

Fundamental rights at Europe's southern sea borders

Summary



Each year, hundreds of men, women and children board overcrowded and ill-equipped boats in an attempt to reach Europe. They may be fleeing violence and persecution or seeking improved opportunities for themselves and their families. Many do not survive the trip, never reaching their destination, as documented by media headlines and substantiated by several reports. Others are intercepted and turned back. Those who do make it may be detained until their legal status is clarified.

This phenomenon began in the late 1980s, when European countries tightened immigration policies, making it more difficult to enter such countries in a regular way. In 1999, Article 1 (5) of the Treaty of Amsterdam established the European Union (EU) area of freedom, security and justice. Since then, the EU has elaborated common rules on border management and also offered, through Frontex, operational support to EU Member States. Prevention of irregular migration, cooperation with third countries to combat human smuggling and facilitate readmissions, while addressing the humanitarian needs of those who have reached European soil, have guided recent EU policies in this domain.

This publication contains the main conclusions of the FRA report on *Fundamental rights at Europe's southern sea borders*, covering sea border surveillance and disembarkation procedures, as well as general issues such as training of border guards. It is the result of a FRA project on the treatment of third-country nationals at the EU's external borders, which was part of FRA's 2010–2012 work programmes.

The report is based on socio-legal research. A review of the domestic, EU and international legal and policy framework has been complemented by desk research and primary data collection in five EU Member States (Cyprus, Greece, Italy,

Malta and Spain), as well as in three third countries (Morocco, Tunisia and Turkey). Primary data collection consisted of 280 in-depth interviews carried out in the summer and autumn of 2011 with migrants, national authorities, fishermen, shipmasters and civil society organisations dealing with sea arrivals. The research aimed to interview those with recent as well as less recent experiences of crossing in order to assess developments over time. In addition to the interviews, non-participatory observation was used to examine the daily routine of border surveillance at points of arrival. The FRA also sent out a questionnaire on land-based surveillance systems to three EU Member States. Preliminary results of this research were discussed with national stakeholders during four meetings organised in Athens, Madrid, Malta and Rome in November and December 2011.

The field research was carried out in 2011, which turned out to be an exceptional year for the central Mediterranean, as events in Libya and Tunisia pushed up the numbers of arrivals, particularly to Lampedusa.

Frontex assisted FRA in obtaining access to relevant officers and provided information as regards Frontex-coordinated joint operations. The FRA visited two of these operations in the summer of 2011: Poseidon Sea in Greece and Indalo in Spain, where it observed maritime patrols.

The report does not describe the situation of migrants¹ arriving at border crossing points in ports, whether they are documented or not. Therefore,

¹ The term 'migrant' is used to refer to persons arriving by sea in an irregular manner. It is used in its broader sense and also includes refugees and other persons who are in need of international protection. The term 'asylum seeker' or 'asylum applicant' refers only to those individuals who have formally submitted an asylum application.

persons arriving at a port by ferry but lacking the necessary entry documents are not covered. Neither does it deal with the issue of stowaways, namely migrants who clandestinely board a vessel and lack the appropriate papers allowing disembarkation once the vessel reaches a port.

With its findings, this report intends to contribute to the discussion on finding solutions to a disqui-

eting phenomenon. It also highlights a number of concrete measures that the EU and its Member States can take to address specific shortcomings identified by this research. FRA believes, however, that only a comprehensive approach including all states, organisations and other parties involved can succeed in putting an end to the high death toll at sea.

Key findings and FRA opinions

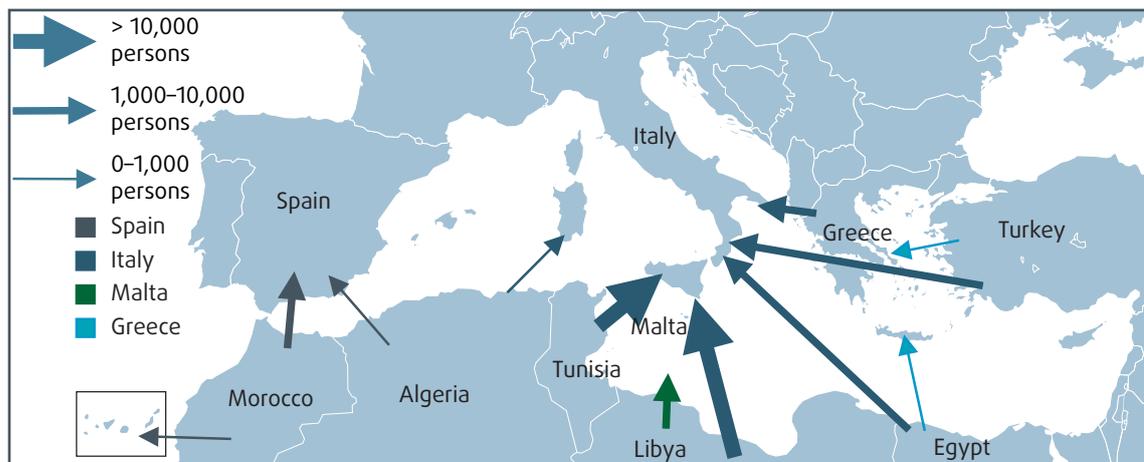
The FRA report *Fundamental rights at Europe's southern sea borders* is about those people who risk their lives crossing to the EU by sea to pursue a dream or escape war or persecution. It covers those four EU Member States most affected by arrivals at sea, namely Greece, Italy, Malta and Spain, and to some extent Cyprus. Migrants who put their lives at risk by crossing the sea in unseaworthy boats to reach the shores of southern Europe highlight an alarming and unresolved chink in the EU's protection of core rights of individuals.

The phenomenon and the risks faced by persons crossing the sea

In numeric terms, arrivals by sea constitute only a small percentage of the total number of persons entering the EU or the Schengen area. Comparable data of external border crossings collected dur-

ing one week in 2009² found that approximately 13 million persons crossed the external borders to enter or exit the Schengen area. More than half of them crossed at airports and fewer than 10 % crossed at a sea border. The number of persons crossing Europe's southern sea borders using unseaworthy boats amounted to some 10,000 people in 2010, increased to over 70,000 people in 2011 following the Jasmine revolution in Tunisia and the civil war in Libya, to drop again to some 20,000 people in 2012. Most of these crossings are organised by smugglers. The map below shows the main routes used for crossing.

Irregularly crossing maritime borders using unseaworthy boats is an extremely dangerous experience. Hardships during the crossings are very common. Migrants may lose their way at sea, run out of fuel, encounter heavy seas, experience engine problems and have leaks in their boats. They also run a high risk of drowning.



Note: For Italy, information on the number of migrants has been estimated on the basis of the number of boats coming from a particular third country.

Source: National police data (2012)

2 Council of the European Union (2009), *Results of the data collection exercise*, 13267/09, 22 September 2009.

Even before they go to sea, many migrants are exposed to serious risks of abuse and exploitation. This is especially the case for women and girls who wait in a transit country in north and west Africa before they have an opportunity to cross to Europe. Refugee protection systems in such transit countries are non-existent or remain undeveloped.

Given the high risks migrants face crossing the sea, all possible efforts should be made to reduce the need for persons to take such a dangerous journey.

FRA opinion

The EU should reinforce its efforts to strengthen the protection space in the transit countries in close collaboration with UNHCR and other relevant UN organisations. Such efforts should focus on the establishment of effective asylum systems, as well as aim to enhance the rule of law, prevention of and protection from abuse and exploitation and access to justice for migrants who are victims of serious crime.

The European Asylum Support Office (EASO) should make use of its mandate to cooperate with third countries with a view to supporting their asylum and reception systems as well as to implement actions aimed at finding durable solutions for refugees.

Right to life

The right to life is one of the most fundamental of human rights. It is enshrined in Article 2 of the EU Charter of Fundamental Rights and in Article 2 of the European Convention on Human Rights (ECHR). In the maritime context, it has been codified by the duty to render assistance to persons in distress at sea and by search and rescue obligations. The duty to render assistance applies to all vessels: government as well as private ships. The International Maritime Organization (IMO) published, jointly with the UN High Commissioner for Refugees (UNHCR), a short guide on rescue at sea principles and practices as applied to migrants and refugees. The guide contains a checklist for shipmasters and governments on appropriate measures.³

Migrants interviewed for this research confirm the positive experience in their encounters with rescuers. Nevertheless, particularly in the central Mediterranean, boats carrying migrants drifted for a considerable time – sometimes more than a week – before they were rescued. The Parliamen-

³ UNHCR and IMO (2006), *Rescue at sea: A guide to principles and practice as applied to migrants and refugees*, September 2006.

tary Assembly of the Council of Europe documented the case of a boat with migrants remaining at sea for two weeks before it drifted back to a Libyan shore.⁴

No statistics on the number of persons dying while crossing the sea to southern Europe exist. UNHCR estimated that more than 1,500 refugees or migrants in an irregular situation drowned or went missing in 2011 while attempting to cross the Mediterranean Sea.⁵ The most deadly incidents took place near north African coasts, where search and rescue capacities are limited.

EU Member States have supported third countries with border management equipment and assets. A functioning rescue system in the Mediterranean is essential to reduce the number of deaths at sea. This also requires that all government and private ships provide assistance to migrants in distress at sea as instructed by the responsible rescue coordination centre. The research shows, however, that private shipmasters and ship owners may face economic, administrative or other disincentives to render assistance or rescue migrants.

FRA opinion

When the EU and its Member States provide assets, equipment and other maritime border management facilities to neighbouring third countries, priority should be given to assets and equipment that can be used to enhance their search and rescue capacities.

EU Member States should not punish for facilitation of irregular entry any private shipmaster who takes on board or provides other assistance to migrants in unseaworthy and overcrowded boats. The European Commission could consider stipulating this in a possible future review of the Facilitation Directive.

EU Member States should use pilot projects to explore ways to support private vessels, and in particular fishing vessels, when they face economic loss because they are involved in rescue operations.

Interception and non-refoulement

The principle of *non-refoulement* bans the return of individuals to persecution, torture or other seri-

⁴ Council of Europe, Parliamentary Assembly (PACE) (2012), *Lives lost in the Mediterranean Sea: Who is responsible?*, Doc. 12895, 5 April 2012.

⁵ UNHCR (2012), *More than 1,500 drown or go missing trying to cross the Mediterranean in 2011*, 31 January 2012.

ous harm. It is most prominently reflected in the 1951 Convention relating to the Status of Refugees, ratified by all EU Member States and incorporated into EU primary law through Article 78 of the Treaty on the Functioning of the European Union (TFEU) and Article 18 of the EU Charter for Fundamental Rights. The Charter also reiterates the prohibition on torture and inhuman or degrading treatment or punishment in Article 4 and bars the return to such treatment in Article 19, in line with case law developed by the European Court of Human Rights (ECtHR) under Article 3 of the ECHR.⁶

The principle of *non-refoulement* bars not only the return of an individual to his or her country of origin, but also to other countries where there is a risk of onward movement to the country of origin (so-called indirect *refoulement*). It also forbids push backs undertaken at high seas. As the ECtHR also clarified, measures taken at high seas, which have the effect of preventing migrants from reaching the borders of the state or to push them back to another country, can also violate the prohibition of collective expulsion.⁷

The EU and its Member States have increasingly looked at possibilities for operational cooperation with the border management authorities of third countries. This has led to the donation of equipment and assets to third countries, the provision of training, capacity building and, in some cases, the implementation of joint operations. In February 2011, the EU's Justice and Home Affairs Council adopted 29 measures for reinforcing the protection of external borders and combating illegal immigration, which called for improving joint patrolling with third countries including at sea borders (measure 4). Joint patrols with a third country, for example in north or west Africa, do not discharge EU Member States officials from their duty to respect fundamental rights. They remain bound by the EU Charter of Fundamental Rights when implementing EU law and must respect the ECHR in all their actions.

Maritime border surveillance operations carried out under the Schengen Borders Code may at any time turn into rescue operations, which the international law of the sea regulates. The two types of operations are closely interlinked; an operation may start out as a border control activity and become a search and rescue event a few hours

later. EU Member States must respect the principle of *non-refoulement* not only during border control but also in rescue operations, as clarified by the ECtHR in the *Hirsi* case.⁸

While border control measures clearly fall under the scope of EU law (Article 79 of the TFEU), search and rescue operations are regulated by the international law of the sea. However, they are intrinsically linked with immigration control, particularly when it comes to the question of where to disembark migrants taken on board private or government vessels. The question emerges whether fundamental rights guidance on disembarkation for border control operations should also be applicable when such operations involve rescue at sea.

For migrants rescued or intercepted at high seas, the absence of clear disembarkation rules and the different interpretations of what is the nearest place of safety not only creates friction between EU Member States, it also increases the risk that migrants are disembarked in ports in which their lives and freedom would be at risk. While some guidance had been developed by the EU for Frontex operations through Council Decision 252/2010/EU, such decision has been annulled by the CJEU on formal grounds.⁹

FRA opinion

After Council Decision 252/2010/EU is annulled, the EU legislator should adopt clear guidance on the respect for fundamental rights in the context of maritime surveillance and on the disembarkation of persons intercepted or rescued at sea, including in particular as regards the principle of non-refoulement. Such guidance should be applicable not only to Frontex-coordinated operations, but also to those operations EU Member States carry out.

Until international law of the sea or EU law provide further legal clarity on where to disembark intercepted or rescued migrants, all parties should make practical arrangements to allow for swift resolution of any disputed case in full respect of the principle of non-refoulement. Creative opportunities for joint action among all parties involved, including the idea of joint processing of asylum claims should be explored in this regard.

6 European Court of Human Rights (ECtHR), *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989, paras. 90-91; ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 114.

7 For more information, see ECtHR, 'Collective expulsions', Factsheet, June 2012, available at: www.echr.coe.int/NR/rdonlyres/6E875E50-67A2-4F67-9C33-815AF6618352/0/Collective_expulsions.pdf.

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

9 Court of Justice of the European Union (CJEU), C-355/10 [2012], *European Parliament v. Council of the European Union*, 5 September 2012.

Where the EU or its Member States finance or donate maritime assets and equipment to third countries, they should also provide training to the authorities of the receiving country to underscore the proper use of donated assets and equipment 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 at bilateral meetings, training or through other channels.

Operational plans and other documents guiding joint operations or patrols with third countries must be drafted in such a way as to mitigate as much as possible the risk of fundamental rights violations. In particular, any guidelines drafted 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.

Schengen evaluations on the surveillance of maritime borders should also review as part of their assessment whether instructions and training provided to officers patrolling the sea adequately address fundamental rights and in particular the prohibition to return a person to persecution, torture or other serious harm (principle of non-refoulement) – including when patrols are carried out jointly with third countries. To this end, evaluators should be provided with appropriate guidance and training on fundamental rights.

When assessing the implementation of measure 4 (on joint patrols with third countries) of the “29 measures for reinforcing the protection of the external borders and combating illegal immigration”, the Council of the European Union should also review whether the actions taken were in full conformity with fundamental rights and highlight any promising practice in this regard.

As a good practice, where appropriate, EU Member States should consider involving the humanitarian organisations that assist in the provision of emergency assistance to migrants intercepted or rescued at sea, in national and local coordination centres.

Maritime surveillance systems and fundamental rights

Maritime surveillance is costly. There will, therefore, be increased collaboration and data sharing between entities involved in monitoring issues such as maritime pollution, fisheries and irregular migration or smuggling. To exchange such information, the EU plans to create a Common Information Sharing Environment (CISE) which will allow exchanges of surveillance data collected for various purposes.¹⁰ This, however, raises fundamental rights issues, particularly if personal data or other sensitive information is stored and shared with third parties.

In the field of border management, EU Member States and Schengen-associated countries are establishing Eurosur as a platform for exchanging border management information between themselves and with Frontex. Given the close link between rescue at sea and maritime surveillance, the planned Eurosur system’s life-saving potential should be put to best use, as it is likely to provide information on vessels or persons threatened by grave and imminent danger requiring immediate assistance.

Eurosur as well as other surveillance systems are not normally intended to collect and store personal data, except where it is exceptionally provided for. Pictures, videos and other recorded information may nevertheless involuntarily result in personal data being captured or shared.

In the border management field, the EU and third countries have created regional cooperation mechanisms. The Seahorse network, which is set up largely through EU funds and connects Portugal and Spain to a number of west African countries, is one such example. Intelligence on concrete migrant movements – including information stored in Eurosur – may be shared with third countries through such networks. Law enforcement authorities in these third countries could use this information to initiate actions in violation of human rights, for example, apprehending and detaining persons in facilities where they might be subject to inhuman or degrading treatment.

¹⁰ European Commission (2010), *Communication from the Commission to the Council and the European Parliament on a Draft Roadmap towards establishing the Common Information Sharing Environment for the surveillance of the EU maritime domain*, COM(2010) 584 final, Brussels, 20 October 2010.

FRA opinion

The European Commission should thoroughly assess the fundamental rights implications and risks prior to establishing a CISE and provide for a system to regularly evaluate CISE's impact on fundamental rights and in particular on the protection of personal data.

The EU legislator should support Eurosur's life-saving potential by strengthening the references to rescue at sea in the proposed regulation. The Eurosur handbook should include practical guidance on how to achieve this. The handbook could recommend, for example, that one national authority manages its respective Eurosur and national rescue coordination centres, that rescue coordination centres post liaison officers in the national Eurosur centre and the creation of an automatic alert system.

Monitoring Eurosur technical and operational functions should be complemented by monitoring its impact on fundamental rights. In the proposed regulation or in the Eurosur handbook, an explicit provision should be made for an independent actor with fundamental rights expertise to support the monitoring work Frontex is requested to undertake.

The Eurosur handbook should provide persons operating national coordination centres with clear guidance on how to ensure respect for fundamental rights, including on how to avoid personal data from being inadvertently collected, stored and shared, as well as how to reduce the risk that data referred to in Article 18 (2) of the proposed regulation are not shared with third countries.

Treatment on board government vessels

Rescue operations are dangerous and officers can be exposed to traumatising experiences. The large number of migrants to be rescued, their panic and impatience together with their inexperience of the sea, adverse weather and sea conditions, the technical challenges inherent in transferring passengers from one ship to another and communication difficulties all make rescue operations extremely complex and risky.

The treatment of migrants on board rescue vessels emerged generally as satisfactory, although differences were noted in the quantity and type of emergency humanitarian items on board the rescue or intercepting vessel. Patrolling officers tend to be male, which creates difficulties if body searches are to be performed, and may also limit communication with female migrants.

The research also showed that there is general recognition that vessels are unsuitable for carrying out asylum or other administrative procedures. In practice, little or no information is provided to migrants while they are on board rescue vessels. The priority is to bring them to a place of safety.

FRA opinion

EU Member States should ensure that staff deployed on vessels have regular access to first-aid refresher courses and that those who live through traumatising experiences have access to adequate mechanisms to deal with these.

EU Member States should ensure that patrolling vessels deployed along migrant routes are equipped with basic supplies, such as adequate medical kits and sufficient quantities of water, food and blankets. As a best practice, Member States may consider collaborating with humanitarian organisations in defining the type and quantity of emergency relief supplies. EU Member States should also deploy female staff on maritime patrols, particularly when there is a likelihood that women may need to be taken on board. Under no circumstances should male staff carry out body searches on female migrants.

Asylum or other administrative procedures should always be carried out by EU Member States on land after providing migrants with emergency assistance and information.

Migrants rescued and taken on board government vessels should receive very basic but clear information, in a language they understand, on where they will be brought and what will happen to them next. EU Member States could consider requiring crew to learn short phrases in the most common migrant languages, and Frontex could consider including these phrases in their language learning tools.

Immediate humanitarian response upon arrival

Migrants arriving by sea in places such as the island of Lampedusa, Malta, an eastern Aegean island or the Andalusian coast are usually in need of emergency humanitarian assistance, specifically food, water, warm clothing, medical care and a place to rest. Greece, Italy, Malta and Spain have established different systems to cater for the needs of migrants when they are disembarked at the pier. Some are more comprehensive and involve specialised humanitarian non-governmental organisations (NGOs), whereas others do not. While as a rule all new arrivals undergo a medical exami-

nation, only two of the four EU Member States researched carry out an immediate medical check-up at disembarkation.

Virtually all new arrivals are hosted in closed facilities (except for those who are hospitalised), at least during the first hours or day(s) following their arrival. Alternatives to detention are not provided for in law or in practice. Safeguards to prevent unlawful or arbitrary detention deriving from Article 5 of the ECHR also apply to individuals deprived of liberty in connection with their unauthorised entry. These should therefore be implemented also when EU Member States have opted out from applying the Return Directive to those apprehended in connection with their irregular border crossings, as envisaged by Article 2 (2) (a) of the directive.

In some locations, temporary facilities have been created at or near ports of arrival. The regime in such initial facilities varies, but in most cases it is detention-like and not suitable for separated children, survivors of torture or other particularly vulnerable persons. NGO access is not always guaranteed. While temporary facilities are intended for short stays, the onward movement of persons is not necessarily swift.

FRA opinion

As a good practice, EU Member States should collaborate with specialised international organisations and/or humanitarian NGOs during the disembarkation phase to provide medical and other emergency aid as soon as possible upon arrival at the pier.

In order to ensure an early identification of persons in need of urgent medical treatment, a doctor or qualified nurse should see each migrant individually at the moment of disembarkation.

Facilities used to host migrants immediately upon arrival should be equipped to provide adequate care and protection to separated children, families as well as individuals with specific needs, such as survivors of torture or suspected victims of human trafficking. EU Member States should consider operating open facilities when there is no risk of absconding or other reasons justifying a deprivation of liberty, or where protection considerations should prevail, as is the case, for example, for separated children.

EU Member States are encouraged to apply the safeguards against arbitrary detention contained in the relevant parts of Articles 15 of the Return Directive to migrants apprehended in connection with the irregular crossing of a sea border, even if they have decided to make use of the optional clause contained in Article 2 (2) (a) of the directive.

The European Commission should clarify in its application report on the Return Directive that EU Member States which opted not to apply the directive to persons apprehended in connection with their irregular border crossing remain bound under the ECHR as well as the EU Charter of Fundamental Rights to respect certain parts of Article 15 (1) and (2) of the Return Directive, such as the need to provide for alternatives to detention, the right to be informed or the right to judicial review, and suggest that these be added to the provisions listed in Article 4 (4) of the directive in case it is revised in future.

Procedures and conditions in closed facilities used for the initial reception of newly arrived migrants should be regularly reviewed by independent detention monitoring bodies – even if these facilities are used only for a very short time after the arrival of a migrant – and the relevant authorities should implement their recommendations. Civil society organisations offering social and legal support as well as international organisations mandated to work with asylum seekers and/or migrants should be given regular access to the persons held.

EU Member States should make all reasonable efforts to avoid a prolonged stay of migrants in initial reception facilities, particularly where these are not equipped for longer stays. Separated children, survivors of torture and suspected victims of human trafficking should be moved without delay to appropriate facilities.

Fair screening and identification procedures

To respect the principle of *non-refoulement* and to ensure that adequate protection and care is given to those persons who are entitled to it, mechanisms must be in place at the border which make it possible to identify and channel individuals to appropriate procedures. Typically, such domestic protection procedures exist for asylum seekers, suspected victims of human trafficking and separated children. Shortly upon arrival, in all four EU Member States researched the police carry out an interview to identify the individual and decide his or her further position under the law. This identification interview usually takes place without a legal advisor and in some cases also without professional interpreters.

Access to reliable information is a precondition for an individual to be able to claim his or her rights. In the border context, lack of information makes it more difficult for persons in need of international protection to lodge an asylum claim and thus increases the risk of *refoulement*. Unless immediate and irreversible decisions on a migrant are taken

beforehand, the provision of information on asylum is most effective when it is given after he or she had a possibility to rest and when it is provided in a user-friendly manner.

A recurrent concern of the UNHCR is access to asylum procedures for persons arriving at borders. The UNHCR's Executive Committee, which includes most EU Member States, has repeatedly stressed that in order to uphold the principle of *non-refoulement* there should be no rejection at borders without access to fair and effective procedures for determining migrants' status and protection needs.¹¹ In 2007, UNHCR published a 10-Point Plan of Action to provide guidance to states confronted with refugee arrivals in the context of mixed migration flows.¹² It also provided a collection of good practices to assist states with how to implement the plan of action.¹³

Article 20 (1) of the Convention on the Rights of the Child (CRC) entitles a child who is temporarily or permanently deprived of his or her family environment, to the state's special protection and assistance. The Schengen Borders Code does not provide much guidance on how to deal with separated children arriving in an irregular manner as compared to the treatment of separated children at border crossing points. Delays have emerged in the identification and transfer of separated children to appropriate facilities, and age assessment procedures do not always respect children's fundamental rights.

Pursuant to Article 79 of the TFEU, the EU shall develop enhanced measures to combat trafficking in human beings, in particular women and children. EU Member States have a duty to promote regular training for officials likely to come into contact with victims or potential victims of trafficking under Article 18 (3) of the 2011 Trafficking Directive (2011/36/EU). Preamble 25 of the same directive clarifies that the target persons for such training should also include border guards. In practice, the identification of suspected victims of trafficking at borders is difficult. In some cases, migrants may not (yet) be aware that they are trafficked and that they will be exploited once they arrive. In other situations, migrants spend little time in border areas, making it impossible to monitor the situation over time.

At the border, survivors of torture or victims of other serious crime, such as sexual abuse or exploitation,

are legally in the weakest situation. There are usually no protection mechanisms for them, unless they are a victim of human trafficking, a person in need of international protection or of minor age. As a result they are often not treated like victims. At the same time, a promising practice to identify women at risk and follow up on their protection needs emerged in Spain.

FRA opinion

EU Member States should undertake regular independent reviews of the effectiveness of systems to provide information to newly arrived migrants. As a good practice, NGOs and international organisations should be involved in the provision of information to newly arrived migrants.

Effective mechanisms must be in place to identify international protection needs at borders. These include: ensuring that every official who may be in contact with migrants is instructed to forward asylum applications to the competent national asylum authority; enabling individuals to lodge an asylum application at any time; and phrasing questions during the identification interview in such a way as to make it possible to learn whether a person may be seeking international protection.

Delays in the identification of separated children and referral as well as transfer to appropriate reception structures should be reduced by applying swifter procedures. At arrival point, trained staff should be present who can provide information to children in a child-friendly manner.

Age assessment procedures should respect the rights of the child. In line with the Action Plan on Unaccompanied Minors, EASO is encouraged to publish practical guidance for EU Member States on how to carry out age assessments in full respect of fundamental rights and include this in its training activities.

Mechanisms to identify potential victims of human trafficking at borders should be regularly reviewed involving actors with anti-trafficking expertise. They should be enhanced, building on lessons learned and also on promising practices identified in the main report of this research project.

Procedures should be put in place at points of arrival to facilitate the identification of survivors of torture and victims of other serious crime and their referral to appropriate structures which can provide the necessary legal, medical and psycho-social support either in the host country or elsewhere as may be appropriate in each particular case, taking into account the specific situation of the victim.

11 UNCHR, Executive Committee on international protection of refugees, Conclusions No. 81 (XLVIII) – 1997 (h); No. 82 (XLVIII) – 1997 (d); No. 85. (XLIX) – 1998 (q); No. 99; (LV) – 2004 (l); No. 108 (LIX) – 2008.

12 UNHCR (2007), *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev.1, available at: www.unhcr.org/refworld/docid/45b0c09b2.html.

13 UNHCR (2011), *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011.

Schengen evaluations covering sea borders of EU Member States should also review if police officers undertaking identification of newly arrived migrants receive adequate instructions and are properly equipped to identify asylum seekers, victims of trafficking in human beings and separated children and to refer them to the appropriate national procedures.

Fundamental rights in the context of return and readmission

Upon arrival, some individuals are speedily returned to the country of departure through a simplified procedure. During the time FRA carried out its research project, this was primarily the case for Egyptian, Moroccan and Tunisian nationals returned from Italy or Spain. The implementation of simplified and accelerated return depends on the third country's readiness to give priority to readmission requests and treat these speedily. Such readiness is influenced by many different factors, in part unrelated to irregular migration.¹⁴

Readmission agreements are a tool which facilitates the implementation of returns, even if they must be seen as part of the broader bilateral relationships. Both the EU and individual Member States can conclude readmission agreements. From 2005 to 2012, the EU concluded 13 readmission agreements.¹⁵ None of these agreements, however, concern countries from where migrant boats to the EU are departing. The agreement with Turkey was

endorsed in June 2012, but is not yet in force. The European Commission published an evaluation of EU Readmission Agreements in 2011, which gives considerable attention to fundamental rights suggesting concrete safeguards to be considered for future agreements.¹⁶

From a fundamental rights point of view, readmission agreements bring both opportunities and risks. On the one hand, an agreement can facilitate the return of third-country nationals to their home country, thus reducing the risk of protracted immigration detention and protracted irregular stay. Readmission agreements with transit countries can also be used to facilitate voluntary departures for migrants in an irregular situation who wish to return home, but who may not have the necessary papers to transit through a third country. In this way, the agreements would reduce the need for forced removals.

On the other hand, the agreements raise a number of challenges, particularly when third-country nationals are returned to a transit country other than their home country. Such challenges motivated the Parliamentary Assembly of the Council of Europe to prepare a report on the issue and propose a draft resolution and draft recommendation in 2010.¹⁷

The first question is whether there are sufficient guarantees to ensure that a readmission agreement does not lead to the removal of persons who are in need of international protection and hence increases the risk of *refoulement*. Theoretically, domestic as well as EU law on asylum and return should constitute a sufficient shield against such risk. The asylum *acquis* does not allow for the return of a person whose application for international protection is examined by responsible authorities, although, in some cases, it allows for removal while judges review a negative decision.¹⁸ The Return Directive incorporates the principle of *non-refoulement* which also applies to returns of persons apprehended while crossing the border unlawfully (Article 4 (4)). In practice, however, operational

14 Cassarino, J.P. (ed.) (2010), *Unbalanced reciprocities: Cooperation on readmission in the Euro-Mediterranean Area*, Washington: The Middle East Institute; Balzacq, T. and Centre for European Policy Studies (CEPS) (2008), *The implications of European neighbourhood policy in the context of border controls (readmission agreements, visa policy, human rights)*, Briefing paper, European Parliament Directorate-General Internal Policies, PE 393.284, Brussels, March 2008; Roig, A. and Huddleston, T. (2007), 'EC Readmission Agreements: A Re-evaluation of the Political Impasse', *European Journal of Migration and Law*, Vol. 9, No. 3, pp. 363–387; Trauner, F. and Kruse, I. (2008), *EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood*, Brussels, CEPS Working Document, No. 290, April 2008.

15 Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, former Yugoslav Republic of Macedonia (fYROM), Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia (chronological order). See European Commission (2011a), *Commission staff working document accompanying the Communication from the Commission to the European Parliament and the Council on Evaluation of EU Readmission Agreements*, Staff working paper, COM(2011) 76 final, SEC (2011) 209, Brussels, 23 February 2011, Table 1.

16 European Commission (2011b), *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM(2011) 76 final, Brussels, 23 February 2011.

17 Council of Europe, PACE, Committee on Migration, Refugees and Population (2010), *Readmission agreements: a mechanism for returning irregular migrants*, Doc. 12168, 17 March 2010. See also Council of Europe, Committee of Ministers (2011), Reply from the Committee of Ministers to the Recommendation 1925(2010) Readmission agreements: a mechanism for returning irregular migrants, 7 April 2011.

18 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (*Asylum Procedures Directive*), Art. 7, 39 (3).

realities to ensure a swift application of readmission agreements may lead to a situation where insufficient attention is given to these safeguards. This is particularly the case where officers have not been clearly instructed, or where such safeguards are not incorporated in the readmission agreement itself and/or the operational guidance for officers implementing these agreements.

The second question is whether transit countries should be required to respect minimum treatment standards of those persons they agree to readmit, and whether evidence of failure to do so should bar the conclusion of a readmission agreement altogether. It is a violation of the principle of *non-refoulement* to return individuals to situations of inhuman or degrading treatment (for example in detention facilities) or where there is a risk of onward removal to a country where the person has a well-founded fear of persecution or other serious harm. More generally, if an agreement is concluded with a country that has a record of persistent or serious violations of human rights, there will still be pressure to implement the agreement, in spite of the risks involved for the readmitted person.

The third question relates to data protection. Only personal data on returnees that are strictly necessary for the readmission should be forwarded to the transit country. This is particularly important for asylum-related information.

FRA opinion

The fundamental rights safeguards suggested by the European Commission in its 2011 evaluation report on existing EU readmission agreements should be included in new EU readmission agreements. EU Member States should also seriously consider such safeguards when they negotiate readmission agreements.

Where EU Member States have set up procedures for the immediate return of newly arrived migrants, all officers involved should receive clear instructions and training on the fundamental rights safeguards that need to be respected during the process.

The EU and its Member States should not conclude readmission agreements that cover citizens of a third country with states that have a record of persistent and serious human rights violations. Where agreements are nevertheless put in place by EU Member States, these should contain concrete guarantees that the readmitting country respects the returnees' human rights. The agreement should also establish an effective and independent monitoring mechanism.

Information on whether an individual applied for asylum should not be passed on to the readmitting state. Passing on such information would contradict the spirit of the confidentiality requirement set forth in Article 41 of the Asylum Procedures Directive.

Fundamental rights training for border guards

To approximate national training of border guards, Frontex has developed a Common Core Curriculum. This curriculum which was adopted first in 2003 and revised most recently in 2012 includes a set of fundamental rights knowledge and skills that every border guard should have. Pursuant to Article 5 of the revised Frontex Regulation (EU) No. 1168/2011, EU Member States have a duty to integrate the curriculum in their national training for border guards.

EU Member States have taken steps to move from a theoretical presentation of human rights to teaching methods that incorporate human rights into the day-to-day working practice of candidate border guards, although further work in this direction is still possible. It would be particularly desirable for police academies to provide those officers who will be deployed at borders with training on the specific human rights issues emerging in a border context, as compared to the human rights challenges of general police work.

FRA opinion

All national institutions involved in maritime border surveillance should incorporate the relevant fundamental rights subjects of the Common Core Curriculum in their basic training.

As a general rule, national training institutions as well as Frontex should incorporate human rights into the training materials dealing with the different aspects of maritime border surveillance operations, rather than teaching it as a stand-alone issue.

Frontex is encouraged to promote actively their training manuals on trafficking in human beings as well as on fundamental rights, which were developed in collaboration with international organisations and the FRA, including through targeted training activities for EU Member State representatives.

National training institutions should make full use of the training manuals on fundamental rights for border guards developed by Frontex in collaboration with the FRA and other international organisations, as well as of the UNHCR training manual for border guards.

National training institutions should consider creating an online depository of human rights and refugee law training materials – including those developed by UNHCR, so as to facilitate access to these by students who have finished their training.

EU solidarity and Frontex: fundamental rights challenges

The EU has established some solidarity measures to support EU Member States most affected by arrivals. These include EU funding, which is currently being revisited with the proposal to create two new funds: the Asylum and Migration Fund, and the Internal Security Fund (in particular its instrument on borders and visas). The language of the instrument on borders and visas contains only few references to fundamental rights. Fundamental rights are not addressed among the instrument's objectives and are therefore not part of the indicators proposed to measure achievements. The allocation of funds appears to be security focused and based on threat levels determined through consultation with Frontex.

Another solidarity tool is Frontex operational support. Considerable resources are devoted to Frontex-coordinated operations at sea. Such sea operations have primarily taken place in the Mediterranean and in the eastern Atlantic off the west African coast, with some 50 carried out by the end of 2012. Most Frontex maritime operations are organised under the European Patrols Network (EPN) framework, a permanent regional border security network for the southern maritime borders of the EU.

Frontex-coordinated operations at sea have raised considerable fundamental rights concerns. In response to these, Frontex has taken significant steps to enhance fundamental rights compliance, by: spelling out specific duties in documents governing an operation; featuring fundamental rights more prominently in training activities; and setting up a clear duty for guest officers deployed through Frontex to report fundamental rights violations. There are, nevertheless, still aspects that remain to be addressed.

FRA opinion

As regards future home affairs funds, practical steps should be taken to ensure that all EU measures to be funded under the Internal Security Fund instrument for borders and visa and the Asylum and Migration Fund are compatible with fundamental rights. This could be done by ensuring that independent fundamental rights expertise is sought at key stages of programming, project implementation and evaluation. Moreover, express reference to fundamental rights should be made in the operative part of the proposed Internal Security Fund instrument for borders and visa.

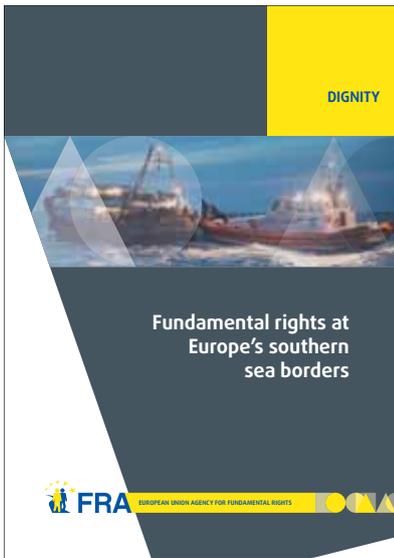
Concerning Frontex-coordinated sea operations, operational plans should continue to reflect the content of the guidance included in Council Decision 2010/252/EC, until it is replaced by a new instrument. Evaluation reports of Frontex operations should also discuss the challenges, incidents and promising practices related to fundamental rights in an operation.

Frontex operational plans should contain clear instructions and procedures for debriefing officers on referring, with the interviewee's consent, asylum requests as well as other important protection-relevant information received during the debriefing interview to the national asylum or other competent authority. If present in the operational area, EASO should provide training and guidance to debriefing officers to enable them to recognise asylum requests and to refer these to the appropriate authority.

EU Member States hosting Frontex-coordinated operations should ensure that practical guidance on the fundamental rights issues related to a specific operation is provided to guest officers, and, where possible, involve the international organisations, humanitarian or other actors dealing with the relevant fundamental rights issue at a Member State level. Frontex should encourage this guidance and involvement.

Frontex and the EU Member States hosting Frontex-coordinated operations should define a standardised kit of emergency relief items for all vessels deployed to the operational area that may have to take migrants on board. Emergency kits should be defined according to the specific needs of that operational area. Where appropriate, support from humanitarian organisations should be sought in determining the content of these emergency kits.

The European Patrol Network is encouraged to regularly discuss the fundamental rights challenges relating to maritime surveillance and to promote good practices in this regard.



This FRA report examines the conditions at Europe's southern sea borders with respect to the most fundamental rights of a person, the right to life and the right not to be sent back to torture, persecution or inhuman treatment. It looks at sea border surveillance and disembarkation procedures, as well as general issues such as European Union (EU) policy, training and Frontex-coordinated operations, and examines practices across the EU Member States researched – Cyprus, Greece, Italy, Malta and Spain. By mapping the fundamental rights challenges at Europe's southern sea borders and by identifying promising practices, this report is intended to offer advice to EU policy makers as well as practitioners at both the EU and Member State level.

Further information:

For the full FRA report – *Fundamental rights at Europe's southern sea borders* – see: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>

An overview of FRA activities on third-country nationals at the EU's external borders is available at:
<http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-protecting-fundamental-rights-eu>



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