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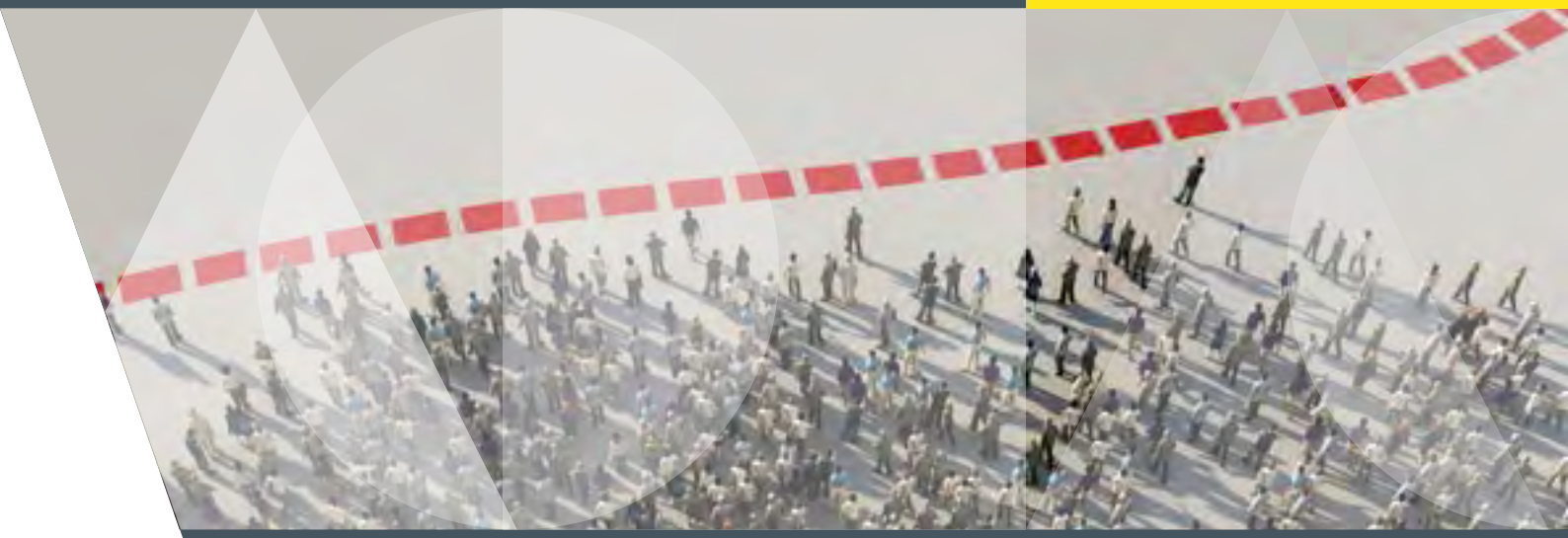

# Scope of the principle of *non-refoulement* in contemporary border management: evolving areas of law

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# Scope of the principle of *non-refoulement* in contemporary border management: evolving areas of law

# Foreword

The challenges resulting from the arrival of large numbers of refugees and migrants have prompted diverse border management activities by European Union (EU) Member States. These increasingly take place on the high seas and in, or under the authority of, third countries. Such efforts must respect the principles and rights as reflected in international law, including the universal principle of non-*refoulement*.

International refugee law and human rights law, the European Convention on Human Rights, the Charter of Fundamental Rights of the EU, and judgments of the European Court of Human Rights all clearly stipulate that there must be no *refoulement*. While the exact scope and content of this prohibition vary, the principle undoubtedly also applies when individuals reach the EU's land or sea borders.

EU Member States' contemporary border control activities raise difficult questions related to their *non-refoulement* obligations, calling for more legal clarity. This report scrutinises specific scenarios – within third countries, on the high seas, and at the EU's borders – regarding which views differ as to whether they constitute *refoulement*. The analysis presents each scenario and the applicable legal framework, briefly sketches current practices, and outlines arguments that speak against, and in favour of, finding a violation of *non-refoulement*.

Most importantly, based on this report and the input of experts who met in Vienna on 14 March 2016,the European Union Agency for Fundamental Rights (FRA) developed specific guidance on how to reduce the risk of such violations. Offering practical advice, the guidance seeks to support the EU and its Member States in taking action – including against human trafficking and people smuggling – that is both effective and duly considers the applicable legal framework and resulting fundamental rights implications.

**Michael O'Flaherty**
*Director*

# Contents

## Purpose of the guidance

This guidance on how to reduce the risk of *refoulement* in border management situations aims to support the EU and its Member States when implementing integrated border management measures with the assistance of third countries. It also intends to mitigate possible risks of being held accountable. It is not comprehensive, and Member States have to comply with all applicable obligations both within as well as beyond the scope of these guidelines, including those set forth in international, European and national law.

The guidance focuses on border management situations where the responsibility for possible violations of fundamental rights are unclear, in particular on activities that are carried out with the assistance of third countries. It does not cover situations where the law is settled. The guidance sets out 10 suggestions for practical measures.

The European Union Agency for Fundamental Rights (FRA) developed this guidance based on its report on the *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*. Both the report and the guidance benefited greatly from expert input at a meeting held in Vienna on 14 March 2016.

## Principle of *non-refoulement*

The principle of *non-refoulement* is a central piece of the EU's fundamental rights regime, reflected in Article 78 (1) of the Treaty on the Functioning of the EU. Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (Charter) also encompass the prohibition of *refoulement*, which is further specified in secondary EU law. Essentially, these provisions mirror international human rights obligations by EU Member States.

For refugees, the principle of *non-refoulement* as laid down in Article 33 of the 1951 Convention relating to the Status of Refugees is the cornerstone of the international legal regime for their protection. It prohibits the return of refugees to a risk of persecution. It covers also people seeking asylum until a final decision is made on their application.

For all persons, regardless of their legal status, the principle of *non-refoulement* is a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the 1966 International Convention on Civil and Political Rights, Article 3 of the 1984 United Nations Convention against Torture and Article 3 of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights. Such provisions do not allow for any derogation, exception or limitation.

The EU asylum *acquis* also prohibits the return of a person to real risk of serious harm deriving from indiscriminate violence in situations of armed conflict.

The principle of *non-refoulement* not only prohibits the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct *refoulement*) but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect *refoulement*).

The prohibition of *refoulement* applies also to conduct at borders and at sea.

Conduct that may trigger *refoulement* may also engage violations of other fundamental rights, such as the right to be heard, the right to an effective remedy or the prohibition of collective expulsion.

## Integrated border management

The concept of integrated border management guides the action of the EU and its Member States on external border control. It promotes a four-tier access control model, including:

- measures in third countries (such as the provision of advice and training);
- cooperation with neighbouring countries;
- measures at the external border itself;
- measures within the territory, including return.

When implementing integrated border management measures in or together with third countries, EU Member States may become involved in activities where the application of fundamental rights obligations deriving from the Charter and specifically from the prohibition of *refoulement* is not fully settled.

## State responsibility

The Charter applies to the EU as well as to Member States when they act within the scope of EU law. This includes also conduct at the border or outside the EU territory.

Under Article 1 of the ECHR, states have to secure the rights of the convention to everyone within their jurisdiction. States may exceptionally also exercise jurisdiction when they operate outside their territory.

Under international law, an internationally wrongful act of a state entails international responsibility. Conduct is wrongful when it breaches an international obligation of the state and when it is attributable to the state. State responsibility may exceptionally arise when a state aids or assists, directs and controls or coerces another state to engage in conduct that violates international obligations.

The possible legal consequences for EU Member States of requesting the assistance of third countries to prevent the arrival of migrants to the EU depend on the individual circumstances of each operation and factors such as the exercise of *de jure* or *de facto* control over a person or the degree of leverage exercised by the EU Member State on the conduct of the third country. Although exceptional, responsibility by EU Member States cannot be fully excluded.

## Ten suggestions for practical measures in border management situations

### 1. Conduct a prior assessment and monitor the human rights situation in the third country

When considering the deployment of document experts or liaison officers to third countries or where operational cooperation with a third country is envisaged which may involve the interception of migrants and/or their disembarkation in a third country, EU Member States should conduct a careful assessment of the human rights situation in that country. Such assessment would enable EU Member State to evaluate possible fundamental rights implications and calibrate its planned activities so as to avoid or reduce the risk of participation in conduct which could violate human rights.

Such assessment should be based on a full range of sources and include information on access to asylum and on the treatment of persons in need of international protection. The principles set out in Article 4 (2) of Regulation (EU) No. 656/2014 on Frontex-coordinated operations at sea may be used as a guidance. Regular monitoring of the situation would allow to adjust the operational involvement in case of changes.

### 2. Clarify responsibilities and procedures in arrangements concluded with third countries

Arrangements concluded with third countries could include rules on allocation of responsibility, paying attention to the fact that third countries may not be bound by the same human rights obligations as EU Member States. Arrangements on deploying document experts or immigration liaison officers at third-country airports to support airlines in deciding whether to allow a passenger to board an aircraft or not could include guidance on where to refer people who are not allowed to board an aircraft and express a fear of serious harm or persecution and/or if there are clear indications of a real risk of *refoulement*.

### 3. Refrain from asking third countries to intercept migrants in case of real risk of harm

Third countries should not be requested to intercept people on the move before they reach the EU external border, when it is known or ought to be known that the intercepted people would as a result face persecution or a real risk of other serious harm.

## 4. Provide fundamental rights training to staff deployed in third countries

Staff deployed as liaison officers or as document experts to third countries should be trained and equipped with the necessary knowledge and skills to understand if and how the principle of *non-refoulement* may be engaged in operations in which they are involved.

## 5. Offer human rights training to third-country officials

Third-country officials who act as a contact point or support operationally integrated border management measures carried out in third countries should be made aware of human rights requirements, in particular those deriving from the principle of *non-refoulement*. This is important, for example, when third-country officials operate on board of EU Member State assets deployed to enhance third countries' border surveillance capacity.

## 6. Clarify responsibilities in operational plans

Operational plans and other documents guiding joint operations or patrols with third countries should be drafted in such a way as to reduce as much as possible the risk of fundamental rights violations. In particular, they should have clear provisions on the use of force, the prohibition of torture, inhuman or degrading treatment or punishment and respect for the principle of *non-refoulement*.

## 7. Embed fundamental rights in capacity-building activities

Training and other capacity-building activities offered to third countries in the field of border management should include and mainstream human rights and refugee law. When assets and equipment are donated to third countries, this should be accompanied by training the authorities of the receiving country to underscore their proper use in accordance with applicable human rights law. Donors should monitor how third countries use the assets and equipment they provide and discuss any inappropriate use and the consequences thereof at meetings, training or through other channels.

## 8. Take decisions on an individual basis applying appropriate safeguards

EU law requires an individual assessment before a decision is taken authorising or not the entry of a third-country national on the territory of an EU Member States. Although the depth of such examination depends on the specific procedure, basic safeguards, such as linguistic and legal assistance as well as access to effective remedies, must be respected in all cases. To achieve this, the individual assessment should be carried out on land, as the necessary pre-conditions to identify protection needs and vulnerabilities can usually not be met on board a vessel.

## 9. Disembark people rescued at sea in a place where they are safe

To the extent that it does not endanger people's lives, vessels requested to rescue migrants at sea should not be instructed to disembark them in countries where their lives and freedoms would be threatened, as suggested in the guidelines on the treatment of persons rescued at sea drawn up in 2004 by Maritime Safety Committee of the International Maritime Organisation. Where needed, the good offices of the United Nations Commissioner for Human Rights (UNHCR) could be used in the identification of a place of safety.

## 10. Facilitate access to international protection at borders

In line with the EU Schengen and asylum acquis, border guards must be trained and provided with the relevant information on asylum. This will ensure that people arriving at the external border who may be in need of international protection are informed and those who wish to seek international protection are referred to the relevant national authorities – mindful that international protection needs are not limited to certain nationalities only. Full use should be made of existing training modules and practical tools developed by the European Asylum Support Office (EASO), in cooperation with FRA, Frontex and UNHCR, such as the tool for first contact officials on access to asylum procedures.

Access to asylum procedures must exist in law and in practice. Where EU Member States have erected fences at the border, there must be accessible points where people can safely apply for international protection.

# Introduction

The principle of *non-refoulement* is the cornerstone of the international legal regime for the protection of refugees. Article 33 of the Convention relating to the Status of Refugees (1951 Refugee Convention) prohibits returning (*refouler*) a refugee – and hence also a person seeking asylum as they can potentially be a refugee – to a risk of persecution. The prohibition of *refoulement* is also reflected in primary European Union (EU) law – specifically, in Articles 18 and 19 of the Charter of Fundamental Rights of the EU and in Article 78 of the Treaty on the Functioning of the EU. Secondary EU law relating to borders, asylum, migration and return further prohibits *refoulement* (see Annex). Article 3 of the European Convention on Human Rights (ECHR) – as interpreted by the European Court of Human Rights (ECtHR) – and the EU asylum *acquis* have expanded the groups of persons covered by the principle of *non-refoulement* (personal scope) and the types of harm to which a person cannot be returned (material scope).

Following the concept of Integrated Border Management,[1] EU Member States have increasingly moved border management activities beyond their territorial borders, extending border control activities to the high seas and third countries. Border controls within, or under the authority of, third countries have particularly raised the question of whether *non-refoulement* obligations of Member States remain applicable. Does the legal obligation to observe *non-refoulement* also hold outside a state's territory? In other words, does the principle of *non-refoulement* have extraterritorial effect and, if so, what does this mean in practice? For example, are EU Member States bound by the requirement of *non-refoulement* if a EU representative assists a third-country vessel in intercepting people at sea? And what if a representative of an EU Member State advises airlines to allow – or not to allow – a passenger heading to the EU to board?

At FRA's Fundamental Rights Conference held in Rome in 2014,[2] participants concluded that, while the prohibition of *refoulement* is universal, grey areas remain that call for more legal clarity. This report identifies and discusses 10 scenarios regarding which views differ as to whether they constitute *refoulement*. These occur within three overarching border control contexts: within third countries, on the high seas, and at the EU's borders. For each scenario, the applicable legal framework is described focusing on EU law, followed by a brief sketch of current practices. The report then presents arguments as to whether or not a specific situation amounts to a violation of *non-refoulement*.

This report draws on desk research by Conny Rijken and Nanda Oudejans at Tilburg University, based on guidance provided by FRA. The research consisted of analysing legislation, case law and – when available – state practice in relevant EU and non-EU Member States. Expert opinions issued by international and European organisations and bodies, academic work and other relevant resources were also examined.

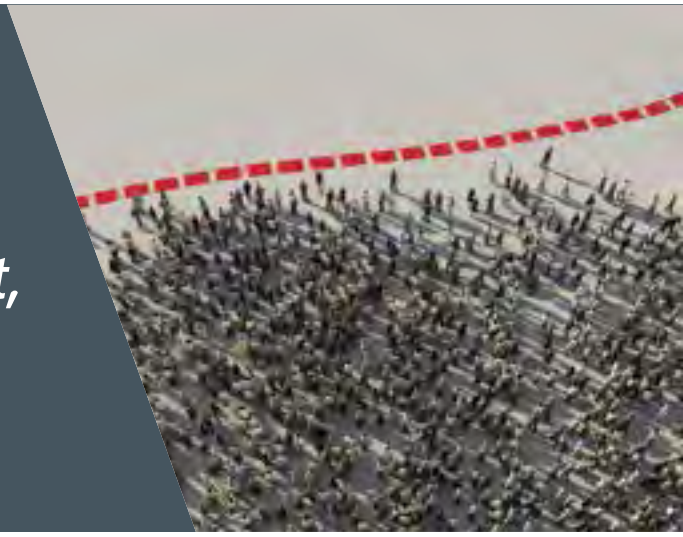
The report's analysis is complemented by concrete guidance on reducing the risk of *non-refoulement* violations. The *Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries* is presented at the beginning of this publication and aims to serve as a practical tool for the EU and its Member States. FRA developed both the report and the guidance based on expert input provided during a meeting held in Vienna on 14 March 2016.

1 Council of the European Union (2006a); European Commission (2010); European Commission (2015a), proposed recital 3.

2 FRA (2014a).

# PART I: PRINCIPLE OF *NON-REFOULEMENT*, JURISDICTION AND STATE RESPONSIBILITY

# 1 Principle of *non-refoulement*, jurisdiction and state responsibility



## 1.1. *Non-refoulement:* definition and relevant legal framework

### International law

The prohibition of *refoulement* is the cornerstone of refugee protection. It derives from Article 33 (1) of the 1951 Refugee Convention,[3] which provides that

*"[n]o 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".*

It protects refugees against being returned to a risk of persecution.

In addition, international human rights law has made *non-refoulement* an integral component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, enshrined in Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The United Nations (UN) Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has interpreted Article 7 – and to some extent, Article 6 on protecting the right to life – as implying that return to torture and other forms of ill-treatment is also prohibited. According to the UN HRC,

*"States Parties must not expose individuals to the danger of torture or cruel or inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement".*[4]

The prohibition of *refoulement* is also explicitly stipulated in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), which states that

*"[n]o 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".*[5]

All EU Member States are party to these UN conventions. Moreover, the principle of *non-refoulement* is considered to be a rule of international customary law,[6] and hence binds all states – regardless of whether they are parties to these international conventions.

As shown in Table 1, the scope and content of the principle of *non-refoulement* reflected in various international instruments vary. Taken together, international refugee law and human rights law prohibit the return to a risk of persecution and the return to a risk of torture, inhuman or degrading treatment or punishment.

3 UN General Assembly (GA), Convention Relating to the Status of Refugees, 28 July 1951.
4 UN, Human Rights Committee (1992).
5 UN, GA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
6 Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrant*, OC-18/03, 17 September 2003, Concurring Opinion of Judge A.A. Cançado Trindade, para. 217ff; UNHCR (1997); Hong Kong, Court of Final Appeal of the Hong Kong Special Administrative Region, *C, KMF and BF v. Director of Immigration, Secretary for Security*, Nos. 18, 19 and 20 of 2011, 31 January 2013, Intervention of the UNHCR. See also Lauterpacht, E. and Bethlehem, D. (2003); Hathaway, J. C. (2005), pp. 363-367; Allain, J. (2001), pp. 533-558; Goodwin-Gill, G. S. (2011), pp. 443-444.

Table 1: Scope of the principle of ***non-refoulement*** in international and European human rights law

| Legal norm | Action | Type of harm | Personal scope |
|---|---|---|---|
| **Convention relating to the Status of Refugees, Article 33** | prohibition of *refoulement* | persecution | Refugees – independently of any formal recognition as such; they must be outside their country of origin |
| **UN Convention against Torture, Article 3** | prohibition of *refoulement* | torture | Any person present under a state's jurisdiction |
| **International Covenant on Civil and Political Rights, Article 7** | prohibition of subjecting individuals to specified acts | torture, inhuman or degrading treatment or punishment | Any person present under a state's jurisdiction |

*Source: FRA, 2016*

The principle of *non-refoulement* enshrined in the 1951 Refugee Convention not only covers recognised refugees but also asylum seekers awaiting status determination. Furthermore, it bans both the return to a country where a person would be at risk of persecution or serious harm (direct *refoulement*), and the return to countries where individuals would be exposed to a risk of onward removal to such countries (indirect or onward *refoulement*).[7]

## Primary EU law and the European Convention on Human Rights

The Treaty on the Functioning of the EU (TFEU) explicitly calls for a Common European Asylum System in conformity with the 1951 Refugee Convention and stresses the need to comply with the principle of *non-refoulement* in Article 78 (1). The Court of Justice of the EU (CJEU) has reiterated that the Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they risk being persecuted.[8]

Article 4 of the Charter of Fundamental Rights of the EU prohibits torture and inhuman or degrading treatment or punishment. Article 19 (2) of the Charter prohibits the return to a state where there is a serious risk that the person concerned would be tortured or subjected to other inhuman or degrading treatment or punishment. Article 18 of the Charter enshrines the right to asylum with due respect to the rules of the 1951 Refugee Convention, thus including the *refoulement* prohibition in Article 33 of the convention. Pursuant to Article 51 of the Charter, these provisions are binding on EU institutions and EU Member States when they implement EU law.

Article 3 of the ECHR stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This is an absolute prohibition that does not allow any derogation. The ECtHR has interpreted Article 3 to encompass *non-refoulement*, finding that a returning state can also be held responsible under this Article where there are substantial grounds for believing that the person concerned faces a real risk of torture or inhuman or degrading treatment or punishment upon return or extradition.[9] The court took a similar approach to returns to countries in which a substantial and foreseeable risk of the death penalty or execution exists.[10]

## Secondary EU Law

The principle of *non-refoulement* is widely reflected in secondary EU Law. The Annex lists 10 secondary EU law instruments that contain *non-refoulement* provisions.

Article 21 of the Qualification Directive (2011/95/EU)[11] affirms the prohibition of *refoulement*. It thus aims to ensure that no person in need of international protection is sent back to a risk of persecution or other serious harm. The directive also establishes a right to subsidiary protection for third-country nationals who do not fulfil the conditions necessary to be recognised as

7 Hathaway, J. C. (2005), p. 233; EXCOM (2003), para. (a) (iv); ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 293.

8 CJEU, Joined cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 75.

9 ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989, para. 91; *Vilvarajah and Others v. United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, para. 107ff.

10 ECtHR, *Bader and Kanbor v. Sweden,* No. 13284/04, 8 November 2005; *Al Nashiri v. Poland,* No. 28761/11, 24 July 2014; *A.L. (X.W.) v. Russia*, No. 44095/14, 29 October 2015.

11 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.

refugees under the 1951 Refugee Convention, but who need international protection as they face a real risk of 'serious harm', as defined in Article 15 of the directive. According to this article, 'serious harm' consists of the death penalty, execution, torture, and inhuman or degrading treatment or punishment. In a situation of armed conflict, international or internal, "a serious and individual threat to a civilian's life or person by reasons of indiscriminate violence"[12] also amounts to serious harm.

The principle of *non-refoulement* applies not only to refugees formally recognised as such, but also to asylum seekers. Article 9 of the Asylum Procedures Directive (2013/32/EU)[13] allows applicants for international protection to remain in the Member State pending a decision on their asylum request. Derogations from the right to remain are only possible in exceptional circumstances, provided there is no risk of *refoulement*.

The prohibition of *refoulement* also applies to returns of people in need of international protection to a third country based on 'safe third country' or 'country of first asylum' rules. These rules arise from Articles 35 and 38 of the Asylum Procedures Directive and are tools to deal with asylum applicants who previously stayed in, or transited, a third country. However, states may not use these to return a person to a risk of persecution or other serious harm. They may indeed only be applied if, after having heard the asylum applicant, an EU Member State authority concludes that all conditions required by the directive are met, including protection from *refoulement*.

The prohibition of *refoulement* is also included in Article 5 of the Return Directive (2008/115/EC)[14] and therefore applies to all migrants in an irregular situation. Furthermore, pursuant to Article 4 (4) of the directive, Member States have to respect the principle of *non-refoulement* with regards to people who are refused entry at the border or are apprehended or intercepted by the competent authorities in connection with their irregular border crossing (for this group of persons, states have the option not to apply most other parts of the directive).

12 See CJEU, C-465/07, *Elgafaji v. the Netherlands,* 17 February 2009, for further clarification.
13 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180.
14 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348.

## 1.2. Application of *non-refoulement* at borders

It is settled law that EU Member States' obligation to respect the principle of *non-refoulement* also applies when they turn back people who have reached the EU's external borders.

Under the 1951 Refugee Convention, *non-refoulement* not only refers to returns or expulsions of people who are already within a host state's territory, but also encompasses rejection at the borders.[15] The UN High Commissioner for Refugees (UNHCR) has indeed stressed that the principle of *non-refoulement* applies equally on a state's territory, at a state's borders, and on the high seas.[16]

Similarly, obligations deriving from the ECHR also apply at borders. In *Amuur v. France*, the ECtHR clarified that people in international transit zones of airports are protected by the ECHR.[17] In the *Hirsi* case, the court found that Article 3 also applies to interceptions on the high seas.[18]

Secondary EU law leaves no doubt as to the applicability of the principle of *non-refoulement* at borders. It binds border guards checking documents at border crossing points,[19] even when such crossing points are run together with third-country border guards and are located outside an EU Member State's territory.[20] Recital 3 of the Carrier Sanctions Directive (2001/51/EC)[21] states that the directive is to be applied "without prejudice to the obligations resulting from the [1951 Refugees Convention]", which includes the prohibition of *refoulement*. The principle of *non-refoulement* also applies to border surveillance activities, regardless of whether they are carried out at sea or on land.[22] Moreover, EU law regulating Frontex's work contains detailed guidance on how to ensure respect for the principle of *non-refoulement,* particularly when operating at sea (see Annex).

15 See, for example, Goodwin-Gill, G. S. and McAdam, J. (2007), p. 208.
16 UNHCR (1997).
17 ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, paras. 43 and 52.
18 ECtHR, *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 February 2012.
19 Asylum Procedures Directive, Art. 8; Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, Art. 4.
20 Schengen Borders Code, Annex 6, point 1.1.4.3.
21 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187.
22 Schengen Borders Code, Art. 4; Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur Regulation), OJ L 295, Art. 2.

Under Article 8 of the Asylum Procedures Directive, border guards have a duty to provide information about the possibility to apply for international protection when there are indications that a person may wish to do so. Article 6 of the directive requires border guards to refer people who express the intention to apply for international protection to the asylum procedure by informing them where and how an application for international protection can be lodged.

## 1.3. Question of jurisdiction when operating outside a state's territory

According to international and European human rights law, protection against *refoulement* applies to all persons within the jurisdiction of a state. This is reflected in Article 2 (1) of the Convention against Torture, which obliges states to "prevent acts of torture in any territory under its jurisdiction". Although Article 2 (1) of the ICCPR stipulates that a state undertakes to respect and ensure the rights of the convention to all persons "present in its territory and subject to its jurisdiction", the UN HRC has clarified that the notions of 'territory' and 'jurisdiction' as invoked by Article 2 (1) are not cumulative requirements.[23] At the European level, Article 1 of the ECHR compels states to ensure the rights of the convention to anyone within their jurisdiction.

In contrast to international law instruments, the EU Charter of Fundamental Rights does not define its territorial scope, nor does it contain any jurisdictional clauses.[24] This is different from the EU Treaties, which do specify to which territories they apply (Article 52(2) of the TEU), even allowing for specific regimes as laid down in Article 355 of the TFEU.

The Charter applies to the EU and its Member States when they act within the scope of EU law. It is uncontested that the Charter – which has the same rank as the EU Treaties – applies to the EU's external relations and hence extraterritorially.[25] Article 21 (1) of the TEU indeed states that the "[t]he Union's action [...] *seeks to advance* in the wider world [...] the universality and indivisibility of human rights and fundamental freedoms". Article 3 (5) of the TEU further states that "[i]n its relations with the wider world, the Union shall uphold and *promote* its values" (all emphasis added). These values are listed in Article 2 of the TEU, and the EU's fundamental rights commitment is detailed in Article 6 of the TEU, which applies horizontally to all EU actions. Territoriality is therefore not a separate dimension when examining the Charter's applicability. Similarly, 'jurisdiction' as developed in international human rights law "is not a threshold requirement for the applicability of EU human rights law".[26] The only requirement for the Charter to apply to the EU or a Member State when they are acting extraterritorially is for them to be acting within the scope of EU law.

This background note focuses not only on the Charter, but also refers to European and international human rights law in a wider sense. This requires carefully examining issues of jurisdiction, including the exercise of control, in each of the following scenarios. However, the conclusions derived from an absence of control do not necessarily exclude responsibility under the Charter.

The function of jurisdiction in public international law generally differs from the specific function of jurisdiction in human rights law. Jurisdiction in the former is primarily about delimiting the exclusive competence of a state in respect to its own territory, precluding intervention in the territories of other sovereign powers. Jurisdiction in the latter is primarily about defining the scope of persons with respect to whom a state has human rights obligations.[27]

Both jurisdiction under public international law and human rights law is presumed to be exercised within a state's sovereign territory. The ECtHR explained this in its *Banković* admissibility decision, where it held that

*"Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".*[28]

This conclusion reflects the more general notion that each state has a primary obligation to respect, protect and fulfil the human rights of individuals located on its own territory. Inversely, extraterritorial human rights protection is considered 'exceptional' and needs special justification.

Exceptions to the general principle of territorial jurisdiction under public international law do not fully coincide with those under specific human rights law

23 UN, HRC (1986), para. 4; UN, HCR (2004), para. 10.
24 UN, GA, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. This convention does not have such a clause either (but key articles refer to 'jurisdiction').
25 CJEU, T-512/12, *Frente Polisario v. Council*, 10 December 2015.
26 Moreno Lax, V. and Costello, C. (2014), p. 1662.
27 Den Heijer, M. and Lawson, R. (2013), p. 163.
28 ECtHR, *Banković and Others v. Belgium and Others* [GC], No. 52207/99, 12 December 2001, para. 61; *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99, 8 July 2004, paras. 312-314; *Al Skeini and Others v. The United Kingdom* [GC], No. 52207/99, 7 July 2011, para. 131.

regimes.[29] Traditionally, extraterritorial human rights protection has been associated with either state agents operating on foreign soil – through conduct that directly affects a person's human rights[30] – or when military forces control (parts of) foreign territory.

In *Banković*, the ECtHR listed four non-exhaustive situations in which actions performed outside a state's territory may trigger jurisdiction within the meaning of Article 1 of the ECHR:

(i) extradition or expulsion cases;[31]

(ii) cases where either state authorities act abroad or their national actions produce extraterritorial effects;[32]

(iii) instances of (lawful or unlawful) military operation where the state exercises effective control of an area outside its national territory;[33]

(iv) cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.[34]

When EU Member States carry out border control activities outside their state territory, some challenges emerge. First, when they operate in third countries, two states usually cooperate in preventing individuals' departures and have concurrent jurisdiction over the affected subjects.[35] In practice it may be difficult to establish with sufficient clarity whether the EU Member State's conduct permits concluding that the person subject to *refoulement* was under its jurisdiction. Second, one may question whether the prohibition of *refoulement* applies at all. Individuals are indeed stopped before leaving the third country, i.e. a state that is neither a EU Member State nor a Schengen Associated Country, and are neither returned nor pushed back over a physical border. They would thus not cross any state boundary but be moved from one jurisdiction to another, similarly to detainees who are transferred by a foreign force operating in a third country to the authorities of that country.

It is arguable whether the term '*refoulement*' can be used in cases where persons at risk of harm do not physically cross an international border but move from one jurisdiction to another. If it were held that human rights law extends the interpretation of jurisdiction to include extraterritorial acts, it could be said that a state's obligation of *non-refoulement* is triggered not only when an individual, if returned, crosses a territorial border, but also when the person is moved from one jurisdiction to another. Therefore, it could be argued that *refoulement* not only occurs when a person is removed from one territory to another, but also when a state, while exercising jurisdiction over a person in a third country, hands that person over to the jurisdiction of another country.

The analogy of diplomatic asylum supports this view. When persons take refuge at diplomatic posts within their own countries, the protecting state is obliged to protect the refugees against *refoulement* and cannot remove and deliver them to the jurisdiction of the country of origin.[36] For the sake of simplicity – but without seeking to pre-empt further discussion on this matter – FRA also uses the term *refoulement* to refer to situations in which individuals are moved from one jurisdiction to another in the scenarios described in this report.

## 1.4. Indicators of jurisdiction

On the basis of relevant literature and case law, the following conditions can be identified as establishing a jurisdictional link between persons affected by external border controls and the state that authorises or carries out such controls:

- *de jure* control;
- *de facto* control over a territory or a person;
- the exercise of public powers.

Each of these indicators are detailed below.

### De jure *control*

When states exercise *de jure* control outside their own territory, individuals on that territory fall within their jurisdiction. '*De jure* control' refers to instances where jurisdiction is derived from a defined set of rules that have been agreed upon in advance by the state in question – through implicit or explicit consent.[37] In principle, in such cases, the question of jurisdiction can be dealt with in abstract terms and does not require a thorough fact-based assessment.

29 On extraterritorial jurisdiction under public international law, see Bernhardt, R. (1997), pp. 55-59; Bernhardt, R. (1995), pp. 337-343; Jennings, R. and Watts, A. (eds.) (2008), para. 137; Dupuy, P. M. (1998), p. 61; Brownlie, I. (1998), pp. 287, 301 and 312-314.
30 UN, Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, Adoption of views on 29 July 1981, para. 185.
31 ECtHR, *Banković and Others v. Belgium and Other*s [GC], No. 52207/99, 12 December 2001, para. 68.
32 *Ibid.*, para. 69.
33 *Ibid.*, para. 70.
34 *Ibid.*, para. 73.
35 Moreno Lax, V. (2008), p. 335.
36 Goodwin-Gill, G. S. and McAdam, J. (2007), p. 250 (quoting Lauterpacht, E. and Bethlehem, D. (2003)).
37 Milanovic, M. (2013).

In *Banković*, the ECtHR recognised that states exercise extraterritorial jurisdiction through activities performed abroad by their diplomatic or consular agents and on board craft and vessels registered in, or flying the flag of, that state. Those are typically cases of *de jure* control because "customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction by the relevant [s]tate".[38] With regard to the specific situation of a vessel operating on the high seas, Article 92 (1) of the UN Convention on the Law of the Sea explicitly provides for the exclusive jurisdiction of the state under whose flag the vessel sails.[39]

In the *Hirsi* case, the ECtHR applied this principle to a case brought by Somali and Eritrean migrants whose boat was intercepted on the high seas by an Italian military vessel, and who were then transferred onto that Italian ship and returned to Libya. The court ruled that "the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention".[40]

For purposes of Article 1 of the ECHR, taking migrants on board of a government ship establishes a jurisdictional link between the ship's flag state and the migrant, and thus triggers the state's human rights obligations. During the time that migrants are under a state's *de jure* control, the state bears the responsibility of protecting them against *refoulement*. In *Hirsi*, the ECtHR also clarified that a state cannot circumvent its jurisdiction by describing the interception of migrants on the high seas as a rescue operation.[41]

## De facto *control*

Whether a person falls within a state's jurisdiction is not only a question of law but also a question of fact.[42] In its General Comment No. 2, the UN Committee Against Torture (CAT) interprets the expression 'any territory under its jurisdiction' in Article 2 of the Convention against Torture as including "all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control". The CAT has further held that this covers "acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State party exercises factual or effective control".[43] With regard to the scope of application of the ECHR, the ECtHR has confirmed on several occasions that *de facto* control over persons or territories creates *de jure* responsibilities.[44]

*De facto* control over a foreign territory can trigger an EU Member State's responsibility when "as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory".[45] Effective control established by military action[46] is of limited relevance for contemporary border management practices. This is different in cases of effective control over individual persons.

The European Commission of Human Rights already examined the lawfulness of a German applicant's arrest by agents of the German government in France in 1989. It noted that a state's obligation – under Article 1 of the ECHR – to secure the rights guaranteed by the convention to everyone within its jurisdiction was

*"[n]ot limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad. Furthermore [...] authorized agents of a state not only remain under its jurisdiction when abroad, but bring any other person 'within the jurisdiction' of that state, to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of the state is engaged."*[47]

38 ECtHR, *Banković and Others v. Belgium and Other*s [GC], No. 52207/99, 12 December 2001, para. 73.

39 See also Permanent Court of International Justice, *The Case of the S.S. Lotus* (*France v. Turkey*), No. 10, 7 September 1927, para. 65 ("what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies").

40 ECtHR, *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 Februray 2012, para. 180; *Medvedyev and Others v. France,* No. 3394/03, 29 March 2010, para. 67; Den Heijer, M (2013), p. 271; Moreno Lax, V. (2012), p. 579.

41 ECtHR, *Hirsi Jamaa and others v. Italy,* No. 27765/09, 23 February 2012, para. 79.

42 Den Heijer, M. and Lawson, R. (2013), p. 164; Kritzman-Amir, T. and Spijkerboer, T. (2013), p. 14; Fisher-Lescano, A. *et al.* (2009), p. 275.

43 UN, Committee against Torture (CAT) (2008), para. 16. Recently, UN CAT re-affirmed this position in UN CAT (2014), para. 10.

44 ECtHR, *Öcalan v. Turke*y, No. 46221/99, 12 March 2003, para. 93, confirmed by *Öcalan v. Turke*y [GC], 12 May 2005; *Al-Saadoon and Mufhdi v. United Kingdom*, No. 61498/08, 2 March 2010; *Medvedyev and Others v. France*, No. 3394/03, 29 March 2010; *Al Skeini and Others v. United Kingdom* [GC], No. 52207/99, 7 July 2011; *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 February 2012.

45 ECtHR, *Loizidou v. Turkey,* No. 15318/89, 23 March 1995, para. 52; *Banković and Others v. Belgium and Other*s [GC], No. 52207/99, 12 December 2001, para. 70.

46 See e.g. ECtHR, *Al Jedda v. the United Kingdom,* No. 27021/08, 7 July 2011; *Hassan v. the United Kingdom,* No. 29750/09, 16 September 2014; *Jaloud v. the Netherlands,* No. 47708/08, 20 November 2014.

47 ECtHR, *Stocké v. Germany*, No. 11755/85, Commission Report adopted on 12 October 1989, para. 166. For a more detailed discussion of the evolution of the jurisdictional tests of control over territory and control over persons in the case law of the ECtHR, see Gondek, M. (2009).

The court repeated this position with respect to the arrest of a Turkish national – Abdullah *Öcalan* – by Turkish security forces in Kenya. In *Öcalan,* Turkey denied that it had jurisdiction under Article 1 of the ECHR because of the absence of control over any part of Kenya's territory. However, the court's Chamber and Grand Chamber found that despite of the lack of territorial control, the Turkish officials had exercised sufficient effective control over Öcalan to bring him within Turkey's jurisdiction.[48] Similarly, in *Issa*, the court held that, irrespective of control over foreign territory, a state may be held accountable "for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state".[49]

The former European Commission of Human Rights held in *Cyprus v. Turkey* that "authorized agents of a State, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but bring other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons, the responsibility of the State is engaged".[50]

The decisive criterion for extraterritorial human rights obligations is thus a state's acts, which must create a qualified relationship with the victim of the violation. This was already somewhat inherent in *Banković,* where the ECtHR ruled that "the essential question to be examined" is whether the applicants were, "as a result of the extraterritorial act, capable of falling within the jurisdiction of the respondent states".[51] The court was even more direct in *Al-Skeini*, stating that "what is decisive in such cases is the exercise of physical power and control over the person in question".[52] The UN HRC further confirmed that what matters is "not the place where the violation occurred, but rather [...] the relationship between the individual and the state in relation to the violation of any of the rights set forth in the Covenant, wherever they occurred".[53]

On the understanding that location is not decisive in establishing jurisdiction, but that jurisdiction is instead contingent upon the exercise of *de facto* control, it is irrelevant whether surveillance and patrol activities are carried out on the high seas or in the territorial waters of third countries. In cases of possible *de facto* control, the degree to which a state exercised full and effective control over the individual needs to be established – which is not necessary in cases where a state exercises *de jure* control (for example, through the conduct of its consular agents).

Moreover, *de facto* control over persons requires a certain level of physical constraint. This results when migrants are obstructed from continuing their journey, when state vessels use their strength and physical presence to push back smaller boats with migrants, or when force is used to prevent migrants from reaching the border.[54]

## Exercise of public powers

The exercise of public powers in a third country can also be an indicator to determine possible extraterritorial jurisdiction. When clarifying the concepts of 'territory' and 'jurisdiction' referred to in Article 2 (1) of the ICCPR, the UN HRC noted:

*"States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."*[55]

In *Banković*, the ECtHR first reaffirmed that "the exercise of extraterritorial jurisdiction by a Contracting State is exceptional". It then acknowledged that a state can exercise extraterritorial jurisdiction when "through the consent, invitation or acquiescence of the Government of [a] [foreign] territory, [the Contracting State] exercises all or some of the *public powers* normally to be exercised by that Government".[56] In *Al-Skeini*, the ECtHR said of the exercise of executive or judicial functions on the territory of another state:[57]

48 ECtHR, *Öcalan v. Turkey*, No. 46221/99, 12 March 2003, para. 93, confirmed by *Öcalan v. Turkey* [GC], 12 May 2005.
49 ECtHR, *Issa and Others v. Turkey*, No. 31821/96, 16 November 2004, para. 71.
50 ECtHR, *Cyprus v. Turkey*, Nos. 6780/74 6 and 6950/75, Commission Report adopted on 26 May 1975, paras. 136-7.
51 ECtHR, *Banković and Others v. Belgium and Others*, No. 52207/99, 12 December 2001, para. 54.
52 ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], No. 52207/99, 7 July 2011, para. 136.
53 UN, Human Rights Committee, *López Burgos v. Uruguay*, Communication No. 52/1979, Adoption of views on 29 July 1981, para. 12.1.
54 Fisher-Lescano, A. *et al.* (2009), p. 275.
55 UN, Human Rights Committee (2004), para. 10 (emphasis added).
56 ECtHR, *Banković and Others v. Belgium and Others*, No. 52207/99, 19 December 2001, para. 71 (emphasis added).
57 ECtHR, *Al Skeini and Others v. the United Kingdom*, No. 55721/07, 7 July 2011, para. 135. Building on the ECtHR jurisprudence, Hathaway and Gammeltoft-Hansen identify three conditions to be met for the exercise of public powers to establish jurisdiction: the state must act in accordance with a treaty or other agreement (e.g. a Memorandum of Understanding), the public power is normally exercised by the host government, and the breach must be attributable to the acting state (Hathaway, J. C., and Gammeltoft-Hansen, T. (2014), pp. 42-44).

*"The Court [recognises] the exercise of extraterritorial jurisdiction by a Contracting State when, [...] in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, [in such a case] the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State."*

## 1.5. State responsibility for a breach of *non-refoulement*

State responsibility for breaches of *non-refoulement* can emerge in two ways: via independent state responsibility and via 'derived responsibility' flowing from an international wrongful act committed by a third country. Aside from being responsible for their own breaches of *non-refoulement*, EU Member States can, in principle, also be held accountable for aiding and assisting, directing, or coercing such violations by a third country.

Article 2 of the Articles on State Responsibility for Internationally Wrongful Acts – drawn up by the International Law Commission – identifies two conditions for state responsibility to arise: the conduct must be attributable to the state and it must constitute a breach of an international obligation.[58] These two elements are distinct but interconnected. To identify the precise act or omission that can be imputed to a state, one has to examine the scope and content of the international obligation allegedly breached.

Articles 12–15 (Chapter II) of the Articles on State Responsibility for Internationally Wrongful Acts provide guidance on ascertaining when an act or omission or a series of acts or omissions are to be considered state conduct. Under these articles, it is generally understood that the only conduct imputable to a state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. agents of the state. The conduct of private persons is *a priori* not attributable to the state.[59]

Once specific conduct is attributed to a state, the next question is under which conditions that particular conduct constitutes a breach of the state's international obligations. With regard to *non-refoulement,* this means that once an act or omission that affects migrants or refugees is attributed to a state, one must look into that state's specific obligations deriving from the 1951 Refugee Convention, international human rights law, the ECHR, the EU Charter of Fundamental Rights, and relevant secondary EU law.

With respect to the prohibition of *refoulement* derived from Article 3 of the ECHR, a state's responsibility may depend on the knowledge of its relevant organs or agents: The obligation to protect migrants and refugees from *refoulement* is triggered if the authorities of the returning state know, or should have known, that migrants are at risk in the state of disembarkation. This would be the case if that state mistreats migrants, does not have proper asylum procedures in place, or engages in forced returns without due process.[60] In *Hirsi*, the ECtHR explained that the existence of a risk of ill-treatment in the third country "must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal".[61] It arises independently of any specific claims brought by the intercepted immigrants.[62]

Articles 16, 17 and 18 of the Articles on State Responsibility for Internationally Wrongful Acts outline circumstances under which a state may assume responsibility for the internationally wrongful acts of another – known as 'derived responsibility'. These constitute exceptions to the general principle of independent state responsibility, and the threshold for state responsibility is therefore high. It is necessary to establish a close connection between the state's act of assisting (Article 16), directing (Article 17) or coercing (Article 18) another state, and the other state's internationally wrongful act.[63]

Extraterritorial border management activities could potentially fall under the scope of Article 16. It provides that a state is responsible for "aid[ing] or assist[ing] another State in the commission of an internationally wrongful act" if three requirements are fulfilled. First, the relevant state organ or agency providing aid or assistance must have knowledge of the circumstances making the conduct of the assisted state internationally wrongful. Second, the aid or assistance must be provided to facilitate the commission of that conduct, which must in turn indeed result in wrongful conduct. Third, the conduct must be such that it would have been wrongful even if it had been committed by the assisting state itself.[64]

58 International Law Commission (ILC) (2001a). The UN General Assembly took note of the articles and attached the ILC report to UN, GA (2002), *Resolution adopted by the General Assembly: Responsibility of States for internationally wrongful acts*, A/RES/56/83, 28 January 2002.
59 ILC (2001b), Comments on Art. 12-15.
60 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 131; *MSS v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 358.
61 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 121.
62 *Ibid.*, para. 133.
63 ILC (2001b), Comment on Art. 16, para. 8.
64 *Ibid.*, Comment on Art. 16, para. 3. See also International Court of Justice (ICJ), *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* No. 91, 26 February 2007, para. 432.

Academics have suggested that "the emerging law on liability for aiding or assisting another state to breach its duties under international law has enormous potential to close the accountability gaps that the new generation of *non-entrée* practices seek to exploit", but also acknowledged that this is not settled law or practice.[65]

## 1.6. Prohibition of collective expulsion

In addition to entailing possible violations of *non-refoulement*, some of the scenarios outlined in this report would also possibly violate the prohibition on collective expulsion enshrined in Article 4 of Protocol 4 to the ECHR and in Article 19 of the EU Charter of Fundamental Rights. The purpose of these provisions is to prevent states from removing migrants without examining their personal circumstances or giving them access to an effective remedy to contest their removal. In that sense, any form of removal or interception activity that prevents entry may constitute collective expulsion if it is not based on an individual decision and if effective remedies against the decision are unavailable. Such measures may also violate the right to an effective remedy enshrined in Article 47 of the Charter.

When assessing the collective character of an expulsion, the ECtHR examines, for instance, whether the removal orders contain references to the personal situation of the persons concerned and whether individual interviews were conducted before the orders were issued.[66] The mere existence of a formal court decision or a prior identification procedure with respect to each of the persons concerned does not rule out the possibility of a collective expulsion.[67]

The ECtHR has made clear that the prohibition of collective removal also applies on the high seas. In *Hirsi*, migrants were intercepted on the high seas and transferred to Libya. The court found that this was carried out without any form of examination of each individual situation, and therefore constituted collective expulsion in breach of Article 4 of Protocol 4 to the ECHR.[68]

65 Hathaway, J. C. and Gammeltoft-Hansen, T. (2014), p. 63.

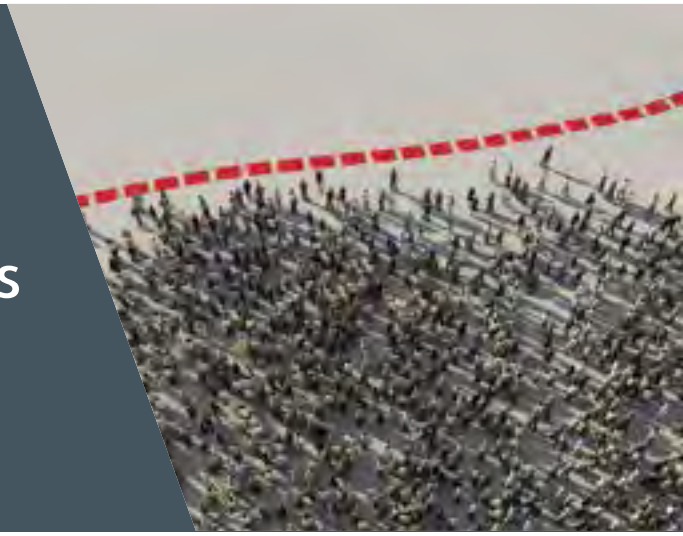
66 ECtHR, *Khlaifia and Others v. Italy*, No. 16483/12, 1 September 2015, para. 156 [pending with GC after referral on 1 February 2016].

67 ECtHR, *Georgia v. Russia (I)* [GC], No. 13255/07, 3 July 2014, para. 175.

68 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 185.

# PART II: INTRODUCTION TO THE SCENARIOS

# 2 Introduction to the scenarios



In the past decades, the EU has increased efforts to prevent immigrants from irregularly crossing its external borders. To increase efficiency and cost-effectiveness, the EU developed the concept of Integrated Border Management (IBM), on the basis of which control activities at the external borders were complemented with measures taken in third countries and cooperation with neighbouring states.

The principle of *non-refoulement* applies as soon as a person enters a state's territory, is at its border, or comes within its jurisdiction. What are the implications for states' obligations under the principle of *non-refoulement* if border controls no longer take place at the border itself, but are externalised? The externalisation of border controls has opened up a range of issues calling for more legal certainty.

This report presents and discusses different scenarios involving situations that raise questions of state obligations regarding *non-refoulement*. The scenarios fall into three categories:

1. activities carried out by EU Member States within third countries and on board of vessels sailing under the flag of third countries;

2. activities carried out by EU Member States on the high seas;

3. activities carried out by EU Member States at the EU's external borders.

Each scenario follows the same structure. After briefly introducing the scenario, the applicable legal framework is outlined, followed by a description of current practices. It is then considered whether or not a state exercises jurisdiction over the people affected. Grey areas are identified as such. The report presents both arguments that support and arguments that speak against finding that jurisdiction is exercised in a particular scenario. A discussion of circumstances that create risks of *non-refoulement* violations, and what should be done to prevent such violations, follows. Again, arguments for and against finding that violations have occurred are given.

## 2.1. Principle of *non-refoulement* and operations in third countries

The scenarios presented in this section involve remote border control measures carried out in a third country – meaning a country which is neither an EU Member State nor a Schengen Associated Country – to prevent people – other than citizens of such third country – from irregularly entering the EU or the Schengen area. The section focuses on whether an EU Member State may be held accountable for violations of the principle of *non-refoulement* when it exercises border controls within a third country – a complicated question due to the concurrent exercise of jurisdiction by the host state and the authority of the EU Member State seeking to preserve its borders abroad. In moving border control to third countries, Immigration Liaison Officers and document experts posted abroad play an important role, as do bilateral agreements between the third country and the EU Member State(s).

The following scenarios are discussed:

- **Scenario 1 – At third-country airports**
  Member States post document experts at third-country airports to assist airlines in checking passengers before embarkation. These experts

instruct and provide assistance or guidance to airlines on whether or not individual passengers should be allowed to board.

- **Scenario 2 – On third-country patrolling vessels**
  In this scenario, representatives of EU Member States are present on a third-country vessel patrolling the sea. They have no law enforcement powers, but advise third-country vessel captains to prevent boats carrying migrants from reaching the high seas or the territorial waters of an EU Member State – for example, by stopping their boats, forcing them to turn back or by conducting them back to the third-country shore.

- **Scenario 3 – In a third-country territorial sea**
  EU Member State vessels patrol the territorial waters of a third country based on an agreement with that third country (or third countries). The vessels prevent migrants from reaching the high seas or the territorial waters of EU Member States – for example, by stopping their boats, forcing them to turn back, or by conducting the migrants back to the third-country shore.

- **Scenario 4 – Capacity-building activities in third countries**
  EU Member State officials carry out capacity-building activities to assist third countries with border management, including to prevent people from travelling to the EU irregularly. Third-country border guards carry out the border surveillance itself, but also use equipment, advice, guidance, intelligence and/or training provided by EU Member State representatives.

In all four scenarios, the question will focus on the circumstances under which the conduct of agents of EU Member States triggers an obligation to protect people from *non-refoulement*.

## Scenario 1 – At third-country airports

Member States post document experts at third-country airports to assist airlines in checking passengers before embarkation. These experts instruct and provide assistance or guidance to airlines on whether or not individual passengers should be allowed to board.

### Background

One form of externalising border control is the deployment of document experts in key third countries. This practice has increased over the past two decades.[69]

The experts are often referred to as immigration liaison officers (ILOs). Their mandate is regulated by national law and through agreements with third countries.

To enhance cooperation among immigration liaison officers posted by EU Member States, the EU adopted Regulation (EC) No. 377/2004,[70] later amended by Regulation (EU) No. 493/2011.[71] It sets out the obligation to establish forms of cooperation among immigration liaison officers posted by EU Member States to the same third country. A Common Manual has also been drafted to assist the liaison officers with their information gathering, reporting and cooperation tasks, and explain their role in facilitating identification for return purposes.[72]

As for pre-entry clearance by document experts posted abroad, the International Air Transport Association (IATA) issued a 'Code of Conduct for Immigration Liaison Officers' in October 2002.[73] It promotes consistency of approach and cooperation. Although non-binding, the code offers some basic rules and suggestions. It explicitly mentions that the immigration liaison officers aim 'to assist airlines in establishing whether individual passengers who appear to be improperly documented are nevertheless *bona fide* and may be carried without incurring financial charges under carrier legislation'. It emphasises the limited power of the immigration liaison officers, namely that they serve to advise airline staff but lack the power to oblige airline companies to follow their advice. Paragraph 2.3 indicates what should be done when a passenger without the appropriate documents asks for asylum: if immigration liaison officers "receive requests for asylum, applicants should be directed to the office of the United Nations High Commissioner for Refugees, to the appropriate diplomatic missions(s), or to an appropriate local NGO". As such, the code provides for a practical execution of the right to asylum.

### Practice

Some EU Member States have deployed document experts to third countries, entrusting them with pre-entry clearance tasks at airports. In practice, they assist and guide airlines and/or the authorities of the third country in which they are posted on whether individual passengers should be allowed to board a flight. Their operational involvement may vary. Some deployed experts systematically check the papers of

69 See e.g. Nessel, L. A. (2009), p. 698.

70 Council Regulation (EC) No. 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64 (Regulation (EC) No. 377/2004).

71 Regulation (EU) No. 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No. 377/2004 on the creation of an immigration liaison officers network, OJ L 141 (Regulation (EU) No. 493/2011).

72 Council of the European Union (2006b).

73 The IATA/Control Authorities Working Group (IATA/CAWG) (2002).

all passengers heading to their own Member State; in other cases, checks on individual passengers are carried out on a needs basis or upon request by the airline. Typically, the document expert's advice on whether to allow or refuse embarkation is not formally binding on the airline as the experts lack the legal authority to compel airlines to deny boarding.

The United Kingdom posted 56 immigration liaison officers in overseas countries as early as 2009 to prevent irregular migration to the country.[74] The strategic director for border control had stated that pre-entry clearance operations are the most effective way to combat irregular migration.[75] Dutch document experts also support and advise airlines on the validity of their passengers' travel documents, but only have an advisory role; the final decision on whether to allow a passenger to board lies with the airlines.[76] Similarly, Australian document experts (called Air Liaison Officers) intercept passengers who do not possess the necessary documents but are attempting to travel to Australia. They provide the following boarding advice to airlines about passengers who want to embark on a plane: 'Ok to board' or 'Do not board'.[77]

Both states and the IATA code of conduct stress the limited power of immigration liaison officers or document experts, noting that their role and function are limited to assisting airlines or private companies and that they have no law enforcement powers. However, the advice they give must be considered against the backdrop of carrier liability. This makes private companies – such as airlines – responsible for ensuring that passengers without proper documentation are not transported. It is crucial, therefore, to clarify the link between the deployment of ILOs or document experts abroad and carrier liability.

## Relation with carrier sanctions

Pursuant to Article 26 of the Convention Implementing the Schengen Agreement and the Carrier Sanctions Directive (2001/51/EC), Member States must oblige carriers to return at their cost non-EU nationals who have been refused entry. Carriers must ensure that non-EU nationals they carry and who intend to enter the territories of EU Member States possess the necessary travel documents, including, where appropriate, visas. If carriers do not comply with this obligation, financial penalties will be imposed. Pursuant to Article 4 (2) of the directive, financial penalties do not apply when the non-EU national is seeking international protection.

According to Directive 2004/82/EC on the obligation of carriers to communicate passenger data,[78] air carriers are also required to communicate to the affected EU Member State information concerning their passengers travelling to a EU border crossing point. This information is supplied to improve border control and to combat irregular immigration more effectively. Shortly before an aircraft lands in an airport in the EU, carriers are required to transmit the passengers' nationalities, names and dates of birth, the numbers and types of travel documents used, the border crossing point of entry into the EU, the departure and arrival times of the transportation, and the total number of passengers carried.

In light of the financial penalties imposed on carriers for bringing undocumented or ill-documented passengers to the territory of an EU Member State, it is questionable whether it can be reasonably said that deployed document experts merely give 'advice'. After all, if a carrier ignores the expert's negative advice, it may be liable for penalties and bears the full responsibility for returning the migrant concerned.[79]

## Exercise of control

In this scenario, a person is prevented from seeking protection from ill-treatment following the advice of a document expert posted by a EU Member State at a third-country airport. The question is whether this could amount to *refoulement* and thus violates the principle of *non-refoulement* under human rights law. To determine this, it is first necessary to establish whether the document expert exercises control over passengers boarding an airplane. The first element to examine is the relationship with the airline company and with the host state. The division of responsibility between document experts, airline companies and host states

74 In a case involving a pre-entry clearance procedure operated by British immigration officials at Prague Airport in the Czech Republic, the UK Court of Appeal determined that such a procedure, aimed principally at stemming the flow of asylum seekers from the Czech Republic, was not in breach of the UK's obligations under Art. 33(1) of the Convention, see: United Kingdom, Court of Appeal, *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666, 20 May 2003, para. 310. The judgment was later upheld by the British House of Lords, see: United Kingdom, House of Lords, *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, 9 December 2004.

75 Nessel, L. A. (2009), p. 647.

76 Scholten, S. and Minderhoud, P.E. (2008), p. 137; The Netherlands, Parliamentary Reports II 1999-2000, 26 732, No. 7 (*Kamerstukken II 1999-20000, 26 732*, nr. 7), p. 90; Advisory Committee on Migration Affairs (Adviescommissie voor Vreemdelingenzaken) (2003), p. 68.

77 Taylor, S. (2008).

78 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261 (Directive 2004/82/EC).

79 See, for example, Taylor, S. (2008).

varies. Typically, agreements between states based on which document experts are stationed are not publicly available. Whether document experts exercise control depends on their role and responsibilities.

*Arguments against finding that document experts exercise control*

Document experts posted abroad do not have a mandate to decide whether or not a person can embark, but merely advise carriers on allowing or refusing passengers to board. Since the decision to allow or refuse boarding is taken by the carrier, the experts do not exercise effective control over the persons concerned.

Moreover, document experts posted abroad can only operate within a third country on the basis of a bilateral agreement. They are not allowed to operate independently in the host state, and execute their functions under the authority of the host state's officials. If violations occur, the host state bears responsibility.

*Arguments that support finding that document experts exercise control*

Even if document experts do not hold decision-making powers, their advice to airline companies is backed up by the possibility of sanctions and of having to bear the costs of returning passengers who are not admitted into the EU Member State. Considering the possible financial consequences for carriers, it is highly unlikely that they would ignore a document expert's advice not to allow a passenger to board. Carriers are likely to comply with a document expert's negative advice as long as avoiding penalties is economically more beneficial than letting a migrant travel and apply for asylum. In such cases, the document expert's power could be said to amount to factual control over passengers. The passenger checks conducted before boarding prevent a migrant from entering a state's territory. The exercise of factual control that results in barring migrants' access to EU Member States' territory creates legal responsibilities. This implies that the document expert's home state is responsible if violations of *non-refoulement* occur.

That document experts act under the host state's supervision does not unburden the sending state of its responsibility. A state cannot avoid responsibility, and hence the obligation to comply with *non-refoulement*, by referring to a bilateral agreement.

Immigration liaison officers or document experts are often accorded diplomatic status, as recommended by IATA.[80] When acting abroad, diplomats bring persons within the jurisdiction of their state if they exercise authority over them. If the sending state, through its document experts, exercises jurisdiction and conducts an internationally wrongful act, the sending state is accountable in line with Article 2 of the Articles on the Responsibilities of States for Internationally Wrongful Acts, considered to reflect customary law.[81]

## Applicability of *non-refoulement*

If it is assumed that document experts do not exercise control, either because the carrier acts independently or because the third country bears sole responsibility, no Member State responsibility is triggered. This is because the person is considered not to have been transferred to another territory or to another jurisdiction, and to have remained under the control and jurisdiction of the host state.

However, if it is assumed that document experts do exercise control, it needs to be determined whether preventing people from boarding a plane can amount to *non-refoulement*, given that the individual concerned remains within the same third country. On the understanding that under human rights law, the exercise of control brings people within state jurisdiction, and that transfer from one jurisdiction to another is bound by the principle of *non-refoulement*, states may become responsible. Article 4 (2) of the Carrier Sanctions Directive (2001/51/EC) could be used to support this view, as it explicitly states that penalties imposed on carriers should be "without prejudice to Member States' obligations in cases where a third-country national seeks international protection".

Document experts advising and guiding carriers are thus obliged to comply with the prohibition of *refoulement* when advising on embarkations. The exercise of control does not automatically imply a violation of *non-refoulement*. A violation only occurs if the document expert knows, or should have known, that the passenger who is not permitted to board is contained within a state – either the third country or a state of onward removal – in which he or she is exposed to serious harm. If this knowledge is or should have been available to the document expert, then a protective duty arises, irrespective of the specific claims brought by the intercepted migrant. Protection from *refoulement* is thus contingent upon the person's treatment in the host country (or the country to which the person is transferred), whether proper asylum procedures are in place, and to whom the intercepted migrant is handed over after being refused boarding (e.g. a UNHCR office or reliable immigration office).

80 IATA/CAWG (2002), point 3; Block, L. (2010).

81 UN (2012), foreword and p. 1.

## Scenario 2 – On third-country patrolling vessels

Representatives of EU Member States are present on a third-country vessel patrolling the sea. They have no law enforcement powers, but they advise third-country vessel captains to prevent boats carrying migrants from reaching the high seas or the territorial waters of an EU Member State – for example, by stopping their boats, forcing them to turn back or by conducting them back to the third-country shore.

### Background

One way to reduce the number of irregular migrants travelling by sea is to cooperate with third countries from which migrants depart. This cooperation can take various forms. In this section's scenario, a representative of an EU Member State is present on a third-country patrolling vessel that is tasked with patrolling movement on the high seas or towards the EU's territorial waters. The aim is to stop boats carrying migrants, and force migrants and asylum seekers to turn back or accompany them back to a third-country shore. The EU Member State representative does not have law enforcement powers but advises the third-country vessel's captain and crew. Patrols occur either in the third-country's territorial waters or on the high seas. This scenario falls under the first group of situations, i.e. operations in third countries, as states exercise jurisdiction on vessels sailing under their flag, including when they are outside territorial waters.

People heading for the EU by sea frequently rely on smugglers. This justifies international cooperation to combat international organised crime. The Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime indeed promotes, in Article 7, cooperation among States Parties to prevent and combat smuggling, while protecting the rights of the migrants concerned. Article 19 stipulates that the protocol's provisions are not to affect rights under the 1951 Refugee Convention and the principle of *non-refoulement*.[82]

A number of African coastal countries have criminalised irregular departure from their countries. In Algeria, Egypt, Libya, Morocco, Tunisia and Turkey, leaving the country irregularly is punished with a financial fine and/or imprisonment.[83]

### Practice

The activities outlined in this specific scenario – in which an EU Member State representative is posted on a third state vessel – were practiced by Italy in 2010.[84] The Italian representative facilitated the coordination of surveillance and rescue operations.

A somewhat different scenario would occur if the representative of an EU Member State present on a third-country vessel were to function purely as observer and silently witnessed human rights violations, but did not intervene.

### Exercise of control

The allocation of responsibility for possible violations of the principle of *non-refoulement* is complicated by the presence of officials of two different states. At present, there is no case law on this subject. On the basis of legal analysis, different and competing views are possible.

*Arguments against finding that EU Member States' representatives exercise control*

On the high seas and in light of flag sovereignty, a patrolling vessel flying the flag of the third coastal state is under the jurisdiction of that state. If the captain or crew of the vessel prevent migrants from continuing their passage towards Europe – either by stopping them, forcing them to turn back, or accompanying them back – the third country is fully responsible for the measures taken.

Another argument might be that the third-country patrolling vessel is controlling its own borders and is not aiming to implement the EU's immigration policy. The interception of people on the high seas or contiguous zone by a third-country vessel enforces the third-country immigration laws prohibiting their nationals or other people from leaving the country without prior authorisation.[85] EU Member States cannot be held accountable for that.

Finally, when patrols are carried out in the territorial waters of a third state, that third country exercises jurisdiction over its own territorial waters. Therefore, the EU Member State is fully exempted from responsibility.

82 See also UNHCR (2011).
83 FRA (2013), p. 43
84 *Ibid.*, p. 46.
85 For an overview of penalties set by relevant third countries for leaving the country in an irregular manner, see FRA (2013), p. 43.

*Arguments that support finding that EU Member States' representatives exercise control*

Whether or not an EU Member State that posts a representative on a third-country patrolling vessel bears responsibility for possible human rights violations depends mainly on the tasks and actions accorded to the representative. For example, if the representative is a mere observer who is simply present, it would be difficult to argue in favour of jurisdiction and shared responsibility. But if the representative's role is broader, things may be different. For example, they could share information about the location of boats carrying migrants, give advice on where and how to disembark the people concerned, or actively assist the host vessel in preventing migrants from entering an EU Member State's territorial waters. This could amount to exercising control and hence would trigger the EU Member State's obligations. Whenever a state exercises control – and hence jurisdiction – it is bound to respect the principle of *non-refoulement* under the ECHR and – if implementing EU law – the Charter of Fundamental Rights. That the vessel upon which the EU Member State representative is present flies the flag of the third country, or patrols in the third country's territorial waters, does not alter the EU Member State's responsibility. A state cannot escape its human rights obligations by referring to another state's jurisdiction or to a bilateral agreement between them.

Furthermore, that the third-country patrolling vessel is enforcing its own immigration laws when intercepting migrants at sea does not serve as an argument against the EU Member State's responsibility. Under certain circumstances, it might signal that the EU Member State concerned is associated in the violation of Article 12 of the ICCPR, which enshrines everyone's right to leave a country, including their own.[86] Moreover, such activities could amount to aiding and assisting which, under the conditions mentioned in Section 2.2, could be considered to trigger jurisdiction.[87]

### Applicability of *non-refoulement*

If the first view is adopted – namely that the EU representative has no control and that the third country bears exclusive responsibility – the EU Member State cannot be found to be in violation of *non-refoulement*.

If the second view is adopted, the specified scenario could constitute a breach of *non-refoulement* if the patrol vessel is the vessel of a state that is known, or should have been known, not to have an effective asylum procedure, to ill-treat migrants, or to return them to countries in which they are at risk of ill-treatment (indirect *refoulement*).

Based on Article 2 of the Articles on State Responsibility for Internationally Wrongful Acts, states are liable for both actions and omissions. Thus the above analysis on acts of EU Member State representatives on board of third-country vessels could equally apply to situations in which the representative had a legal obligation to intervene, but did not do so.

## Scenario 3 – In a third-country territorial sea

EU Member State vessels patrol the territorial waters of a third country based on an agreement with that third country (or third countries). The vessels prevent migrants from reaching the high seas or territorial waters of EU Member States – for example, by stopping their boats, forcing them to turn back, or by conducting the migrants back to the third-country shore.

### Background

Third-country coastal states sometimes do not have the means and equipment for maritime surveillance. To strengthen maritime border management, EU Member States and third-country coastal states may mutually agree that the former assist in the patrolling and surveillance of the latter's territorial waters. This may take place within the framework of Article 7 of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime. Spain has concluded agreements with Senegal and with Mauritania, for example.[88]

The commander of the EU vessel is responsible for what happens on the vessel, while the coastal state remains responsible for controlling its territorial waters. The EU Member States do not have the authority to control a third country's borders as, in the absence of an agreement to that effect, this would be an infringement of state sovereignty. The commander of the vessel and its personnel operate under the authority and jurisdiction of the third country whose territorial waters they are patrolling. To facilitate this, officials from the third country are usually present on the vessel.[89]

EU patrolling vessels typically have no mandate to stop or give orders to other vessels in the territorial waters of a third country. Their mandate depends on the scope

86 Guild, E. and Monnet, J. (2014); Carrera, S. and Guild, E. (2014), p. 11; Den Heijer, M (2012), p. 246-249.
87 See also Hathaway, J. C. and Gammeltoft-Hansen, T. (2014) p. 56.
88 Garcia Andrade, P. (2010).
89 *Ibid.*, p. 320.

of the authorisation given by the third country and agreed bilaterally, mostly through arrangements that are not publicly available.

## Practice

This particular issue was at stake in the *Marine 1* case.[90] Although it started as a rescue operation on the high seas, the Spanish authorities subsequently towed the *Marine 1* vessel carrying 369 migrants to the Mauritanian shore. The migrants were not disembarked; instead, the vessel was anchored off the Mauritania coast for eight days. The Spanish Civil Guard personnel took control over the vessel; migrants were not allowed to leave the vessel, minimal food and medical care was provided, and contact with NGOs was restricted. The case was brought before the CAT, which concluded that Spain had exercised jurisdiction because it maintained (*de facto*) control over the persons on board the *Marine 1*, even if the events took place in a third country's territorial waters. However, it also dismissed the case based on a lack of *locus standi*, because the claimant was not duly authorised to act on behalf of the victims.

EU Member State vessels patrolling a third country's territorial sea may carry on board a host country officer, who is authorised under national law to stop a boat or ship, or to board the ship to undertake necessary immigration, custom or other relevant inspections or checks.[91] The question is whether an EU Member State can circumvent liability by allowing a coastal state representative on the vessel to make formal decisions and issue orders.

## Exercise of control

*Arguments against finding that Member States exercise control*

When EU Member State vessels patrol the territorial waters of third countries, issues may arise regarding who exercises jurisdiction. Two situations are conceivable: either intercepted migrants are taken on board the Member State vessel, or the Member State vessel stops or turns back the boat carrying migrants upon instruction of the third-country official. As long as people are not taken on board the EU Member State vessel, no question of jurisdiction arises. Unless otherwise provided in bilateral agreements, neither the commander nor the personnel are allowed to stop or inspect other vessels sailing third countries' territorial waters. If a third-country representative is present on the vessel and enforces its national migration policies, then the third-country official is responsible. Since the Member State representatives are acting under a third country's authority, they cannot be held accountable because their actions and operations fall within the jurisdiction of the host state.

*Arguments that support finding that Member States exercise control*

In general, the commander of the vessel exercises jurisdiction over the crew and all other persons on the vessel. What happens on a vessel falls within the jurisdiction of the flag state, even if it is patrolling in the territorial waters of a third country. If the commander exercises control over persons on board of the vessel, the commander has jurisdiction over them. If migrants are intercepted and taken on board a Member State vessel, they come within the jurisdiction of that Member State.

If a Member State vessel diverts a migrant boat that is stopped in the territorial waters and tows or accompanies it back to the third-country shore, the EU Member State is not exempted from its human rights obligations. If the commander or the EU Member State's personnel instruct the boat to go back, they exercise control and, thus, jurisdiction. On the other hand, if the third-country official present on the EU Member State vessel gives the instruction, determining who is actually exercising control is more complicated.

Some scholars contend that human rights violations committed by third-country representatives in joint operations with EU Member States – or while on board Member State vessels or aircraft – trigger the EU Member State's jurisdiction, even if the Member State's authorities operate under the third country's control.[92] General international human rights law obligations cannot be circumvented by operating under foreign authority. Such situations can be subject to joint or shared jurisdiction by both the host and the EU Member State.[93]

In addition, if the third country's authorities violate human rights and the EU Member State's authorities fail to stop these violations when having a legal obligation to do so, the latter becomes co-responsible. State liability can result from non-action under Article 2 of the Articles on State Responsibility for Internationally Wrongful Acts, which provides that an internationally wrongful act can consist of either an action or an omission.[94]

90 UN, CAT, *J.H.A. v. Spain (Marine I case)*, CAT/C/41/D/323/2007, 21 November 2008.
91 FRA (2013), p. 45.
92 Garcia Andrade, P. (2010), pp. 221-222;. Spijkerboer, T. (2007), pp. 127-139, Den Heijer, M (2012), pp. 242-246.
93 Hathaway, J. C. and Gammeltoft-Hansen, T. (2014), pp. 47-52.
94 *Ibid.*, pp. 56-57.

### Applicability of *non-refoulement*

*Arguments against finding Member States responsible for* non-refoulement

In principle, EU Member States' patrolling vessels have no jurisdiction to stop other vessels in third-country territorial waters or to interdict migrants who want to leave the third state. This can only happen with the agreement of the third state, but such actions would then be undertaken under the third-country official's authority.

The EU Member State's intervention is a form of cooperation with states that lack the necessary resources. It is carried out under the duty set forth in Article 7 of the UN Protocol against the Smuggling of Migrants.

*Arguments that support finding Member States responsible for* non-refoulement

EU Member State representatives maintain their obligations under human rights law even when they operate on a vessel deployed to a third country. If they know, or should have known, that the intercepted migrants risk being ill-treated once sent back to the third country and/or handed over to the third-country authorities, this would be a violation of *non-refoulement*. Such a risk can consist of the absence of a well-functioning asylum system in the third country, the risk of ill-treatment in the third country or the risk of onward removal.[95] The EU Member State authorities on the vessel need to be aware of the situation in the host country and need to assess the risks the intercepted people face in the host country.

The same conclusion would apply if an EU Member State vessel were to escort migrants from a third country's territorial waters to its mainland.

## Scenario 4 – Capacity-building activities in third countries

EU Member State officials carry out capacity-building activities to assist third countries with border management, including to prevent people from travelling to the EU irregularly. Third-country border guards carry out the border surveillance itself, but also use equipment, advice, guidance, intelligence and/or training provided by EU Member State representatives.

### Background

This scenario responds to the general idea that an overall migration policy needs to include measures to address the root causes of migration and the capacity of transit countries to deal with the challenges posed by irregular migration.

Support and assistance to third countries is an integral part of the EU's Global Approach to Migration and Mobility (GAMM), the overarching framework of the EU's external migration policy since 2005, revised in 2011.[96] The framework defines how the EU conducts its policy dialogues and cooperation with non-EU countries. The areas of priority are: better organising legal migration, preventing and combatting irregular migration, maximising the development impact of migration and mobility, and promoting international protection. Respect for human rights is a cross-cutting priority for this policy framework.[97]

### Practice

The Commission communication on the EU Migration Agenda[98] proposes immediate actions through the European External Action Service. Capacity-building activities, such as training of border guards or provision of technical equipment, take place both on a bilateral level – between EU Member States and third countries – and through EU agencies such as Frontex and the European Asylum Support Office (EASO). There are many different levels of cooperation. Border management activities have different levels of intensity and consequently different levels of impact on *non-refoulement*. The common denominator of all these activities is that they aim to enhance the capacity of third countries to manage their borders, possibly while indirectly reducing irregular immigration to the EU.

### Exercise of control

EU Member States donate patrol vessels and equipment, and provide training on tactics, risk assessment or document checks, among others. Whether EU Member States exercise control over migrants by giving third countries financial, material or advisory support depends on the level of involvement of EU Member States' representatives.

95 Den Heijer, M. (2012), pp. 243-244.

96 European Commission (2011).
97 *Ibid.*, p. 6.
98 European Commission (2015b).

*Arguments against finding that Member States exercise control*

Giving material (e.g. equipment) or financial support to third countries with a view to managing immigration flows does not amount to effectively exercising control on the part of EU Member States. Den Heijer, for example, concludes that merely financing reception and status determination activities is highly unlikely to trigger the financing party's international responsibility. This applies equally to the financing of border guard trainings or other capacity-building activities. Human rights violations committed by third-country authorities, even when using equipment donated by an EU Member State, would not normally be attributable to an EU Member State.[99]

*Arguments that support finding that Member States exercise control*

The view that the role of a donor fully exempts EU Member States from human rights obligations does not sit easily with the EU's self-proclaimed status as a human rights polity, particularly if the aim of capacity building in third countries is to prevent migration flows to Europe. Article 2 of the Treaty on the European Union provides that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Scholars have characterised external support activities as an export of responsibilities that contradicts the EU's commitment, expressed in the Lisbon Treaty, to protect human rights.[100]

Whether the assistance given amounts to *de facto* or *de jure* effective control depends on the specific factual situation. This will have to take into account the actual involvement and the leverage exercised by the EU Member State, and whether it makes development funding or trade to the third country dependent on the implementation of a border management policy.

Supporting external migration management by third countries may give rise to human rights issues, if EU Member States enter into cooperation with third countries that they know, or should have known, to have a deplorable reputation in terms of human rights. If – as a direct consequence of EU Member State action – a migrant is to remain under the jurisdiction of such a regime, this might violate their right to leave a country and may raise issues under Article 3 of the ECHR.

Hathaway and Gammeltoft-Hansen have taken a more progressive approach towards the 'cooperation' on migration management between states. Building on their theory of the exercise of public powers, such cooperation would fall within the activities of aiding and assisting which, under the conditions mentioned in Section 2.2, can be considered to trigger jurisdiction.[101]

## Applicability of *non-refoulement*

Whether and when the principle of *non-refoulement* is triggered in case of external support actions of the EU depends on the leverage of the Union's or EU Member States' activities. Responsibility for possible violations of the principle of *non-refoulement* can only be triggered under human rights law where *de facto* or *de jure* effective control – and hence jurisdiction – can be established. At this stage, a clear line determining effective control cannot be drawn, including because practices on external support actions vary greatly and more elaborate research on this matter would be required. It is not possible to easily assign responsibilities to EU Member States and/or the EU, but such responsibility cannot be fully excluded, either.

*Arguments against finding Member States responsible for* non-refoulement

Even if the EU or its Member States provide advice, equipment or financial means, the third country remains responsible for how it adopts and uses them. Therefore, the third country remains in full control and neither the EU nor its Member States can be held responsible.

*Arguments that support finding Member States responsible for* non-refoulement

If the EU or its Member States have strong leverage over the third-country actions, they can exercise control over migrants in a third country. Depending on the state's reputation on treatment of migrants, on the type and intensity of support provided, and on whether the EU Member State takes action to mitigate possible human rights violations by the third country, the leverage to achieve the EU's migration objectives may trigger responsibilities for violations of the principle of *non-refoulement*.[102]

99 See also FRA (2013), p. 46.
100 See e.g. Miller, S. (2010); Walters, W. (2010); Giuffré, M. (2012).
101 Hathaway, J. C. and Gammeltoft-Hansen, T. (2014), pp. 17-28, 53-57.
102 Council of Europe (2013), p. 53.

## 2.2. Principle of *non-refoulement* and operations on the high seas

Border control operations also take place on the high seas with the purpose of preventing people from entering the EU Member State's territory or its territorial waters in an irregular manner. In practice, such operations often turn into search and rescue operations.

The debate revolves around the question of when a person is considered to fall under the jurisdiction of an EU Member State. For operations on the high seas, the laws of the sea are an important source to determine jurisdiction.[103] The most relevant treaties in this regard are the UN Convention on the Law of the Sea of 1982 (UNCLOS), which – for search and rescue – is supplemented by the International Convention on Maritime Search and Rescue (SAR Convention) and the International Convention for the Safety of Life at Sea (SOLAS Convention). These two conventions are briefly mentioned under Scenario 6.

The sea is divided into different zones in which different legal regimes apply. Generally, three different zones can be distinguished which are relevant for immigration control purposes: the territorial waters (maximum 12 nautical miles from a state's base line), the contiguous zone (maximum 24 nautical miles from a state's base line), and the high seas.[104] The territorial waters fall under the sovereign powers of the coastal state, which exercises full jurisdiction.[105] Ships of all states have a right of innocent passage through territorial seas but this can be retracted if, for instance, the passing ship acts contrary to the coastal state's migration laws. If the vessel is suspected of being involved in smuggling of migrants, the coastal state can undertake action as it is fully competent.[106] In the contiguous zone, the coastal state has limited competence, but is entitled to adopt necessary measures to prevent infringements of immigration laws and national regulations. In addition, the coastal state is mandated to punish those infringements.[107] For purposes of migration control, the sea anywhere beyond the contiguous zone (24 nautical miles) should be considered high seas. The high seas are open to all states and all ships enjoy freedom of navigation there. Vessels are subjected to the exclusive jurisdiction of the flag state. There is a general prohibition on boarding or entering a ship flying a foreign flag without prior and explicit permission from the flag state, apart from the situations listed in Article 110 of UNCLOS. This Article also clarifies that a ship without a flag is considered to be stateless. Law enforcement authorities are allowed to enter and check a stateless ship navigating on the high seas. In the Mediterranean most boats carrying migrants to the EU are flagless.

The EU has only regulated law of the sea matters with regards to Frontex-coordinated operations in Regulation (EU) No. 656/2014. This regulation establishes rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.[108] Nevertheless, EU Member States are bound by international law – including the ECHR and the law of the seas – for operations outside the context of Frontex.

This report discusses the following two scenarios, examining under what circumstances operations by EU Member States carried out at high sea trigger their obligation to protect migrants from *non-refoulement*:

- **Scenario 5 – Interception at sea**
  An EU Member State – alone or in Frontex coordinated operations – operates on the high seas and takes coercive action (threatens the boat's passengers by using force, tows the boat, enters the migrants' boat and drives it back, takes the migrants on board and brings them back) to push back a boat carrying migrants to the port of embarkation in a third country or to the territorial sea of a third state.

- **Scenario 6 – Rescue at sea**
  Maritime rescue coordination centres (RCC) in the EU initiate a search and rescue (SAR) operation concerning a boat carrying migrants on the high seas, which is within a third-country search and rescue zone (e.g. in the absence of a functioning maritime rescue and coordination centre in the third country), and instruct the rescue boat to disembark the migrants in a third country.

103 See e.g. the position of Italy in ECtHR, *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 February 2012; in UN, CAT, *J.H.A. v. Spain (Marine I case)*, CAT/C/41/D/323/2007, 21 November 2008; and in Australia, Federal Court of Australia, *Ruddock v. Vadarlis (the Tampa case)*, No. 1297, 18 September 2001.

104 The exclusive economic zone (200 nautical miles) and the continental shelves are excluded from the discussion because they are not relevant in relation to migration control.

105 UN Convention on the Law of the Sea, 10 December 1982, Art. 2.

106 *Ibid.*, Art. 17 and 19 (2)(g).

107 *Ibid.*, Art. 33;UN Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, Art. 24(1); Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189 (Regulation (EU) No. 656/2014), Art. 8.

108 Regulation (EU) No. 656/2014, paras. 93-107.

## Scenario 5 – Interception at sea

An EU Member State – alone or in Frontex coordinated operations – operates on the high seas and takes coercive action (threatens the boat's passengers by using force, tows the boat, enters the boat carrying migrants and drives it back, or takes the migrants on board and brings them back) to push back an immigrant boat to the port of embarkation in a third country or to the territorial sea of a third state.

### Background

Usually, states can only undertake migration control actions vis-à-vis a vessel on the high seas if prior authorisation is given by the flag state – unless the vessel has no nationality, as is mostly the case with boats carrying migrants in the Mediterranean. Article 110 of UNCLOS read in conjunction with the Anti-Smuggling Protocol to the United Nations Convention on Transnational Organised Crime is generally understood as the legal basis for interventions on the high seas against vessels suspected of carrying irregular migrants.[109] For Frontex-coordinated sea operations, the competence to take law enforcement measures against a ship on the high seas is regulated in Article 7 of Regulation (EU) No. 656/2014. Upon suspicion of migrant smuggling, state officials can – in accordance with the Anti-Smuggling Protocol and *subject to prior* authorisation of the flag state (unless there are reasonable grounds to suspect that the vessel is stateless) – request information, stop, board and search the vessel. If the suspicion of migrant smuggling is confirmed, state officials may seize the vessel and apprehend the persons on board; prevent the vessel from entering the territorial or contiguous zone; or conduct the vessel – or hand over persons on the vessel – to a third country, to the state hosting the Frontex operation, or to other Member States participating in the operation.

### Practice

EU Member State officials patrol in the territorial waters of their Member State and on the high seas. Some EU Member States have concluded bilateral or multilateral agreements with third countries for the disembarkations of migrants who started their journey in the third country and are intercepted on the high seas (e.g. the former agreement between Italy and Libya discussed in *Hirsi*).

Although Member States effect most patrols, a portion of sea operations are carried out under the coordination of Frontex. Frontex is an EU agency that was established by Regulation (EC) No. 2007/2004 to support EU Member States with border management.[110] In 2015, Frontex allocated 57 % of its total budget for joint operations to sea operations.

### Exercise of control

Following the ECtHR ruling in the *Hirsi* case, this scenario does not raise any major questions. State officials on the high seas are bound by the principle of *non-refoulement* since, when they rescue people in distress, they have physical control over them. Such 'full' or 'effective' control[111] makes international human rights law, including the principle of *non-refoulement*, applicable. Therefore, arguments are not divided into those that support and those against finding that the principle applies.

In *Hirsi*, the ECtHR explained that actions undertaken on the high seas vis-à-vis another vessel trigger jurisdiction if migrants are taken on board and if the authorities exercise *de facto* or *de jure* control over the intercepted migrants. Such control is also exercised if people are returned, directed, instructed, ordered to return, disembarked, forced to enter, conducted to or handed over to the authorities or territory of another state. The existence of a bilateral agreement legitimising the disembarkation of intercepted migrants in a third country does not affect liability for *refoulement*. Such agreements do not absolve Member States from their obligations under international human rights law.[112]

### Applicability of *non-refoulement*

The principle of *non-refoulement* fully applies on the high seas, where EU Member States' authorities remain liable for their conduct. Therefore, they have an obligation to assess the situation in the state of envisaged disembarkation and refrain from disembarking people

109 Garcia Andrade, P. (2010), p. 314.

110 See Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Regulation (EC) No. 2007/2004), OJ L 349. This regulation was repealed on 14 September 2016, with the establishment of the European Border and Coast Guard Agency through Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC (Regulation (EU) 2016/1624), OJ L 251, 16 September 2016, p. 1. Regulation (EU) 2016/1624 had not yet entered into force when this manuscript was finalised. Therefore, this report refers to the agency by its previous short-hand name, Frontex.

111 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 79-81. UN, Human Rights Committee (2004), para. 10; ICJ, *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,*, No. 131, 9 July 2004, Rep. 36, paras. 106 and 109; UN, Human Rights Committee (2010), para. 5.

112 Mitsilegas, V. (2015), p. 20.

if the third country lacks an asylum system or if the returned people would be at risk of ill-treatment or *refoulement*. Otherwise, EU Member States become accountable for *refoulement*. Recital 13 of Regulation (EU) No. 656/2014 reminds EU Member States of their *non-refoulement* obligation. This obligation is triggered whenever they "are aware or ought to be aware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that third country amount to substantial grounds for believing that the asylum seeker would face a serious risk of being subjected to inhuman or degrading treatment or where they are aware or ought to be aware that that third country engages in practices in contravention of the principle of *non-refoulement*". Article 4 (2) of the regulation obliges Frontex to objectively assess the situation in the third country intended for disembarkation and bans returns to the country if this would infringe the principle of *non-refoulement*.

As the ECtHR ruled in *Hirsi*, Italy acted in violation of Article 3 of the ECHR because an appropriate asylum procedure was lacking in Libya and there was a risk of indirect *refoulement*. Safeguards for Frontex-coordinated operations are now explicitly codified in EU law. The *non-refoulement* provision in Article 4 of Regulation (EU) No. 656/2014 is broadly formulated; it includes situations in which a person is "disembarked in, forced to enter, conducted to or otherwise handed over" to the authorities of a country in which they face a risk, and thus covers push-back operations.[113] Member States operating outside Frontex operations remain bound by the ECHR as interpreted by the ECtHR in *Hirsi*.

## Scenario 6 – Rescue at sea

Maritime rescue coordination centres (RCC) in the EU initiate and coordinate a search and rescue (SAR) operation concerning a boat carrying migrants on high seas, which is within a third-country search and rescue zone (e.g. in the absence of a functioning maritime rescue coordination centre in the third country), and instruct the rescue boat to disembark the migrants in a third country.

### Background

Although the liability and obligations in relation to *non-refoulement* are very similar to those in Scenario 5, it is necessary to understand in what situations the search and rescue regime is triggered and whether it makes a difference if a commercial vessel undertakes the search and rescue (SAR). Therefore, this regime is shortly explained below.

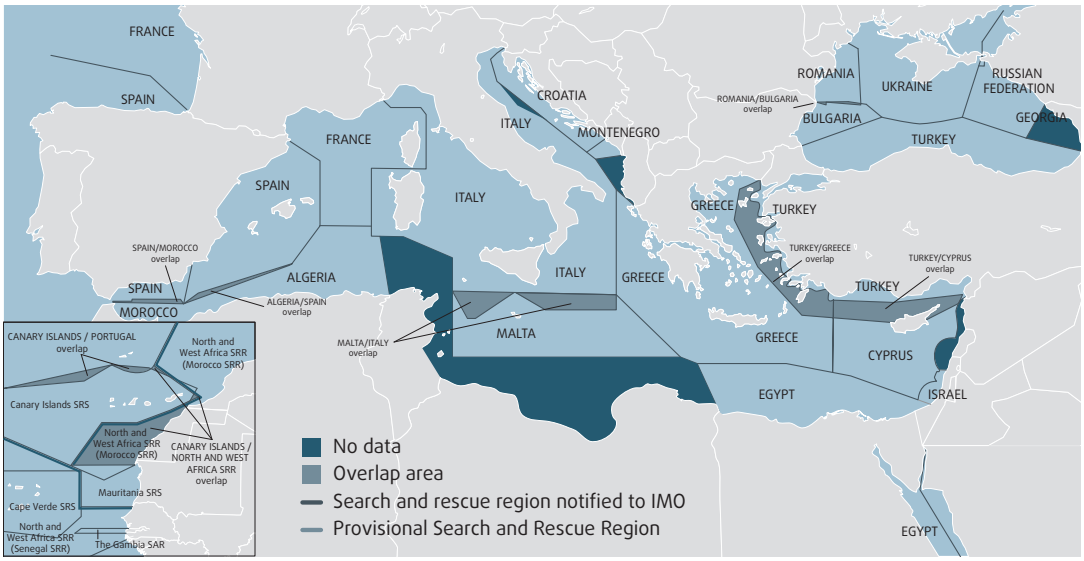
113 Peers, S. (2014).

Important provisions on the duty to provide assistance can be found in UNCLOS, the SOLAS Convention, and the SAR Convention.[114] In general, the shipmaster (of both private and governmental vessels) has an obligation to render assistance to those in distress at sea without regard to their nationality, status, or the circumstances in which they are found. Article 98 of UNCLOS states that, on the high seas, a state shall require the master of a ship flying its flag to provide assistance to persons in danger and to rescue persons in distress. Similar provisions can be found in Regulations 10 and 15 in Chapter V of SOLAS. Although international treaties oblige ships to provide assistance to vessels in danger or distress, no international system covering search and rescue operations existed until the adoption of the SAR Convention. The 1979 SAR Convention draws up "an international SAR plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be coordinated by a SAR organisation and, when necessary, by co-operation between neighbouring SAR organisations".[115] The convention obliges states to establish rescue coordination centres (RCC) and outlines operating procedures to be followed in the event of emergencies or alerts and during SAR operations. Based on information received from states, the Maritime Safety Committee (MSC) of the International Maritime Organisation divided the world's oceans into different SAR regions, each with its own coordinating party. In each of these areas, the countries concerned have delimited search and rescue regions for which they are responsible. The coordinating party provides and organises search and rescue services in its SAR zone. Figure 1 outlines the SAR regions in the Mediterranean.

To optimise the assistance, three emergency phases are distinguished: the uncertainty phase, the alert phase and the distress phase. In accordance with Chapter 1.3.11 of the SAR Convention, the distress phase refers to "a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance". In relation to those rescued, Chapter 1.3.2 of the SAR Convention obliges State Parties "to provide for their initial medical or other needs, and deliver them to a place of safety".[116] However, a duty to initially search and rescue does not solve the problem of disembarkation of those who are rescued.

114 O'Brien, K. S. (2011).
115 See International Maritime Organisation.
116 IMO, International Convention on Maritime Search and Rescue, 27 April 1979, Chapter 1, point 1.3.2.

Figure 1 : Mediterranean SAR regions




*Source: International Maritime Organisation, 2011*

To address this problem, amendments to the SOLAS and SAR Conventions adopted in 2004 relating to persons in distress at sea complement the obligation to render assistance with a corresponding obligation to cooperate in rescue situations. State Parties must coordinate their actions and cooperate to ensure that shipmasters providing assistance are released from their obligations. The amendments place on the RCC concerned the duty to initiate the process of identifying the most appropriate place for disembarkation.[117] Non-binding guidelines on the Treatment of Persons Rescued at Sea complemented these amendments. These guidelines define a place of safety, as a "place, where the survivor's safety of life is no longer threatened and where their human needs (food, shelter, medical needs) can be met" and clarify the need to avoid disembarkation of asylum seekers and refugees in territories where their lives and freedoms would be threatened. The guidelines also discourage on-board screenings and status determinations that would unduly delay disembarkation.[118] In conclusion, if people rescued at sea claim asylum, the RCC should be informed immediately to prevent disembarkation in a country where it would violate the principle of *non-refoulement*. Where appropriate, the UNHCR should be contacted.

Article 9 of Regulation (EU) No. 656/2014 further elaborates on when a situation qualifies as a situation of distress. According to paragraph 2, when officials "have reasons to believe that they are facing a phase of uncertainty, alert or distress as regards a vessel or any person on board, they shall promptly transmit all available information to the Rescue Coordination Centre (RCC) responsible for the search and rescue region".

## Practice

Migrants currently usually travel on unseaworthy vessels, and most of the time, the RCC of an EU Member State is contacted. The RCC may also receive available information – for example, on the condition of the vessel, the number of people on board, the need for medical assistance, and the presence of deceased persons. The RCC may contact the third-country RCC that is responsible for the search and rescue area in which the vessel is located and – unless such third country takes immediate action in coordinating a response – ask a public or private vessel to intervene. This can be a government vessel of an EU Member State, a third-country government vessel or a commercial vessel.

The RRC identifies the place of disembarkation depending on the individual circumstances of the case. Disembarkation in a neighbouring third country appears to occur only when a SAR operation is carried out within the third-country territorial sea in coordination with the third-country RCC, and without the involvement of EU government vessels. Rescue operations carried out by EU government vessels are normally followed by disembarkation in one of the EU Member States. FRA does not have sufficient information on the places of disembarkation of persons rescued on the high seas by commercial vessels, although recent cases point to disembarkation being allowed in one of the EU Member States.

117 IMO, *Adoption of Amendments to the International Convention for the Safety of Life At Sea, 1974*, Resolution MSC.153(78), 20 May 2004, Annex 3; IMO, *Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979*, Resolution MSC.155(78), 20 May 2004, Annex 5.

118 IMO (2004), paras. 6.12-6.18 and 6.20.

If a vessel deployed in a Frontex-coordinated operation is requested to intervene, rescued migrants and asylum seekers are typically disembarked in the Member State hosting the Frontex operation. Article 10 (1)b of Regulation (EU) No. 656/2014 bans disembarkation in the third country from which the vessel is assumed to have departed when this would violate the principle of *non-refoulement*.

### Exercise of control

When a government vessel of an EU Member State carries out a rescue operation, it exercises full control over the rescued people, triggering jurisdiction. The fact that the vessel acted under RCC instructions is irrelevant.

The situation is more complicated when the RCC requests private vessels to intervene. Leaving aside the possible criminal responsibility of shipmasters if they do not comply with their search and rescue duties, the question is whether the RCC – when negotiating with states the disembarkation of rescued migrants on-board of commercial or other private vessels – bears responsibility if the rescued people are brought to a place where their life or freedom is endangered.

*Arguments against finding Member States responsible for* non-refoulement

The rescued people are not on board of vessels owned by the RCC, or on board of other government vessels. Therefore, the RCC has no direct control over them. The RCC has to take several circumstances into account to define the place of safety, including distance as well as weather and sea conditions. Moreover, the RCC has to negotiate disembarkation with the different states involved and is not free to choose where the people should be disembarked.

*Arguments that support finding Member States responsible for* non-refoulement

The RCC is located within a state entity, usually the coast guard, the army or a similar law enforcement authority. The RCC acts on behalf of the state. Even if the rescued people are on a private vessel, the shipmaster of such vessel is bound to follow the RCC's instructions. The RCC therefore exercises control over the rescued people and can decide their fate.

The RCC has a duty of due diligence. If it does not obtain permission for disembarkation in a safe third country, it always has the option of ordering disembarkation in the territory of its own state.

### Applicability of *non-refoulement*

A rescue operation is "an operation to retrieve persons in distress, provide for their initial medical or other needs, *and deliver them to a place of safety*".[119] Whether the RCC is bound by the principle of *non-refoulement* when giving instructions to third-country state vessels or private vessels for disembarkation depends on whether the RCC exercises control over the rescued persons. If this is the case, it must refrain from instructing the rescue vessel to disembark migrants in a location where they face a serious risk of the death penalty, torture, persecution, other inhuman or degrading treatment or punishment, or of onward *refoulement*.

## 2.3. Principle of *non-refoulement* at the EU's external borders

The third group of scenarios covers people who have reached the external borders of the EU. This includes people at an official border crossing point (BCP) at the air, land and sea border, as well as people who otherwise reach the territory or the territorial sea.

One way for EU Member States to have migrants and asylum seekers intercepted before they reach the land or sea border is by sharing intelligence with the neighbouring third country, enabling the third country to stop the migrants before they reach the border of the EU Member State.

People can be refused entry at border crossing points if they do not possess the required documents, such as a passport and visa. Patrols carried out at the land borders may prevent people from entering the territory and those carried out at sea may prevent them from entering the territorial waters.

Finally, if people have crossed the border, a judicial space can be created in which they are considered by law or practice as not having entered the territory of the EU Member State. This may be the case for persons held in detention facilities established at or near airports, or for persons who find themselves at the outer side of fences recently built by some EU Member States to prevent migrants from crossing the 'green border'.

Although these situations are governed by different legal regimes (border control, law of the seas, aviation law), the answers to the questions of whether and when the prohibition of *non-refoulement* is triggered

119 SAR Convention, Chapter 1.3.2; IMO, International Convention for the Safety of Life At Sea, 1 November 1974, Chapter V, Regulation 33, para. 1-1 (emphasis added).

have great similarities and build on what has been said in previous scenarios. The following four scenarios are considered together.

- **Scenario 7 – At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea**
  Border guards identify people moving towards the border and suspect that they intend to cross the border in an unauthorised manner. They request assistance from the third country to intercept them before they cross the border.

- **Scenario 8 – At all border-crossing points (airports, land, and sea)**
  Border guards check documents during first-line, second-line or gate checks and refuse entry to those who do not have the required documents.

- **Scenario 9 – At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea**
  Border guards stop and turn back people who have reached the border.

- **Scenario 10 – After crossing the border**
  Border guards intercept persons *after* they have crossed the physical land border or entered the territorial sea but while they are still in areas which, under national law or practice, are considered as transit zones or otherwise excised areas for immigration purposes. Border guards expel the migrants or use force to move them out of the territory or of the territorial sea.

## Scenario 7 – At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea

At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea – border guards identify people moving towards the border and suspect that they intend to cross the border in an unauthorised manner. They request assistance from the third country to intercept them before they cross the border.

### Background

Under Article 12 of the Schengen Borders Code (SBC),[120] EU Member States have a duty to prevent unauthorised border crossings and to counter cross-border criminality. To achieve this goal, EU Member States may cooperate with the neighbouring third country, requesting it to intercept people while they are still on its territory and before they reach the EU Member State border.

The sharing of information on people approaching the border normally takes place on the basis of a bilateral or multilateral agreement. Under certain conditions, exchange of intelligence with third countries is also envisaged as a possibility by Article 20 of the Eurosur Regulation ((EU) No. 1052/2013).[121] This Article establishes a common framework for the exchange of information relevant for border surveillance between EU Member States and Frontex. Article 20 (5) of the Eurosur Regulation, however, prohibits any exchange of information with third countries that "could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights".

### Practice

Depending on the terrain, vegetation and weather conditions, technical means often allow border guards to spot people at a significant distance from the border, while they are still inside the territory or the territorial sea of a third country (in case of small stretches of sea separating two states).

In some cases, the neighbouring country's assistance is requested. Information on people approaching the border is given to the third-country authorities with the request of stopping the migrants and asylum seekers and picking them up before they cross the border.

### Exercise of control

The question is whether the EU Member State exercises effective control when it shares information with, and requests assistance from, the third country, or whether effective control also requires physical action to stop the migrants as they approach the border.

*Arguments against finding that EU Member States exercise effective control*

People are prevented from reaching the border through the actions of the border guards of neighbouring countries. Effective control is exercised by the third country, not by the EU Member State border guards who provided the information on the migrants' position to the third country.

120 Schengen Borders Code.

121 Eurosur Regulation.

*Arguments that support finding that EU Member States exercise effective control*

The authorities of the EU Member States indirectly exercise effective control when they activate the action by the authorities of the third state through the information exchange. Although written in veiled wording, Article 20 (5) of the Eurosur Regulation seems to support this view as it prohibits an information exchange if the information provided could lead to the identification of persons in need of international protection.

### Applicability of the principle of *non-refoulement*

These two opposing views lead to different interpretations when it comes to the question of the applicability of *non-refoulement*.

*Arguments against finding that* non-refoulement *applies*

If the sharing of information does not bring with it the exercise of effective control, this situation does not trigger *non-refoulement* responsibilities.

*Arguments that support finding that* non-refoulement *applies*

If effective control is exercised through the sharing of information, the EU Member State action could trigger responsibility for the harm suffered by the people as a result of their interception by the third country. The ban on sharing certain information with third countries – imposed by Article 20 (5) of the Eurosur Regulation – reflects a due diligence duty for EU Member States. It obliges them to take into account the situation in the third country and not to take action when they know, or should have known, that the individuals concerned face a risk of serious harm.

Whether Member States' actions trigger responsibilities for violations of the principle of *non-refoulement* as laid down in Article 33 of the 1951 Refugee Convention is a separate question. Under this convention, the prohibition of *refoulement* does not apply as long as the individual has not crossed an international boundary. Regardless of how this question is resolved, EU Member States remain bound by the duty enshrined in Article 3 of the ECHR not to subject individuals to torture, inhuman or degrading treatment or punishment. This duty is also reflected in Article 4 of the EU Charter of Fundamental Rights, and can apply extraterritorially whenever effective control is established.

## Scenario 8 – At all border-crossing points

At border-crossing points, border guards check documents during first-line, second-line or gate checks and refuse entry to individuals who do not have the required documents.

### Background

Under international law, each state has the sovereign power to decide who is, and who is not, allowed into the country. If a traveller at a border crossing point (BCP) does not have the documents required under national law, that person can be refused entry. However, under international law, including refugee law, and under EU law, EU Member States do have obligations to protect persons in need of protection.

At border crossing points, border guards check the documents of individuals entering the countries through these points, acting on the basis of the Schengen Borders Code. Article 5 of the Schengen Borders Code stipulates that the EU's external borders may only be crossed at a border crossing point, save for a few exceptions. The conditions for entry are specified in Article 5. According to Article 14 (1), persons who do not meet these conditions must be refused entry, unless this contradicts asylum rules and the principle of *non-refoulement*, set forth in Article 4 of the code.

In line with Article 6 (2) of the Asylum Procedures Directive, a person who asks for international protection must have an effective opportunity to apply for it as soon as possible.[122] Furthermore, if there are 'indications' that a person is in need of international protection, the migrant must be informed about the possibility to ask for asylum and referred to the asylum procedure.[123] Article 8 (1) of the directive specifies that, at border crossing points, Member States must make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

122 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive).

123 Art. 8(1) of the Asylum Procedures Directive reads as follows: "Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so".

### Practice

According to the Schengen Handbook, the wish to apply for international protection does not need to be expressed in any particular form.[124] The word 'asylum' does not need to be used expressly. The defining element is the expression of fear of what might happen upon return. In case of doubt as to whether a certain declaration can be construed as a wish to apply for international protection, border guards should consult the national authority responsible for examining applications for international protection.

Difficulties persist in identifying asylum seekers at airports and land border crossing points, as noted by FRA in two 2014 reports. At airports, asylum seekers are generally expected to identify themselves as such. Unless officers are adequately trained and on the alert, persons in need of international protection may pass unnoticed or be referred incorrectly, particularly if they receive insufficient information during the checks.[125] The number of asylum applications at land border crossing points has traditionally been extremely low, although this changed after the civil unrest in Ukraine in 2014, when many applied for asylum at Polish border crossing points. Typically, it is difficult for undocumented persons who come from further afield to reach a border crossing point at the EU's external borders. If they lack documents, they would normally not be allowed through the neighbouring third country's checkpoint. An exception to this was the transit of migrants and refugees through parts of Europe in the second half of 2015 and early 2016. Visible information on asylum is mostly lacking at land border crossing points.[126]

### Exercise of control

There is no doubt that border guards who check documents and decide whether a person is allowed to enter do exercise effective control.

### Applicability of *non-refoulement*

The border guards exercising effective control are fully bound by the principle of *non-refoulement*. If protection is requested, an individual assessment of the need for such protection must be made. To that end, and following Article 6 of the Asylum Procedures Directive, the border guard must refer the application to the designated authority. If such individual assessment is not made or protection is unlawfully denied, the principle of *non-refoulement* is breached.

The obligation can also be triggered if the migrant does not apply for asylum and is denied entry in spite of indications that the person is in need of international protection. The ECtHR's reasoning in *Hirsi* applies both to maritime surveillance activities and to border checks: "It was for the national authorities, faced with a situation in which human rights were being systematically violated [...] to find out about the treatment to which the applicants would be exposed after their return [...]. Having regard to the circumstances of the case, the fact that the parties concerned had failed expressly to request asylum did not exempt Italy from fulfilling its obligations under Article 3."[127] The European Asylum Support Office (EASO) has, together with Frontex and FRA, developed a practical tool for first contact officials. It helps officers determine whether there are indications that a person may wish to apply for international protection.[128]

## Scenario 9 – At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea

At the green border – or at the boundary between the Member State's territorial sea and a third-country territorial sea, border guards stop and turn back people who have reached the border.

### Background

Under Article 12 of the Schengen Borders Code, EU Member States have a duty to patrol their land and sea borders to prevent unauthorised border crossings and to counter cross-border criminality. Border surveillance should also discourage people from circumventing the checks at border crossing points.

The principle of *non-refoulement* applies to border surveillance activities regardless of whether they are carried out at sea or on land.[129]

### Practice

Border surveillance is carried out through stationary or mobile units. The aim is to prevent unauthorised border crossings and apprehend individuals who cross the border in an irregular manner. Technical and electronic means are also used for border surveillance. For example, the Integrated External Surveillance System (*Sistema Integrado de Vigilancia Exterior*, SIVE) in Spain

124 European Commission (2006), Section 10, para. 10.1.
125 FRA (2014b), p. 7.
126 FRA (2014c), p. 8.
127 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 133.
128 EASO (2016).
129 Schengen Borders Code, Art. 4; Eurosur Regulation, Art. 2.

uses different surveillance techniques – such as radar and cameras along the coast and on patrol boats, as well as satellite pictures – to identify migrants before they reach and enter Spanish territorial waters.[130]

When migrants approach the green border or the territorial sea, border or coast guards in EU Member States may take action to prevent unauthorised crossings. This may be done in different ways: by inviting the migrants to use existing border crossing points and indicating how to reach these, or by ordering the people to stop and alerting them that crossing the border outside established crossing points is not allowed. In extreme cases, officers may shoot in the air or use physical force to stop the migrants.

### Exercise of control

There is no doubt that border guards or coast guards exercise effective control when they stop migrants who have reached the land border or the territorial sea. Refusals to comply with such orders are typically punishable under national law.

### Applicability of the principle of *non-refoulement*

Officers exercising effective control are fully bound by the principle of *non-refoulement*. If migrants request international protection they must be referred to the designated asylum authority, as required by Article 6 of the Asylum Procedures Directive. Otherwise, responsibility for *refoulement* is triggered.

The obligation can also be triggered if the migrant does not apply for asylum and is denied entry in spite of indications that he or she is in need of international protection. In such cases, EU Member State officials are obliged to provide information on asylum, as required by Article 8 of the Asylum Procedures Directive.

## Scenario 10 – After crossing the border

Border guards intercept persons *after* they have crossed the physical land border or entered the territorial sea but while they are still in areas which, under national law or practice, are considered transit zones or otherwise excised areas for immigration purposes. Border guards expel the migrants or use force to move them out of the territory or the territorial sea.

### Background

This scenario occurs if a migrant has physically crossed the border. Following the traditional understanding of vesting jurisdiction under human rights law, the state whose border is crossed has jurisdiction and is bound by the principle of *non-refoulement*. However, for immigration control purposes, states have creatively tried to move the border inwards.

### Practice

In some cases, EU Member States try to move the border by extending the transit zone. For instance, the 'transit zone' at Charles de Gaulle international airport in France has been extended to include hospitals in Paris and a courtroom more than 20 kilometres from the airport.[131]

Comparable situations exist at land borders. People find themselves in a legal vacuum when they are at the outer side of fences, such as those established in the Spanish enclaves of Ceuta and Melilla, and in Bulgaria, Greece, Hungary and Slovenia. Such fences are built on the EU Member State's territory, usually with a margin of land strip on the outer side, which allows the authorities to undertake maintenance and repair work without having to ask the neighbouring country for access. This means that migrants are on the EU Member State's territory before actually arriving at the fence. States often consider these migrants not to have yet entered their country, even if they are physically on their territory.

### Exercise of control

These situations do not generate major legal concerns as it has been recognised that, in such cases, the people are within the EU Member State's territory. This means that the legal human rights framework fully applies and that these individuals are subject to the EU Member State's rules and regulations. They are indeed under the effective control of the EU Member State and, under Article 1 of the ECHR, a state is bound to respect its human rights obligations whenever it exercises jurisdiction.

### Applicability of the principle of *non-refoulement*

As a consequence of the exercise of effective control in such situations, the principle of *non-refoulement* fully applies. Although national legislation may not fully apply in transit zones at international airports or in strips of land that are on the outer side of border crossing points or fences, such areas must be considered as part of the national territory, in which international human rights obligations apply.

130 For more information on national maritime surveillance systems, see FRA (2013), pp. 58-60.

131 Human Rights Watch (2009).

# In conclusion

Although a number of areas call for more legal clarity, there is a solid basis for concluding that jurisdiction may vest, and *non-refoulement* may apply, in many of the presented scenarios. Especially since the ECtHR ruling in the *Hirsi* case, the extension of the effective control doctrine to encompass control over an individual has been widely accepted and broadly applied.

The grey areas that remain concern EU Member State operations in third countries, especially when EU Member States, EU institutions, or EU agencies "assist" third countries in their efforts to manage migration flows. It is debated whether *non-refoulement* applies in such situations, which involve activities carried out under the umbrella of cooperation or external relations but, in some cases, with the ultimate aim of preventing migration flows from heading towards the EU. Hathaway and Gammeltoft-Hansen have argued that donor states cannot avoid their obligations under international human rights and refugee law in all instances in such situations. They take the debate a step further by arguing that, based on the exercise of public powers, jurisdiction is triggered. The logic behind this reasoning is that a state cannot be allowed to perpetrate, on the territory of another state, human rights violations that are not permitted on its own territory. Therefore, jurisdiction for human rights obligations follows the state's exercise of powers.

What follows from these more general observations is that, for some scenarios, legal arguments can be found for both extensive and more restrictive application of the principle of *non-refoulement*. Both lines of reasoning have been explored in the discussions of the various scenarios presented in this report.

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# Annex: Secondary EU law provisions referring to *non-refoulement*

| Instrument | Article | Wording |
|---|---|---|
| Qualification Directive 2011/95/EU | Article 21 | 1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.<br>2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:<br>(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or<br>(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State. |
| Asylum Procedures Directive 213/32/EU | Article 9 (3) | A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and Union obligations of that Member State. |
| | Articles 28, 35, 38, 39, 41 and Annex I | Safeguards relating to implicit withdrawal or abandonment, safe country of origin and safe third county and subsequent applications |
| Return Directive 2008/115/EC | Article 4 | (*provisions applicable also in Member States that make use of the option not to apply the directive to persons who are subject of a refusal of entry or are apprehended or intercepted by the competent authorities in connection with the irregular crossing*)<br>4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall [...]:<br>(b) respect the principle of non-refoulement. |
| | Article 5 | When implementing this Directive, Member States shall [...] respect the principle of non-refoulement. |
| | Article 9 | 1. Member States shall postpone removal:<br>(a) when it would violate the principle of non-refoulement [...] |
| Council Framework Decision 2002/946/JHA on Facilitation | Article 6 | This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967. |
| Frontex Regulation, as amended by Regulation (EU) No. 1168/2011 | Article 1 (2) | The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'); the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'); obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation. |
| | Article 2 (1a) | 1a. In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law.' |

| Instrument | Article | Wording |
|---|---|---|
| RABIT Regulation (EC) No. 863/2007 | Article 2 | This Regulation shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement. |
| VIS Regulation (EC) No. 767/2008 | Article 31 (3) concerning transfer of data to third countries | 3. Such transfers of personal data to third countries or international organisations shall not prejudice the rights of refugees and persons requesting international protection, in particular as regards non-refoulement. |
| Schengen Borders Code Regulation (EU) No. 2016/399 | Article 4 | When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'); relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'); obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis. |
| Eurosur Regulation (EU) No. 1052/2013 | Article 2 (4) | 4. Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation. |
| | Article 20 (5) | 3. The agreements referred to in paragraph 1 shall comply with the relevant Union and international law on fundamental rights and on international protection, including the Charter of Fundamental Rights of the European Union and the Convention Relating to the Status of Refugees, in particular the principle of non-refoulement.<br>5. Any exchange of information under paragraph 1, which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited. |
| Regulation (EU) No. 656/2014 on sea operations coordinated by Frontex | Article 4 | 1. No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*.<br>3. During a sea operation, before the intercepted or rescued persons are disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country and taking into account the assessment of the general situation in that third country in accordance with paragraph 2, the participating units shall, without prejudice to Article 3, use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*.<br>5. [...] The exchange with third countries of personal data regarding intercepted or rescued persons obtained during a sea operation shall be prohibited where there is a serious risk of contravention of the principle of *non-refoulement*. |

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**HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION**

EU Member States are increasingly involved in border management activities on the high seas, within – or in cooperation with – third countries, and at the EU's borders. Such activities entail risks of violating the principle of *non-refoulement,* the cornerstone of the international legal regime for the protection of refugees, which prohibits returning individuals to a risk of persecution. This report aims to encourage fundamental-rights compliant approaches to border management, including by highlighting potential grey areas. The analysis presented is complemented by concrete guidance on how to reduce the risk of *refoulement* in these situations – a practical tool developed with the input of experts during a meeting held in Vienna in March of 2016.

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