

Fundamental rights implications of the obligation to provide fingerprints for Eurodac

FRA Focus

Processing biometric data for immigration, asylum and border management purposes has become common. This focus paper looks at measures authorities can take to enforce the obligation of newly arrived asylum seekers and migrants in an irregular situation to provide fingerprints for inclusion in Eurodac. It is a large database of fingerprints the European Union (EU) set up for the smooth running of the Dublin system, a mechanism established to determine the Member State responsible for examining an asylum application. The paper intends to assist EU Member States and EU institutions and agencies in avoiding fundamental rights violations when promoting compliance with the duty to provide fingerprints, by examining more closely the impact of refusing to give fingerprints on the principle of non-refoulement, the right to liberty and security, and the protection from disproportionate use of force. It also contains a checklist to guide authorities responsible for implementing the duty to take fingerprints.

This focus paper is the first publication of FRA's project on biometric data in large information technologies systems in the field of borders, immigration and asylum included in its Annual Work Programmes 2014–2016. It is a living document that FRA will review in case of new research findings or if the currently sparse national case law develops further. Although focused on fingerprints, the considerations included in this focus paper also apply to other biometric identifiers.

Main conclusions of this focus paper

- Compliance with the obligation to provide fingerprints for Eurodac should primarily be secured through effective information and counselling, carried out individually as well as through outreach actions targeting migrant communities. To be effective, information should be provided in a language people understand and taking into account gender and cultural considerations.
- Refusal to provide fingerprints does not affect Member States' duty to respect the principle of *non-refoulement*.
- Deprivation of liberty to pressure persons to give their fingerprints must be an exceptional measure which should not be used against vulnerable people.
- It is difficult to imagine a situation where using physical or psychological force to obtain fingerprints for Eurodac would be justified.

Checklist to act in compliance with fundamental rights when obtaining fingerprints for Eurodac

Asylum seekers and migrants in an irregular situation apprehended in connection with their unauthorised border crossing have a duty to provide fingerprints for Eurodac. Member States are obliged to take their fingerprints, but there are limitations on how to enforce such obligation so as not to violate fundamental rights. FRA compiled this checklist to assist authorities and officers who have been assigned the task of taking fingerprints for Eurodac to act in compliance with fundamental rights, parts of which are also useful for individual officers.

- ✓ Obtaining fingerprints should be part of the registration and referral/relocation process, and not implemented as a stand-alone activity.
- ✓ At the start of the fingerprinting process, officers must inform each person on the obligation to give fingerprints, the purpose for collecting the fingerprints and the manner in which fingerprints will be processed, as required by Article 29 of the Eurodac Regulation. Information should be provided both orally – in simple terms – as well as in writing, in a language the person understands.
- ✓ Initial information on fingerprinting for Eurodac should be given together with other registration-related information. To be effective, information should be provided through appropriate means, in a language the persons understand, and taking into account gender, age and cultural considerations. Information should target the individual but, where appropriate, also be complemented by community-level initiatives.
- ✓ Officers should have basic skills in noticing signs that a person may be traumatised, a victim of torture, trafficking in human beings, sexual or gender-based violence, or other serious crime; and be trained on how to mitigate the risk of re-traumatisation or other complications during the fingerprinting.
- ✓ Officers should have the necessary skills to recognise whether a fingertip texture was altered in bad faith, or whether it is physically impossible to take good quality fingerprints, and refrain from imposing any hardship on people who cannot provide their fingerprints for justifiable reasons (such as torn fingerprints as a result of manual work).
- ✓ When someone refuses to give fingerprints, officers should inquire what the reasons for the refusal are (refusals may not only be motivated by the wish to circumvent the Dublin rules, but also by other considerations, such as the fear of data being shared with the country of origin), and record these.
- ✓ Before resorting to coercive measures, people need to be provided with an effective opportunity to comply voluntarily with the fingerprinting requirements, including by asking them to appear for fingerprinting a second time. People who have been informed and continue to object to giving their fingerprints should be counselled with a view to addressing their fears and expectations.
- ✓ Detaining someone to force them to give their fingerprints must remain an exceptional measure. It can only be considered if provided for under national law; must be aimed only at fulfillment of the duty to provide fingerprints; must not be punitive; must be of limited duration; and must cease the moment the obligation is fulfilled. Facilities used must be adequate and conditions therein humane.
- ✓ The use of physical or psychological force to obtain fingerprints for Eurodac should be avoided, given that this entails a high risk of violating fundamental rights.
- ✓ Children, suspected victims of torture, sexual or gender-based violence, victims of other serious crimes, as well as traumatised people should not be detained or coerced into giving fingerprints, nor should other people usually considered vulnerable. No fingerprints for Eurodac should be obtained from children if there is doubt concerning whether or not they have reached 14 years of age.



Introduction

Fingerprints of EU nationals are stored in their passports under Council Regulation (EC) No. 2252/2004 of 13 December 2004, which also requires biometric data to be included in Schengen residence permits. People who need a visa to enter the Schengen area need to enrol their fingerprints in the Visa Information System (VIS), a large IT system containing several million fingerprints and other personal data.¹

Under [Eurodac Regulation \(EU\) No. 603/2013](#), all asylum seekers and migrants in an irregular situation apprehended in connection with an irregular border crossing – except for children under the age of 14 years – must provide their fingerprints. These are stored in a large-scale database called Eurodac. When Member States apprehend migrants in an irregular situation within their territory, they can compare their fingerprints with the Eurodac database.

Eurodac is needed for the smooth running of the Dublin system, a mechanism established to determine the Member State responsible for examining an asylum application. In the absence of connections with a particular Member State (such as a visa or the presence of close family members), under [Dublin Regulation \(EU\) No. 604/2013](#) the Member State through which the asylum seeker entered the EU or the Schengen area usually has the duty to examine the application. The Member State of entry is typically determined by consulting Eurodac, although sometimes other evidence, such as a train ticket, is also used. Most asylum seekers do not possess valid identity documents – such as a passport with a stamp of the border crossing point through which entry occurred – that could serve as evidence of their travel route.

Eurodac – verifying whether a person has applied for asylum

The Dublin system can only run smoothly if Member States can verify whether a person has already applied for asylum, or was apprehended in connection with the irregular crossing of an external border in another EU Member State or Schengen Associated Country (Iceland, Liechtenstein, Norway and Switzerland). Eurodac enables Member States to verify this in a reliable manner. Although taking fingerprints for Eurodac does not in itself determine the identity of a person, it contributes to their identification since a link may be established between an asylum applicant and a past Eurodac entry. In case of a match in Eurodac, the authorities can request

the personal data from the Member State that first entered the person into Eurodac, based on Article 34 of the Dublin Regulation. In addition, Article 1 (3) of the Eurodac Regulation allows the Member State of origin to check the fingerprints taken for the purposes of Eurodac against other databases set up under its national law, such as national databases on foreigners. This may also result in the identification of the person. Under certain conditions, Article 20 of the Eurodac Regulation and Articles 21 and 22 of the VIS Regulation allow fingerprints from asylum seekers to be searched in the Visa Information System (VIS). Therefore, at least in these situations and in line with Recital 5 of the Eurodac Regulation, taking fingerprints for Eurodac might also serve to determine or to verify a person's identity. Further exchanges of information with the Member State in which a match was obtained could also identify the nationality of the asylum seeker or third-country national.

Cases of asylum seekers using acid, glue or other means to destroy their fingerprints to avoid registration in Eurodac are known. More recently, the lack of registration in Eurodac at points of entry has, however, gained increased attention. Since 2014, a significant number of asylum seekers has not been fingerprinted at the point of entry.² In some cases, this resulted from the limited capacity of front-line states to deal with increased arrivals, an issue which is being addressed. In others, those arriving – including individuals from Eritrea or Syria likely in need of international protection – refused to give their fingerprints for Eurodac or to apply for asylum altogether in the first EU Member State they reached. Refusals to provide fingerprints for VIS have not been an issue, probably because this would usually simply result in the refusal of the visa.

The absence of fingerprint records makes applying the Dublin system more difficult. Registration in Eurodac is also a pre-condition for activating asylum seekers' proposed relocation to another EU Member State. A discussion about the feasibility and appropriateness of using restrictive measures to force third-country nationals or stateless persons to give their fingerprints has emerged. The European Agenda for Migration, published in May 2015, stresses the importance of fully implementing the rules on taking fingerprints at the borders.³ A few days later, the European Commission issued a guidance paper on how to implement the duty to take fingerprints⁴, on which civil society commented.⁵

Processing of fingerprints

Fingerprints are processed in Eurodac for asylum and immigration management purposes, and not to identify people suspected of having committed a crime. Asylum seekers and migrants are in a vulnerable situation. They have often fled their country of origin to escape war or persecution, and experience tremendous hardships, often crossing the sea in overcrowded and unseaworthy boats, in constant fear for their lives. This is of utmost importance and must be taken into consideration.

There may be different reasons why people may not feel comfortable in giving fingerprints. A desire to reach the European country of their choice without the risk of being sent back to a Member State of transit under the Dublin system is presumably the main reason for refusing to give fingerprints, but there may be other explanations. It is possible that asylum seekers have had bad experiences with giving fingerprints to the police in their country of origin, or that they fear the fingerprints may be shared with the country of origin, which could endanger family members. Other people may hesitate to give their fingerprints because they are generally afraid of technology or may not trust – in light of global surveillance scandals, for example – that the collected data will be handled in conformity with data protection principles.

In addition, some people may be unable to provide fingerprints because, for example, their fingertip texture has been scraped off due to manual work. The VIS Regulation has specific provisions that address this situation, but these are absent in the Eurodac Regulation. If officers are not adequately trained to recognise whether or not the fingertip texture was altered in bad faith, persons physically unable to provide fingerprints may face undue hardship as they may be suspected of having acted in bad faith.

Interfering with fundamental rights

The processing of fingerprints itself and actions taken by EU Member States to enforce their obligation to take fingerprints for Eurodac may interfere with a number of fundamental rights guaranteed by the [Charter of Fundamental Rights of the European Union \(Charter\)](#). Interferences may involve absolute rights – such as the principle of *non-refoulement* and the prohibition of torture, inhuman or degrading treatment or punishment – from which no derogations are possible.

Interferences can, however, also involve rights that can be limited, for example, the right to liberty (Article 6 of the Charter and Article 5 of the [European Convention on Human Rights \(ECHR\)](#)) or the protection of personal data and private life set forth in Articles 7 and 8 of the Charter and in Article 8 of the ECHR. For interferences with such rights to be justified, they have to respect the requirements of the Charter and of the ECHR. Under EU law, any limitation on fundamental rights guaranteed by the Charter must be in line with the requirements of Article 52 (1) of the Charter, namely: limitations must be provided for by law, must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, respect the essence of the right, and be proportionate.

Obtaining and storing personal data constitutes an interference with the right to personal data protection set forth in Article 8 of the Charter and the right to private life set forth in Article 7 of the Charter and Article 8 of the ECHR. Fingerprints constitute personal data.⁶ The right to personal data protection requires fair processing, which includes adequately informing persons whose fingerprints are taken, as reflected in Article 29 of the Eurodac Regulation. This means that, before resorting to sanctions or coercive measures, asylum seekers and migrants in an irregular situation need to be provided with an effective opportunity to comply with the duty to provide fingerprints. They must be fully informed of all their options, the rationale for collecting fingerprints, the manner in which fingerprints will be processed, and the consequences for not giving their fingerprints.

FRA research

FRA research carried out among asylum seekers in 2009 shows that they consider social networks – such as friends, relatives, acquaintances, other asylum seekers and fellow countrywomen and -men who they meet in reception centres and other places – to be valuable sources of information,⁷ although these sources may not provide accurate or complete information. To be effective, authorities need to take this into account and complement the provision of information with the provision of counselling, when necessary. FRA research also shows that giving information both in writing and orally is more effective, and that asylum seekers usually consider non-governmental organisations (NGOs) more trustworthy than authorities.⁸ Information should also be provided in a gender-sensitive and culturally appropriate manner.



Returning people who do not give fingerprints

The principle of *non-refoulement* prohibits the return of an individual to the frontiers of territories in which he or she would face persecution or other serious harm. It is the cornerstone of the right to asylum set forth in Article 18 of the Charter, as well as a core element of the prohibition of torture, inhuman or degrading treatment or punishment under Article 3 of the ECHR, as explicitly guaranteed by Article 19 of the Charter.

Non-refoulement

Save for the very exceptional situation envisaged by Article 21 (2) of the [Qualification Directive \(2011/95/EU\)](#),⁹ the prohibition of *refoulement* is absolute, meaning that it applies to everybody, independently of the person's status or behaviour. Member States are bound by the principle of *non-refoulement*, regardless of whether or not the individual concerned has requested asylum.¹⁰

Therefore, a person who refuses to give his or her fingerprints remains protected by the principle of *non-refoulement*. Such a person cannot be removed to a country in which he or she would face persecution or other serious harm, or from which he or she would be returned to another country where such risk exists (indirect *refoulement*). In the absence of a clear legal status in the host country providing clarity about their rights, persons protected from *refoulement* must at least be able to enjoy the human rights to which every person physically present within the state is entitled (such as, a certain degree of access to healthcare; basic education for children; birth registration; freedom of religion and conscience).¹¹

Impact on asylum procedure

The next question is whether, and how, an unjustified refusal to give fingerprints for Eurodac impacts the asylum procedure. Under Article 13 of the [Asylum Procedures Directive \(2013/32/EU\)](#), an asylum applicant has a duty to cooperate with authorities. This includes the obligation to provide all necessary information and data to enable the national authorities to examine the asylum application. Article 13 includes a duty to cooperate in establishing one's identity, but does not expressly refer to fingerprinting as envisaged by Article 9 (1) of the Eurodac Regulation.

Refusing to provide fingerprints for Eurodac cannot be a ground for rejecting an asylum application in substance, because such a decision can only be based on an assessment of whether the applicant fulfils the requirements for qualifying as refugee or as being in need of subsidiary protection as laid down in the Qualification Directive. Similarly, the refusal to give fingerprints cannot in itself be considered an implicit withdrawal of the application under Article 28 (1) (a) of the Asylum Procedures Directive, because the fingerprint data for Eurodac does not constitute essential information to substantiate the application, as listed in Article 4 of the Qualification Directive.

Accelerated asylum procedures

Article 31 (8) (i) of the Asylum Procedures Directive envisages the possibility to examine applicants who refuse to give fingerprints for Eurodac in an accelerated manner and/or through a border procedure or in transit zones. Depending on national law, such procedures may, for example, consist of prioritising specific categories of applications, establishing shorter delays for appeals, reducing the time required for the completion of the appeals process, and simplifying and/or prioritising appeals. All accelerated procedures must, however, respect the minimum safeguards required by European law, in particular those relating to effective remedy, set by the ECtHR in its case law on Article 13 of the ECHR and Article 47 of the Charter.¹²

Accelerated asylum procedures were conceived to handle applications that are simple to deal with because they are clearly abusive, manifestly unfounded or manifestly well-founded,¹³ so that national authorities can focus their resources on those applications that require more attention. The rationale for allowing swifter procedures is that certain applications require little time to establish international protection needs – a consideration which does not necessarily apply to applicants who refuse to give fingerprints, given that this has no relation to the merits of their case. It can therefore be questioned whether channelling applicants who refuse to give fingerprints into accelerated procedures, which leads to reduced legal guarantees, is justifiable in light of the principle of non-discrimination.¹⁴

Depriving people of their liberty to force them to give fingerprints

This section looks into deprivation of liberty as a tool to force people to give fingerprints. It is not about examining cases where deprivation of liberty is used in response to a refusal – violent or passive – of a police officer’s order, behaviour that is typically punishable for all persons, regardless of their legal status, and hence also covers non-nationals. In such cases, any deprivation of liberty – if allowed under national criminal law – would be a consequence of the individual’s violent or obstructive behaviour.

Detention is a major interference with the right to liberty set forth in Article 6 of the Charter and in Article 5 of the ECHR. Strict safeguards exist to prevent unlawful or arbitrary deprivation of liberty. Under EU law, any limitation on the right to liberty must be in line with the requirements of Article 52 (1) of the Charter, namely: limitations must be provided for by law, must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, respect the essence of the right, and be proportionate.

To be lawful, it must be possible to subsume any deprivation of liberty under one of the grounds listed in Article 5 of the ECHR, as interpreted by the European Court of Human Rights (ECtHR), which – pursuant to Articles 6 (3) of the Treaty on European Union and 52 (3) of the Charter – has to guide the interpretation of the right to liberty and security set forth in Article 6 of the Charter.

Taken together, under EU law and the ECHR, deprivation of liberty for immigration-related reasons can only be a measure of last resort, and an assessment needs to be made in each individual case to determine whether all pre-conditions required to prevent arbitrary detention are fulfilled. Specific safeguards against arbitrary detention are included in the EU return and asylum *acquis*: Article 15 of the [Return Directive \(2008/115/EC\)](#) allows detention only in order to prepare the return and/or carry out the removal process,¹⁵ and Article 8 of the [Reception Conditions Directive \(2013/33/EU\)](#) lists six exhaustive grounds justifying the detention of asylum seekers.

Detention to prevent unauthorised entry of or to deport or extradite a person

The ECtHR has usually analysed the deprivation of liberty of asylum seekers or migrants in an irregular

situation in the frame of Article 5 (1) (f) of the ECHR, which permits detention to prevent unauthorised entry or for the purpose of deporting or extraditing a person. Detention is only allowed where all pre-conditions required to prevent arbitrary detention are fulfilled. These apply both when a person is detained to prevent unauthorised entry or to effect his or her removal: detention must be provided for in national law in a sufficiently accessible, precise and foreseeable manner; authorities have to act in good faith and must show due diligence (in clarifying whether the foreigner can enter or when preparing and implementing the return); the place and conditions of detention should be appropriate; the length of the detention should not exceed that reasonably required for the purpose pursued;¹⁶ and, in case of pre-removal detention, there must be a realistic prospect for removal.¹⁷ By and large, these pre-conditions are also included in secondary EU law.¹⁸ This clearly indicates that the refusal of an individual to give fingerprints for Eurodac cannot *per se* justify deprivation of liberty under Article 5 (1) (f) of the ECHR, and would only be one of several factors to consider in assessing whether the conditions for deprivation of liberty are met. Article 5 (1) (f) of the ECHR cannot be used to *punish* a person for not giving his or her fingerprints,¹⁹ nor to *pressure* a person to give his or her fingerprints, as such scenario falls under Article 5 (1) (b) of the ECHR.

Detention to fulfil an obligation prescribed by law

Article 5 (1) (b) of the ECHR allows the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law (*Beugehaft*). In this case, detention must be a measure of last resort and be aimed only at fulfillment of the obligation; it must not be punitive, and the detention needs to cease the moment this obligation is fulfilled.²⁰

Articles 9 (1), 14 (1) and 29 (1) (d) of the Eurodac Regulation characterise the collection of fingerprints as an obligation of Member States, and not as a duty for asylum applicants and apprehended migrants. However, the Eurodac Regulation, taken together with corresponding legislation at national level, clearly gives authorities the right to take fingerprints from asylum seekers and apprehended



migrants, and imposes a corresponding duty to provide fingerprints.²¹ In fact, without the duty of foreigners to provide fingerprints, a state could not implement the regulation.

In addition to the ECHR, Article 52 (1) of the Charter requires that limitations on fundamental rights – including limitations on the right to liberty – be provided for by law. While the Eurodac Regulation obliges Member States to collect fingerprints, it does not indicate whether the deprivation of liberty can be used to comply with that obligation. Whether it is lawful to detain a foreigner to convince him or her to provide the required fingerprints depends on the existence of a clear provision in national law that makes it possible to predict, in an accessible, precise and foreseeable manner, that not providing fingerprints will result in the deprivation of liberty.

As noted in the introduction, where persons have no documents, taking fingerprints for Eurodac may in specific circumstances also allow states to verify or determine the identity of a person, particularly once there is a match with another Member State and information is exchanged. For asylum seekers, Article 8 (3) (a) of the Reception Conditions Directive (2013/33/EU) envisages the possibility of deprivation of liberty – provided all conditions set forth in EU law and in the ECHR are fulfilled – in order to determine or verify an applicant’s identity or nationality. For migrants in an irregular situation, the absence of cooperation with efforts to determine identity – which for undocumented migrants may include the refusal to provide fingerprints – is a criteria frequently used by EU Member States to establish whether there is a risk of absconding as per Article 3 (7) and Recital 6 of the Return Directive, which may justify detention under Article 15 (1) of this directive. However, the refusal to provide fingerprints is only one element to take into account when determining whether the grounds for deprivation of liberty set forth in EU law are fulfilled in a particular case. It cannot be the sole basis for automatically allowing the deprivation of liberty.

Regarding “compliance with a lawful order of the court” under 5 (1) b of the ECHR, the ECtHR has stated that a person needs to have a chance to comply voluntarily. Past refusals to comply are not sufficient to justify someone’s detention without providing a new opportunity to comply before resorting to the deprivation of liberty.²² Detention is therefore only lawful if a person had a chance to comply voluntarily and clearly refused to do so. Foreigners have often fled their own country fearing for their lives, and face language and cultural communication barriers, making them particularly vulnerable. Therefore, offering such individuals an opportunity to comply voluntarily requires that they are put in a position – through effective information and counselling in

a language they understand – to understand the rationale for collecting fingerprints, the manner in which fingerprints will be processed and the consequences for not giving fingerprints, so that they can make an informed decision.

Balancing the right to liberty and the fulfilment of an obligation prescribed by law

There must be a balance between the right to liberty and the fulfilment of the obligation under Article 5 (1) (b).²³ Factors to consider when drawing such a balance include the nature of the obligation arising from the relevant legislation, including its underlying object and purpose; the person being detained and the particular circumstances leading to detention; and the length of the detention.²⁴

At the same time, given the vulnerability of asylum seekers and migrants in an irregular situation, pressuring people to give their fingerprints must under no circumstances lead to a risk of traumatising or re-victimisation. This means that detention under Article 5 (1) (b) of the ECHR must remain an exceptional measure that is applied taking into account the physical and mental conditions of the person. Individuals exhibiting signs that they might be victims of torture, sexual or gender-based violence, victims of other serious crimes, and traumatised people should not be subjected to it, nor should people usually considered vulnerable in light of Article 21 of the Reception Conditions Directive and 3 (9) of the Return Directive. No detention should be used for children who are obliged to provide fingerprints, i.e. those aged 14–17 years.

Finally, detention can only be resorted to for a short period of time: the ECtHR deemed excessive the detention of a woman accused of travelling without a valid ticket, who was subsequently held by the police to verify her identity for 13-and-a-half hours,²⁵ but accepted 45 hours of detention to carry out security checks on entering the United Kingdom, an obligation introduced to prevent terrorism.²⁶

Using force to obtain fingerprints

The third question examined in this note concerns the use of force to obtain fingerprints for Eurodac. In simple terms, the use of force can be defined as the use of physical or psychological force to overcome resistance, for example by forcefully placing an individual's open hand on the fingerprint scanner. In such cases, the people concerned are no longer given the chance to comply – as is the case when they are detained – but are physically forced to provide their fingerprints. This is a most intense form of interference with a person's fundamental rights. Given the vulnerability of the people concerned and the pre-conditions that need to be fulfilled, it is difficult to imagine a situation in which using force to obtain fingerprints for Eurodac would be justified.

Risk of inhuman or degrading treatment or punishment

The use of force to obtain fingerprints may in specific circumstances meet the threshold of inhuman or degrading treatment or punishment prohibited by Article 4 of the Charter and Article 3 of the ECHR. The prohibition of torture, inhuman or degrading treatment or punishment is absolute, meaning that any use of force that reaches the threshold prohibited by Article 3 of the ECHR will always be unlawful. A number of factors have to be considered to determine whether that threshold is met.

All use of force that is excessive and has not been made strictly necessary by a person's own conduct diminishes human dignity and hence amounts to inhuman or degrading treatment or punishment as prohibited by Article 4 of the Charter and Article 3 of the ECHR.²⁷ Actions that cause feelings of fear, anguish or inferiority capable of humiliating and debasing a person are always prohibited by Article 3 of the ECHR.²⁸ In assessing whether the conduct by a public authority attains a minimum level of severity to come within the scope of Article 3, attention must be paid to all surrounding circumstances. The ECtHR attaches particular importance to injuries caused to persons who were subject to physical force,²⁹ which means that techniques that pose a danger to the foreigner's physical integrity and health must be avoided. Furthermore, use of force which aims to *punish* an individual for not giving his or her fingerprints would never be allowed.

The use of force must be lawful. This means that the use of force has to be provided for by law – not just in an internal instruction. Such law must be sufficiently precise to enable a person to understand it and predict its application in practice.

When assessing whether the use of force attains the minimum level of severity required by Article 3 of the ECHR, attention must be paid to the fact that – contrary to situations in which breath and blood tests are taken to prevent or investigate criminal offences³⁰ – asylum seekers and migrants in an irregular situation are not crime suspects and are often in a particularly vulnerable position. The ECtHR has paid increasing attention to the vulnerability of the persons concerned to human rights violations, and requires a higher threshold for the use of force in such cases. When a person is deprived of liberty – which is often the case for persons apprehended after unauthorised border crossings – the use of physical force against such person violates Article 3 of the ECHR whenever it is not made *strictly necessary* by the individual's behaviour.³¹

When dealing with persons under the control of the police, the ECtHR has characterised coercive measures as not excessive only in specific circumstances, such as in the case of physical resistance or violent behaviour, passive resistance when being summoned, attempts to escape or the refusal of a detainee to undergo a search.³²

For the use of force not to be considered excessive, the foreigner must have been given a realistic opportunity to comply with the fingerprinting obligation. The person must be thoroughly informed, prepared and been given enough time to decide whether or not to give his or her fingerprints. Compliance should normally be achieved through the provision of adequate information and effective counselling. This will limit the question of whether coercive measures should be used to take fingerprints to exceptional cases.

The use of force would also not be justified to retake fingerprints that have already been obtained from the applicant by national authorities for another procedure,³³ if these can be re-used. Furthermore, techniques that will not make it likely that the taken fingerprints will serve their purpose, are not allowed. If some or all of the existing techniques to obtain fingerprints by force result in a substantial likelihood of low-quality – and therefore unusable – fingerprints, it becomes difficult to conclude that resorting to the use of force is necessary. For example, the Dutch Ombudsman noted that opening an athlete's fist to obtain fingerprints by force resulted in non-usable fingerprints.³⁴



Right to the integrity of the person

Use of force that does not amount to inhuman or degrading treatment or punishment prohibited by Article 4 of the Charter and Article 3 of the ECHR can still raise fundamental rights concerns, particularly in light of Article 3 of the Charter, which enshrines

the right of everyone to respect his or her physical and mental integrity. When force is used to compel a person to do something, the circumstances of each individual case must be assessed to determine whether the use of force was necessary and proportionate, and would thus still constitute lawful interference in light of the standards set forth in Article 52 (1) of the Charter.

Conclusions

In general, an interference with someone's fundamental rights must not outstrip the importance of the aim pursued. Respecting the principle of proportionality implies using less invasive means whenever possible, including providing information and counselling, reaching out to the migrant community concerned, or using other evidence for Dublin purposes.

Asylum seekers and migrants in an irregular situation apprehended in connection with their irregular entry have a duty to provide fingerprints for Eurodac. Compliance with this obligation should primarily be secured through effective information and counselling, carried out individually as well as through outreach actions targeting migrant communities, such as focus group discussions, information sessions and similar initiatives. To be effective, information should be provided through appropriate means, in a language people understand, and taking into account gender and cultural considerations.

Refusal to provide fingerprints does not affect Member States' duty to respect the principle of *non-refoulement*. Therefore, threats of deportation cannot be used to enforce the duty to give fingerprints.

The use of detention to pressure persons to give their fingerprints must remain an exceptional measure. It can only be considered when this possibility is provided for under national law, and must be aimed only at fulfilment of the obligation to provide fingerprints; it must not be punitive, should be of limited duration, and cease the moment the obligation is fulfilled. Before authorities resort to detention to obtain fingerprints, asylum seekers and migrants in an irregular situation need to be provided an effective opportunity to comply with the fingerprinting requirements. Children, suspected victims of torture, sexual or gender-based violence, victims of other serious crimes, as well as traumatised people should not be coerced into giving fingerprints, nor should other people usually considered to be vulnerable.

Given the vulnerability of the people concerned and the obligation to use the least invasive means, it is difficult to imagine a situation in which using physical or psychological force to obtain fingerprints for Eurodac would be justified.

- 1 Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).
- 2 See European Migration Network (EMN) (2014), *Ad-hoc query on Eurodac fingerprinting*, 22 September 2014; General Secretariat of the Council of the European Union, Meeting document to Delegations, *Best practices for upholding the obligation in the Eurodac Regulation to take fingerprints*, DS 1491/14, 30 October 2014.
- 3 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda for Migration*, COM(2015) 240 final, 13 May 2015.
- 4 European Commission, *Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, Commission Staff Working Document, SWD(2015) 150 final, 27 May 2015.
- 5 European Council of Refugees and Exiles, *Comments on the European Commission Staff Working Document “on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints”*, June 2015; and Statewatch, *Briefing – Coercive measures or expulsion: Fingerprinting migrants*, May 2015.
- 6 ECtHR, *S. and Marper v. United Kingdom* [GC], paras: 68 and 84; CJEU, *M. Schwarz v. Stadt Bochum*, C-291/12, paras. 26–27.
- 7 FRA (2011), *The duty to inform applicants about asylum procedures: The asylum seeker perspective*, Luxembourg, Publications Office, p. 30.
- 8 *Ibid.*, pp. 20 and 29–31.
- 9 This provision implements in EU law Article 33 (2) of the 1951 UN Convention Relating to the Status of Refugees. It contains exceptions regarding refugees who constitute a danger to the security of a country or being convicted in final instance for a particularly serious crime, or constitute a danger to the community.
- 10 See ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 133. Also, the *non-refoulement* provisions included in Articles 4 and 5 of the *Return Directive (2008/115/EC)* applies to all migrants in return proceedings.
- 11 For more information on the fundamental rights applicable to irregular migrants, see: FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office; and United Nations Office of the High Commissioner for Human Rights (2014), *The economic, social and cultural rights of migrants in an irregular situation*, New York and Geneva.
- 12 For an overview of the procedural safeguards in asylum and return procedures, see Chapter 4 of FRA/ECtHR (2014), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office.
- 13 UNHCR, Conclusions of the Executive Committee of the UNHCR Programme, Conclusion No. 30 (XXXIV) of 1983. UNHCR, Summary of UNHCR’s Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, March 2005. UNHCR, UNHCR Central Mediterranean Sea Initiative (CMSI) – Proposal for a ‘Response Package for Protection at Sea’, October 2014.
- 14 See, *mutatis mutandis*, ECtHR, *Van Geyseghe v. Belgium* [GC], No. 26103/95, 21 January 1999, para. 33, where the court clarified that a defendant cannot lose the benefit of the rights of the defence because he or she failed to attend a hearing on his or her case: “in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 of the Convention to be defended by counsel”.
- 15 Under Article 2 (2) (a) of the Return Directive, Member States have, however, the possibility to opt not to apply the directive to those persons who are “apprehended or intercepted by the competent authorities in connection with the irregular crossing by land sea or air of the external border”, an option of which a number of Member States are making use.
- 16 ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 74; ECtHR, *Suso Musa v. Malta*, No. 42337/12, 23 July 2013, para. 98.
- 17 ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009, para. 67.
- 18 See Section 6.6 of FRA-ECtHR, *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office.
- 19 ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 171, where the court bans the use of Article 5 (1) (f) to deal with terrorism threats.
- 20 ECtHR, *Vasileva v. Denmark*, No. 52792/99, 25 September 2003, para. 36.
- 21 See, for example, Austria, BFA-Procedure Law (*BFA-Verfahrensgesetz*), para. 42, www.ris.bka.gv.at; Bulgaria, Asylum and Refugees Act (*Закон за убежището и бежанците*), 31 May 2002, Art. 30 (9), <http://lex.bg/laws/ldoc/2135453184>; Malta, Subsidiary Legislation 420.03, Asylum Procedures (Means of Facilitating Identification of applicant) Regulations, 29th October, 2001, Legal Notice 254 of 2001; Sweden, Alien Act (*Utlänningslag* (2005:716)), Chapter 9, Section 8.
- 22 ECtHR, *Petukhova v. Russia*, No. 28796/07, paras. 58–59.
- 23 ECtHR, *Göthlin v. Sweden*, No. 8307/11, 16 October 2014, para. 58.
- 24 ECtHR, *Petukhova v. Russia*, No. 28796/07, paras. 58–59; and *Vasileva v. Denmark*, No. 52792/99, 25 September 2003, para. 38.
- 25 ECtHR, *Vasileva v. Denmark*, No. 52792/99, 25 September 2003, para. 41.
- 26 European Commission of Human Rights, *McVeigh and others v. United Kingdom*, No. 8022/77, 8025/77 and 8027/77.
- 27 See, for example: ECtHR, *Dembele v. Switzerland*, No. 74010/11, 24 September 2013, para. 41 (identity check); ECtHR, *Rehbock v. Slovenia*, No. 29462/95, 28 November 2000, para. 73–78, and *Altay v. Turkey*, No. 22279/93, para. 54, 22 May 2001 (both on excessive use of force during arrest).
- 28 ECtHR, *Kudla v. Poland* [GC], No. 30210/96, para. 92. See also *Raninen v. Finland*, 16 December 1997, para. 55, and *Peers v. Greece*, No. 28524/95, para. 74, *Gäfgen v. Germany*, judgment [GC] of 1 June 2010 at 103.
- 29 For example, ECtHR, *R.L. et M.-J.D., R.L. et M.-J.D. v. France*, No. 44568/98, 19 May 2004, para. 68, and *Rehbock v. Slovenia*, No. 29462/95, 28 November 2000, para. 72.
- 30 ECtHR, *Saunders v. the United Kingdom* [GC], No. 19187/91, 17 December 1996, paras. 68–69.
- 31 ECtHR, *Ribitsch v. Austria*, No. 18896/91, 4 December 1995, para. 38 and *Tekin v. Turquie*, No. 52/1997/836/1042, 9 June 1998, paras. 52–53.
- 32 ECtHR, *Dembele v. Switzerland*, No. 74010/11, 24 September 2013, para. 42; ECtHR, *Klaas v. Germany*, No. 15473/89, 22 September 1993, para. 30; ECtHR, *Sarigiannis v. Italy*, No. 14569/05, 5 April 2011, para. 61; ECtHR, *Milan c. France*, No. 7549/03, 24 January 2008, para. 59; ECtHR, *Caloc v. France*, No. 33951/96, 20 July 2000, paras. 100–101; ECtHR, *Borodin v. Russia*, No. 41867/04, 6 November 2012, paras. 119–121.
- 33 Netherlands, National Ombudsman of the Netherlands (*Nationale Ombudsman*) (2010), *Report No. 2010/267*, The Hague, National Ombudsman, <https://www.nationaleombudsman.nl/rapporten/2010/267>.
- 34 *Ibid.*

Further information:

An overview of the FRA project on biometric data in large information technologies (IT) systems in the field of borders, immigration and asylum activities is available at:

<http://fra.europa.eu/en/project/2014/biometric-data-large-eu-it-systems-areas-borders-visa-and-asylum-fundamental-rights>.

The following FRA reports examine various aspects of and case law related to asylum, borders and immigration into the EU:

- FRA-ECtHR (2013), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>.
- FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>.
- FRA (2011), *The duty to inform applicants about asylum procedures: The asylum seeker perspective*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2010/duty-inform-applicants-about-asylum-procedures-asylum-seeker-perspective>.
- FRA (2010), *Detention of third-country nationals in return procedures*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures>.



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