combating illegal immigration coming from North Africa countries via the EU maritime borders in the Central Mediterranean area and disembarking in Malta and Lampedusa”⁹¹. In this context it remains uncertain, what is meant by “combating illegal migration”, since no more details are provided about procedures. However, it is mentioned that “during the operational period the total of 401 migrants were detected in the operational area in 13 incidents. A further 63 migrants were detected by the means deployed outside the operational area. Out of this total number 166 migrants were rescued. During the operational phase 316 migrants arrived to Malta. Frontex experts interviewed 26% of the migrants that arrived to Malta. The main nationalities of migrants that arrived to Malta were Eritrean, Somali, Ethiopian, and Nigeria”⁹². Klepp investigates further that during the operation of NAUTILUS II about 700 migrants were returned from Malta to Libya⁹³; again no further information can be retraced on this. However, it gives concern with regard to the compliance with the non-refoulement principle. Unfortunately FRONTEX does not provide data on people who managed to apply for international protection. For a more precise evaluation on numbers it would be necessary to look into information of the local authorities.

4.3 Hirsi Jamaa and others v Italy⁹⁴

Certainly bilateral agreements between EU member states and third countries are crucial in the context of FRONTEX operations; they build the legal basis for interceptions in third country territories and for return actions to third countries of origin. In the beginning of 2012 the ECtHR held a judgement on the case *Hirsi Jamaa and others v Italy* regarding the issue of returning intercepted people at sea to Libya. The facts of the case state the reasoning of Italy for this action: “[...] Italian Minister of the Interior said that the

⁸⁸ It is mentioned on the FRONTEX website: “The Central Mediterranean route from Libyan and Tunisian coasts towards the Italian islands of Lampedusa, Pantelleria, Sicily and Malta come under a great pressure of illegal migration both as final destination for migrants and as a transit point to other countries.” Retrieved 6.6.2012 from <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/66>

⁸⁹ Klepp, S. (2008). Negotiating the Principle of Non-Refoulement in the Mediterranean Sea: Missions, Visions and Policies at the Southern Borders of the European Union. *Working Paper Series. Universität Leipzig*, p. 6.

⁹⁰ Deutsche Welle (n. d.). Scharfe Kritik am Flüchtlingslager auf Lampedusa. Retrieved 6.6.2012 from http://www.dw.de/dw/article/0,,1718149_page_1,00.html

⁹¹ FRONTEX. Retrieved 6.6.2012 from <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/66>

⁹² FRONTEX. Retrieved 6.6.2012 from <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/66>

⁹³ Klepp, S. (2008), p. 15.

⁹⁴ ECtHR, *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09, 23 February 2012.

interception of the vessels on the high seas and the return of the migrants to Libya was in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009, marking an important turning point in the fight against illegal immigration [...]”⁹⁵. However, the Court ruled that this claim is not valid since the action of returning the intercepted people violated several provisions of the ECHR. Firstly the Court clearly decided that the applicants fell within the jurisdiction of Italy for the purposes of article 1 ECHR⁹⁶. Even though the incident did not happen during a FRONTEX operation, the Court fostered the responsibility of the member states regarding the obligation to ensure human rights to everyone. Secondly the Court recognized that there had been two violations of article 3 ECHR⁹⁷ because the applicants had been exposed to the risk of ill-treatment in Libya and of return to Somalia or Eritrea. Hence the principle of non-refoulement was violated. Furthermore it was ruled that there had been a violation of article 4 of Protocol no. 4⁹⁸, which also implies a prohibition of the principle of non-refoulement. Lastly the Court decided that there had been a violation of article 13 ECHR⁹⁹ taken in conjunction with article 3 ECHR.

Especially with regard to the non-refoulement principle the judgment of the Court was of great significance. Concerning the uncertainty about the circumstances in which the principle applies, the Court decided that it is also applicable in the high seas. Even though this was presumed by the UNHCR mentioning that “the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State”¹⁰⁰, it was contested whether the principle is indeed applicable in the high seas. Certainly the Court established a crucial ruling in terms of responsibility of states towards intercepted people enshrined in article 1 ECHR and the related discussion about applicability in the high seas.

4.4 Conclusion

Even though the aforementioned ruling of the *Hirsi Jamaa and others v Italy* case was not in the context of a FRONTEX operation, this case certainly has implications for the operations carried out by the member states under the cooperation by FRONTEX. As the FRONTEX-Libyan attempt for cooperation has shown, a certain degree of own dynamic in

⁹⁵ Press release of the Court states: “The applicants are 11 Somali and 13 Eritrean nationals. They were part of a group of about 200 people who left Libya in 2009 on board three boats bound for Italy. On 6 May 2009, when the boats were 35 miles south of Lampedusa (Agrigento), within the maritime search and rescue region under the responsibility of Malta, they were intercepted by Italian Customs and Coastguard vessels. The passengers were transferred to the Italian military vessels and taken to Tripoli. The applicants say that during the journey the Italian authorities did not tell them where they were being taken, or check their identity. Once in Tripoli, after a 10-hour voyage, they were handed over to the Libyan authorities. At a press conference on 7 May 2009 the Italian Minister of the Interior said that the interception of the vessels on the high seas and the return of the migrants to Libya was in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009, marking an important turning point in the fight against illegal immigration.”

⁹⁶ Art. 1 ECHR reads as follows: “Obligation to respect human rights The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

⁹⁷ Art. 3 ECHR reads as follows: “Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

⁹⁸ Art. 4 of Protocol 4 reads as follows: “Prohibition of collective expulsion of aliens. Collective expulsion of aliens is prohibited.”

⁹⁹ Art. 13 ECHR reads as follows: “Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

¹⁰⁰ UNHCR. Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, p. 12.

the development of agreements bears the risk that the principle of non-refoulement is avoided and omitted, as the principle was not mentioned in the report on the technical mission of FRONTEX in Libya in 2007. Thereby it becomes clear that to a certain extent the correct implementation of provisions depends on the involved actors and their specific interests. This is also mentioned by Messineo: “[...] The *Hirsi* case arose in the context of the 2007 bilateral anti-immigration cooperation agreement between Libya and Italy which was fully implemented in early 2009. When the policy of interception and rejection at sea was put into effect, it ostensibly achieved some of its stated aims. The Lampedusa ‘reception centre’ was suddenly nearly empty – a very different image compared to previous years (and subsequent events of 2011). In 2009 alone, more than 800 Somali, Eritrean and Nigerian citizens were returned to Libya before even touching Italian soil. They were returned to Tripoli without regard for the fact that, as unwanted migrants in Libya, many of them faced a real risk of torture, physical violence, rape, indefinite detention in overcrowded and unhygienic conditions, as well as further expulsion towards their countries of origins”¹⁰¹. Surely as FRONTEX is only the coordinating agency of member states, the interest of the involved member states are to the fore and fundamental rights might be overruled and omitted by the practice of the involved actors.

The impact of the non-refoulement principle remains in the aforementioned case of cooperation with Libya rather low. However, the mere cooperation with a third country does not violate the principle, since no active expulsion took place as it happened in the case of *Hirsi Jamaa and others*. Nevertheless as mentioned before the mandate of the agency FRONTEX seems to provide a possibility to avoid the principle as bilateral agreements might be used as sufficient reason for return activities (see the reasoning of Italy in the *Hirsi Jamaa and other v Italy* case).

5. Assessment

Similarly to Libya the West African state Mauritania has also developed into a favored transit country to Europe. The main destination point for migrants leaving from Mauritania is the Canary Islands located only a few hundred kilometers away from the Mauritanian coast. Therefore Spain has established several bilateral agreements with Mauritania (and Senegal) regarding migration control during the last years¹⁰². It is reported that Spain’s Security Secretary of State 2011, Antonio Camacho, stated that “Spain is committed to continue providing material resources to the Mauritanian security forces to further improve the tools at their disposal to deal with security threats and to strengthen their border control mechanisms”¹⁰³. Also FRONTEX got involved in this region with its joint operations HERA I-III in the period between summer 2006 and 2007, some interesting information on the operations is provided: “[...] during the course of this operation the total of 18.987 of illegal immigrants landed in the Canary Islands (as of 10 December). In 100% cases the country of origin of these migrants could be established. This fact

¹⁰¹ Messineo, F. (2012). *Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants’ boats at sea, says ECtHR*. Retrieved 7.6.2012 from <http://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/>

¹⁰² Spain and Mauretania signed an agreement as it can be extracted from the BBC article 17.3.2006 Retrieved 12.6.2012 from <http://news.bbc.co.uk/2/hi/europe/4816312.stm>,

Spain and Senegal signed an agreement on 5.12.2006 on “cooperation in the field of prevention of migration by unaccompanied Senegalese minors, their protection and re-insertion”. Retrieved 12.06.2012 from http://www.congreso.es/public_oficiales/L8/CORT/BOCG/A/CG_A371.PDF.

¹⁰³ Migrants At Sea Blog (2011, May 4). *Spains Security Secretary Visited Mauritania To Strengthen Bilateral Immigration Cooperation*.

Retrieved 18.6.2012 from <http://migrantsatsea.wordpress.com/2011/05/04/spain%E2%80%99s-security-secretary-visited-mauritania-to-strengthen-bilateral-immigration-cooperation/>

contributed to the number of returns of illegal migrants carried out by Spanish authorities with the total of 6076 returnees between June and October”¹⁰⁴. Unfortunately no information is provided about the fate of the people who were not returned. However, besides this it is doubtful that indeed in 100% of the cases the country of origin could be determined by the authorities. It is more probable that the bilateral agreements between Spain and Mauritania and Spain and Senegal provided the necessary legal basis for returning intercepted persons. As it is stated by FRONTEX: “[...] based on their bilateral agreements with Spain, Senegal and Mauritania were also involved with their assets and staff. The main aim of this joint effort was to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea [...]”¹⁰⁵.

Similar to the Italian – Libyan cooperation and incorporated FRONTEX action Spain, Mauritania/Senegal and FRONTEX form a triangle for operational activities in the Mediterranean. Again, the non-refoulement principle remains unmentioned in this context and individuals are being returned either because allegedly their country of origin has been determined (and declared as safe) or due to bilateral agreements with third states the action is not carried out by an EU member state. Furthermore in the context of Spain, Mauritania/Senegal and FRONTEX there has been no ECtHR judgment as it appeared in the *Hirsi Jamaa and others v Italy* case. Accordingly, the judgment of this precedent case becomes more important. The judgment clarified circumstances and fostered obligations in the triangle of actors (member state, third state, FRONTEX)¹⁰⁶.

Assessing the principle of non-refoulement in the context of FRONTEX operations in the Mediterranean it appears that even though it is legally manifested, in practice the principle seems to be avoided. The possibility to avoid the non-refoulement principle emerges through bilateral agreements and this is further fostered by the mandate of FRONTEX to conclude agreements with third countries. The agreements comprise a shift of the direct border lines of the EU to a broader geographical understanding. During the FRONTEX-led mission to Libya in 2007 the delegation visited the Sub-Saharan border area of Libya in order to improve migration control via Libya towards Europe¹⁰⁷. Similarly this occurred during the HERA operations which used existing bilateral agreements between Spain and Mauritania/Senegal to prevent migration movement far outside the EU territory. Thereby the borders are shifted “from border lines to border areas” as Klepp notices¹⁰⁸. This has certain implications for the non-refoulement principle; sometimes as in the case of Mauritania, EU member states are not directly involved in the interception of boats since the third state (the state of departure) is provided with necessary equipment to stop people even before they leave the territory of the state. The same applies to Libya; FRONTEX assesses the internal land borders of Libya and provides suggestions and offers resources for border protection.

Nevertheless this practice is not sufficient to undermine the systemic application of legal obligations as it was proven by the ECtHR in the ruling on the case *Hirsi Jamaa and others v Italy*. While the existing knowledge on the issue emphasizes a lack of clarity¹⁰⁹, this study is not dedicated to strengthen those concerns but rather to highlight the clarity of existing

¹⁰⁴ FRONTEX. Retrieved 18.6.2012 from <http://www.frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-ZubSEM>

¹⁰⁵ Id.

¹⁰⁶ See above section 4.3 *Hirsi Jamaa and others v Italy*. Three main points were made in the judgment regarding the principle of non-refoulement: Were jurisdiction is exercised states must take responsibility; the principle is without limitation applicable in the high seas; fostering Art. 1 ECHR.

¹⁰⁷ See above section 4.1 FRONTEX – Libya cooperation.

¹⁰⁸ Klepp, S. (2011), p. 58.

¹⁰⁹ See above section 1.3 Existing knowledge.

legal obligations. This was also stressed in the case *Hirsi Jamaa and others v Italy*. The ECtHR unambiguously ruled that during the course of action Italy violated article 3, article 13, and article 4 in protocol 4 of the ECHR¹¹⁰. The judgment of the ECtHR was certainly based on clear legal provisions provided by the ECHR which even possess the same legal value as the Treaties since the entrance of the Lisbon Treaty¹¹¹. Thereby the Court reiterated the obligations for states which clearly arise from international law concerning the non-refoulement principle. The international understanding of the term “refugee” as well as the international understanding of “non-refoulement” are accepted by EU law and enshrined in several provisions and additionally in the ECHR¹¹². Therefore the claim of existing legal uncertainty cannot be confirmed. It is rather a lack of transparency in the set-up and the working of the agency FRONTEX which triggers the assumption that the non-refoulement principle is violated. Bilateral agreements and detailed reports about operations are not fully published. Moreover the available information on missions, operations and agreements provides enough reason to conclude that the non-refoulement principle is not respected to its full extent.

6. Conclusion

This study was carried out in order to reply to the following research question: To what extent do the activities coordinated by FRONTEX respect the non-refoulement principle? The analysis conducted in relation on the respect of the principle of non-refoulement in FRONTEX operations in the Mediterranean reveals that the carried out operations are not fully in accordance with the international legal principle. EU legislation is explicitly linked to the international understanding of refugee protection and the related concepts “refugee” and “non-refoulement”. Certainly this should have an impact on EU external border management since the obligation to respect the principle is legally imposed. However, as some examples showed, the practical incorporation in joint operations of FRONTEX in the Mediterranean lacks respect of the non-refoulement principle. Therefore, the answer to the research question of this study should be that the activities coordinated by the EU agency FRONTEX respect the non-refoulement principle only to a limited extent.

Particularly when third countries are involved in the operations, the incorporation of the non-refoulement principle emerges to be flawed. Bilateral agreements remain unpublished and FRONTEX provides only limited information on accomplished operations. The shift from “border lines to border areas” makes it easier to simply avoid the principle of non-refoulement. Nevertheless, as the ruling of the case *Hirsi Jamaa and others v Italy* proved, clear obligations exist in law and neither extraterritoriality nor cooperation with third states release the member state from international obligations. The aim of this study was to apply a coherent approach in the examination of the principle of non-refoulement in FRONTEX operations in the Mediterranean in order to emphasize the clarity of legal obligations and the importance to respect them. The respect for the non-refoulement principle was also stressed by the ruling in the aforementioned case, however, respect to the principle should already be ensured before operational cooperation at the external borders is carried out. Even though legal obligations enshrine the non-refoulement principle, the secrecy of the agency and its obscure practice increases the uncertainty about legal obligations for member states. Nevertheless due to the effective exercise of power, the existence of responsibility cannot be denied. This applies not only to the agency

¹¹⁰ See above section 4.3 *Hirsi Jamaa and others v Italy*.

¹¹¹ Art. 6 TEU.

¹¹² See above section 2.2.2 Legal sources and section 3. The principle of non-refoulement in the European Union.

FRONTEX but furthermore to other institutions of the EU and certainly the member states as it is stated in article 72 TFEU¹¹³. Regarding this it is worth to dare a brief outlook on the migration policies.

Without trying to make uncertain predictions it is nevertheless interesting to view the upcoming presidency of Cyprus in the Council of the EU beginning 1st July 2012 in relation to migration policies. The presidency of the Council of the EU is in charge of “the smooth functioning of the Council”¹¹⁴ and even more important the presidency sets the agenda and chairs all the meetings as well as the meetings from several working groups¹¹⁵. It is reported that the incoming presidency “is worried that Syrian refugees could arrive en masse in the island state and also more broadly in the EU”¹¹⁶. Due the civil unrest and the oppressive response of government forces in Syria during the last month, the UNHCR estimates that about 81.000 people have fled to the neighboring countries¹¹⁷. Regarding the possibility that some people might flee via the sea, Cyprus is indeed one of the first destinations located only about 150 kilometers away from the Syrian coast. After a meeting between the Cypriot and the Maltese president in June 2012, the Cypriot president Demetris Christofias announced at the final press conference: “Malta and Cyprus share common worries and interest over irregular migration [...] we are not racist but we must defend the rights of our country”¹¹⁸.

Clearly the small island state fears irregular migration flows. Therefore it is expected that Cyprus is placing the concern of migration policies and the finalization of the Common European Asylum System high on the agenda of the Council. However, regarding the lasting violations of human rights in Syria and the increasing brutality of the government forces against civilians the Cypriot presidency might not only face a challenge due to the geographical location of the island but is moreover facing the responsibility to ensure the non-refoulement principle in matters of migration policies. The current situation in Syria leaves no doubt that people leaving the country are refugees under the international understanding manifested in the Geneva Convention and EU legislation, hence the principle of non-refoulement should apply. Therefore the Cypriot president Christofias mentioning the need to “defend the rights of his own country” must also take into account the incorporation and application of international obligations. At the time of writing the conclusions of this study the term of the Cypriot presidency had not yet begun. However, it can be established with certainty that the mere interest of a member state is no reason to ignore the responsibility to ensure international rights. Surely this is expected from all member states; nevertheless the presidency of the EU Council should attempt this with even more cautiousness. It remains to be seen how the international community is further handling the situation in Syria and accordingly how refugee movements will develop. In this context Cyprus has to guide the EU Council and ensure international obligations in a responsible way also for the sake of refugee protection.

¹¹³ Art. 72 TFEU reads as follows: “*This Title shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security.*”

¹¹⁴ Cyprus Presidency of the EU Council 2012. Retrieved 18.6.2012 from http://www.cy2012eu.gov.cy/cyppresidency/cyppresidency.nsf/cyp04_en/cyp04_en?OpenDocument

¹¹⁵ Except the sessions of the Foreign Affairs Council which is coordinated by the High Representative of the Union for Foreign Affairs and Security Policy.

¹¹⁶ Nielsen, N. (2012, May 29). *Cyprus Worried About Potential Syrian Refugees*. EU Observer. Retrieved 18.6.2012 from <http://euobserver.com/22/116408>

¹¹⁷ Turkey, Jordan, Lebanon, Iraq. For detailed numbers see <http://data.unhcr.org/syrianrefugees/regional.php>

¹¹⁸ Borg, B. (2012, June 9). *Cyprus and Malta Share Worries On Migrants*. Times of Malta. Retrieved 18.6.2012 from <http://www.timesofmalta.com/articles/view/20120609/local/Cyprus-and-Malta-share-worries-on-migrants.423403>

The case of the Council of the European Union shows that the issue of irregular migration movements and the question how to face it is being tackled on different levels within the EU. Surely with an increase of actors and levels the interests increase too. The very first paragraph of this study quotes Garlick and Kumin who notice that “[...] the attention being paid to migration by the European institutions and the member states presents both risks and opportunities for refugee protection [...]”¹¹⁹. This can indeed be confirmed by this study. Accordingly, the guiding question “refugee protection or irregular migration management?” attempts to point out the risk for fundamental refugee protection, as migration management might hinder the access to EU territory for people who are indeed in need of international protection. It should not be confused to whom protection needs to be provided in the context of migration control. The non-refoulement principle is the core international legal obligation in refugee protection and the member states as well as institutions of the EU in relation to the exercise of their powers, have the responsibility to ensure its unrestricted respect.

¹¹⁹ Garlick, M. & Kumin, J. (2008), p. 112.

Bibliography

- Borg, B. (2012, June 9). *Cyprus and Malta Share Worries On Migrants*. Times of Malta. Retrieved 18.6.2012 from <http://www.timesofmalta.com/articles/view/20120609/local/Cyprus-and-Malta-share-worries-on-migrants.423403>
- Carling, J. (2007). Unauthorized Migration from Africa to Spain. *International Migration*, 45 (4), 3-37.
- Carling, J. (2007). Migration Control and Migration Fatalities at the Spanish-African Borders. *International Migration Review*, 42 (2), 316-343.
- Charter of Fundamental Rights of European Union.
- Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment.
- Council of the European Union. *Council Decision supplementing the Schengen Border Code with regard to surveillance at the sea in the context of operational cooperation*. Brussels: European Union. OJ (L111), 4.5.2010, No 2010/252/EU.
- Council of the European Union. *Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof*. Brussels: European Union. OJ (L212), 7.8.2001, No 2001/55/EC.
- Council of the European Union. *Council Directive 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*. Brussels: European Union. OJ (L204), 30.9.2004, No 2004/83/EC.
- Council of the European Union. *Council Directive laying down minimum standards for the reception of asylum seekers*. Brussels: European Union. OJ (L31), 6.2.2003, No. 2003/9/EC.
- Council of the European Union. *Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status*. Brussels: European Union. OJ (L326), 13.12.2005, No 2005/85/EC.
- Council of the European Union. *Council Regulation establishing a community code on the rules governing the movement of persons across borders*. Brussels: European Union. OJ (L105), 13.4.2006, No 562/2006.
- Council of the European Union. *Council Regulation on establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*. Brussels: European Union. OJ (L 349), 26.10.2004, No 2007/2004.

- Cyprus Presidency of the EU Council 2012. Retrieved 18.6.2012 from http://www.cy2012eu.gov.cy/cyppresidency/cyppresidency.nsf/index_en/index_e?OpenDocument
- Den Heijer, M. (2008). Whose Rights and Which Rights? The Continuing Story of Non Refoulement under the European Convention on Human Rights. *European Journal of Migration and Law*, 10 (2008), 277-314.
- Deutsche Welle (n. d.). Scharfe Kritik am Flüchtlingslager auf Lampedusa. Retrieved 6.6.2012 from http://www.dw.de/dw/article/0,,1718149_page_1,00.html
- Diamandourus, P. (6.3.2012). Letter from the European Ombudsman (P. Diamandourus) to the Executive Director of FRONTEX (I. Laitinen). Retrieved 2.7.2012 from <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark>
- Directorate General for internal policies (2011). *Study on implementation of the EC Charter of Fundamental Rights and impact on EU Home Affairs Agencies (FRONTEX, EUROPOL, Asylum Support Office)*. European Parliament Directorate General for internal policies.
- ECtHR, Amuur v France, Appl. No. 19776/92, 25 June 1996.
- ECtHR, Bader v Sweden, Appl. No. 13284/04, 8.11.2005.
- ECtHR, F. v United Kingdom, Appl. No. 17341/03, 22.6.2004.
- ECtHR, Hirsi Jamaa and others v Italy, Appl. No. 27765/09, 23.2.2012.
- ECtHR, Mamatkulov v Turkey, Appl. No. 46827/99, 4.2.2005.
- ECtHR, T.I. v UK, Appl. No. 43844/98, 7 March 2000.
- European Commission. *Communication from the Commission to the Council and the European Parliament on an open method of coordination for the community immigration policy*. Brussels: European Union. 11.7.2001, COM (2001)387 final.
- European Commission. *Communication from the Commission to the Council. Reinforcing the management of Sothern European Borders*. Brussels: European Union, 30.11.2006, COM (2006) 733 final.
- European Convention on Human Rights.
- European Council. *The Hague programme: Strengthening Freedom, Security and Justice in the European Union*. Brussels: European Union. OJ (C53), 3.3.2005, No 2005/C53/01.
- Fischer-Lescano, A., Löhr, T. & Tohipidur, T. (2009). Border Controls at Sea: Requirements under International Human Rights and Refugee Law. *International Journal of Refugee Law*, 21(2).

- FRONTEX. *FRONTEX-led EU illegal migration technical mission to Libya. 28 May – 5 June 2007.*
- FRONTEX. Retrieved 6.6.2012 from <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/66>
- FRONTEX. Retrieved 6.6.2012 from <http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/6>
- Fruehauf, U. (2011). *EU – Libya Agreements on Refugee and Asylum Seekers – The Need for a Reassessment.* Heinrich Böll Stiftung.
- Garlick, M. & Kumin, J. (2008). Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control. In B. Martenczuk & S. Van Thiel (Eds.), *Justice, Liberty, Security: New Challenges for EU External Relations.* (pp 111-144). Brussels: Brussels University Press.
- Geneva Convention Relating to the Status of Refugee.
- International Covenant on Civil and Political Rights.
- Jeandesboz, J. (2008). *Reinforcing the Surveillance of EU Borders. The Future Development of FRONTEX and EUROSUR.*
- Klepp, S. (2007). A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea. *European Journal of Migration and Law*, 12(1), 1-21.
- Klepp, S. (2011). *Europa zwischen Grenzkontrolle und Flüchtlingsschutz. Eine Ethnographie der Seegrenze auf dem Mittelmeer.* Bielefeld: Transcript Verlag.
- Klepp, S. (2008). Negotiating the Principle of Non-Refoulement in the Mediterranean Sea: Missions, Visions and Policies at the Southern Borders of the European Union. *Working Paper Series. Universität Leipzig*
- Lauterpacht, E. and Bethlehem, D. (2003). 'The Scope and Content of the Principle of Non Refoulement' in E. Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection.* Cambridge: Cambridge University Press, 2003, 87-177.
- Lisson, U. & Weinzierl, R. (2007). *Border Management and Human Rights – a Study of EU law and law of the sea.* Berlin: Deutsches Institut für Menschenrechte/German Institute for Human Rights.
- Martin, M. (n.d.). *The Arab Spring and the death toll in the Mediterranean: The true face of Fortress Europe.* Statewatch. Retrieved 2.7.2012 from <http://www.statewatch.org/analyses/no-167-arab-spring-med.pdf>
- Messineo, F. (2012). *Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants' boats at sea, says ECtHR.* Retrieved 7.6.2012 from <http://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/>

Migrants At Sea Blog. <http://migrantsatsea.wordpress.com/>

Moreno-Lax, V. (2011). Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2), 174-220.

Neal, A. (2009). Securitization and Risk at the EU border: The origins of FRONTEX. *Journal of Common Market Studies*, 47(2), 333-356.

Nielsen, N. (2012, May 29). *Cyprus Worried About Potential Syrian Refugees*. EU Observer. Retrieved 18.6.2012 from <http://euobserver.com/22/116408>

Pallis, M. (2002). Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes. *International Journal of Refugee Law*, 14(2/3), 329-364.

Papastavridis, E. (2010). 'Fortress Europe' and FRONTEX: Within or Without International Law? *Nordic Journal of International Law*, 79(1).

Peer, S. (2012). *Statewatch Analysis – The FRONTEX regulation – Consolidated text after 2011 amendments*. Statewatch.

Regina v Secretary of State for the Home Department, ex parte Adnan [2001] 2 AC 477.

Regulation (EU) No 1168/2011 of 25 October 2011 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.

Rijpma, J. (n.d.). *EU border management after Lisbon Treaty*. Law Department of the European University Institute, Florence.

Statewatch (2012). News. Retrieved 4.6.2012 from <http://www.statewatch.org/news/2012/mar/01frontex.htm>

Tondini, M. (2010). *Fishers of Men? The interception of migrants in the Mediterranean Sea and their forced return to Libya*. Department of Governance Studies, VU University Amsterdam.

Treaty of the European Union.

Treaty on the Functioning of the European Union.

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

UNHCR. UNHCR Note on Principle of Non-Refoulement. November 1997. Retrieved 18.4.2012 from <http://www.unhcr.org/refworld/docid/438c6d972.html>