FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

# PREVENTING AND RESPONDING TO DEATHS AT SEA

# WHAT THE EUROPEAN UNION CAN DO



REPORT

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# Foreword

Last month, a fishing vessel departed Libya, carrying hundreds of people who believed that the treacherous journey they were embarking on would be outweighed by the new life which was awaiting them.

Unseaworthy and overcrowded, the ship capsized and sank on 14 June, with over 100 bodies recovered and countless more missing. The drownings of so many migrants – on average 8 every day last year – is a cause of deep shame for Europe. We cannot keep simply watching as innocent people die at sea.

The EU Agency for Fundamental Rights dispatched a team to Greece, to gather information on the circumstances around the tragedy, as part of our broader work on upholding fundamental rights in the context of migration and asylum.

What we learned during that mission was used to draft the concrete measures we suggest in this report. This includes a call for better protection for shipwreck survivors and prompt, effective and independent investigations of these tragedies – which continue to occur.

Furthermore, EU Member States must improve search and rescue efforts and provide legal pathways to safety to prevent deaths at sea. Finally, the Agency also calls for the establishment of independent border monitoring, and clear disembarkation rules and solidarity for taking charge of rescued people.

FRA believes that these concrete measures will save lives at sea, while also providing unambiguous steps for the European Union and governments to take to prevent such tragedies.

However, none of them will work as effectively as necessarily without commitment from the EU and Member States, and a realisation that our failure to wake up and properly implement effective measures will ultimately lead to a recurrence of this horrific and senseless incident.

“The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.”

The spirit of this text, from Article 6 of the International Covenant on Civil and Political Rights, is one which is reflected in constitutions, religious texts, and customary norms across the world.

It is a spirit which we here in Europe have formally agreed to revere, through our development and ratification of human rights instruments such as the European Convention on Human Rights (Article 2) and the Charter of Fundamental Rights of the European Union (Article 2). Case law and interpretative guidance relevant to the right of life has reinforced the positive obligation upon States to take appropriate steps to safeguard the lives of all those within their jurisdictions.

There is no hierarchy when it comes to the right to life, nor is it an entitlement bestowed only on European Union citizens. It is not just an abstract notion of those of us who have never known war, persecution, inequality, or environmental destruction. It is a real protection, which carries an explicit obligation for States that are bound to honour it on land and on sea.

Michael O'Flaherty
**Director**

# Introduction

On the night of 13-14 June 2023, an unseaworthy and overcrowded fishing boat capsized some 50 miles off the coast of Peloponnese, Greece. According to the UN Refugee Agency (UNHCR), survivors estimated that there were around 750 passengers on the ship. During the rescue operation coordinated by the Hellenic Coast Guard, 104 people were saved, of which 96 were men and eight were unaccompanied boys. [1] In addition, 82 bodies were found. [2] The rest remain missing. Speaking to the press, survivors said that there were also women and children, staying under the deck. The people on board were Egyptians, Pakistanis, Syrians and of other nationalities. The boat had departed from Tobruk in Libya. This is not the first time that an overcrowded boat unfit for navigating the journey has left Cyrenaica in Eastern Libya, bound for Italy.

Every year, in its Fundamental Rights Report, the European Union Agency for Fundamental Rights (FRA) provides data on the number of migrants and refugees who die or go missing trying to reach Europe by sea. [3] In the first quarter of 2023, the number of fatalities at sea were highest since 2017. [4] In March 2023, FRA's Director Michael O'Flaherty identified the need to save lives as the first of five priority actions to address the fundamental rights challenges at the EU's external borders. [5]

In the week following the tragic incident, FRA dispatched a mission to Greece and to Frontex headquarters in Warsaw to understand the circumstances around the incident. The mission was part of its broader work on upholding fundamental rights at border. [6] FRA visited the initial reception facility in Malakasa (Attica Region) where the authorities transferred the shipwreck survivors. FRA had meetings with the Hellenic Coast Guard, the Ministry of Migration and Asylum (including the Fundamental Rights Officer at the Ministry), the Reception and Identification Service (RIS), the Greek Ombudsman, the Greek National Commission for Human Rights, and UNHCR in Greece. In Warsaw, FRA met with staff of the Frontex Situational Centre and with the Fundamental Rights Office.

People fleeing by boat to escape war or danger and seek refuge elsewhere is not a new, nor solely a European phenomenon. The term 'boat people' was first used to describe the situation witnessed in the South Chinese Sea between 1970 and 1980. Large numbers of people fled their country by sea in the Gulf of Bengal, the strait of Aden in the Red Sea, the Caribbean and from Indonesia to Australia. [7]

Reducing the death toll in the Mediterranean Sea is complex and cannot be resolved by the European Union (EU) and its Member States alone. As FRA pointed out in its 2013 report on Fundamental rights at Europe's southern sea borders, only a comprehensive approach including all relevant states, EU bodies, international organisations and other parties involved can succeed in putting an end to the high death toll in the Mediterranean Sea.

> **“This is yet another example of the need for Member States to come together and create orderly safe pathways for people forced to flee and for comprehensive action to save lives at sea and reduce perilous journeys.”**
>
> *UN General Secretary, António Guterres, UN news, 14 June 2023*

Nevertheless, the EU and its Member States could take action which does not depend on cooperation with other parties. This short report identifies six areas of intervention suggesting several concrete measures to tackle the increasing death toll at sea. [8]

- **Prompt, effective and independent investigations**
  - EU Member States to investigate all shipwreck incidents in which people die promptly and effectively, respecting the procedural requirements established by the case law of the European Court of Human Rights;
  - EU Member States to seek the expertise of specialised human rights bodies in the investigations, such as National Preventive Mechanisms and Ombud institutions, where compatible with their mandate;
  - The EU legislator should consider applying the transparency and accountability principles developed to investigate maritime incidents to shipwreck incidents. These principles currently apply in the context of maritime transport activities and are laid out in Directive 2009/18/EC (which is currently under review), but could also apply to shipwreck incidents, which typically involve overcrowded and unseaworthy vessels, occurring in the context of border management;
- **Improved search and rescue at sea**
  - European Commission and EU Member States to agree on a procedure to record all search and rescue operations where Frontex is involved or has provided support, and to share the recorded information;
  - Frontex to develop together with EU Member States a protocol of action to take when aerial surveillance assets sight a vessel in an emergency situation, and they alert the national authorities. Such a protocol could entail for example a requirement to inform Frontex about their follow up actions;
  - European Commission to propose to the recently re-activated European Contact Group on Search and Rescue to exchange information on search and rescue protocols and develop best practices in the context of border management;
  - EU Member States to review and adjust their search and rescue protocols based on best

practices;

- European Commission to consider linking EU funding for maritime border management to the adoption of and adherence to operational protocols which reflect best practices and ensure timely assistance to people in imminent danger at sea;
- Member States to ensure that everyone involved in search and rescue operations are trained in de-escalation, to be best equipped to engage in negotiations with those in charge of a vessel in distress;
- The European Border and Coast Guard to collectively ensure that sufficient appropriate naval assets are deployed in open sea areas, where risk analysis suggests shipwrecks are more likely to occur;

- **Clear disembarkation rules and solidarity for taking charge of rescued people**
  - The EU legislator to include a special mechanism for people disembarked following a search and rescue operation, when negotiating the Regulation on Asylum and Migration Management, as proposed by the European Commission;
  - EU Member States to extend the timeframe of the voluntary solidarity mechanism established in June 2022 beyond one year, to increase the number of relocations and to include all people in need of international protection, regardless of their nationality;
- **Better protection of shipwreck survivors**
  - EU legislator to list shipwreck survivors who request international protection as an explicit category of asylum applicants with special needs;
  - The EU Asylum Agency, in cooperation with Frontex, to develop EU-wide guidance for shipwreck survivors in asylum and return procedures;
- **Establishing independent border monitoring**
  - EU Member States to establish independent border monitoring mechanisms building on the guidance published by FRA;
- **More accessible legal pathways to the EU**
  - EU Member States to offer more legal pathways to persons in need of international protection by increasing resettlement places, promoting other humanitarian admission programmes and giving them priority when allocating EU funding;
  - European Commission and Member States to design the envisaged EU Talent Partnerships to cover all economic areas where there are labour shortages in the EU, including low-skilled labour. The Talent Partnerships could be designed to offer labour mobility options commensurate to the labour market shortages in the EU and provide for simple, accessible procedures and requirements;
  - EU and its Member States to include refugees and other persons in need of international protection in the EU Talent Partnerships.

# 1. Prompt, effective and independent investigations

There are conflicting accounts of the circumstances surrounding the incident that occurred on the night of 13-14 June 2023. The versions differ, for example, in whether the vessel was adrift or moving; and whether it was towed. [9] Following the deadly incident, several actors called for an **independent** investigation, including the LIBE Committee of the European Parliament, the Greek National Commission for Human Rights, and civil society organisations. [10]

A prompt, effective and independent investigation of shipwreck incidents creates transparency about the way they were handled. It also helps identify whether the acts or omissions by the authorities incur legal responsibility by not respecting and protecting the right to life, as set out in Article 2 of the Charter of Fundamental Rights of the European Union (Charter) and in Article 2 of the European Convention on Human Rights (ECHR).

According to the case law of the European Court of Human Rights (ECtHR), the right to life entails a positive obligation for states to take appropriate steps to safeguard the lives of those within a state's jurisdiction. [11] In 2022, the ECtHR interpreted the right to life in the context of a search and rescue operation of an unseaworthy vessel carrying migrants and refugees which sank in the Aegean Sea. It found that the Greek authorities had not done all that could reasonably be expected of them to provide the applicants and their relatives with the necessary level of protection. [12]

The ECtHR's interpretation is also relevant for EU law and is outlined in Article 52 (3) of the Charter. In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR – as is the case with the right to life – the meaning and scope of those rights "shall be the same".

Under the ECHR, states must carry out an effective official investigation whenever individuals make arguable complaints of rights violation of Article 2 (right to life) of the ECHR. [13] For an investigation to be effective, it must:

- not depend on a complaint from the victim or next of kin; [14]
- be impartial and independent; [15]
- be capable of establishing the facts and where appropriate, identifying and punishing those responsible; [16]
- secure and consider relevant evidence; [17]
- be prompt; [18]
- enable the victim or victim's next of kin to be involved in the procedure to the extent necessary to safeguard their legitimate interests; [19]
- provide for sufficient public scrutiny to secure accountability in practice as well as in theory. [20]

Concerning the shipwreck incident off Pylos, from official statements, FRA knows that criminal proceedings have been initiated against those rescued migrants who are suspected of involvement in migrant smuggling. [21] FRA is not aware whether the competent public prosecutor is also investigating the circumstances of the incident itself, including the conduct by the Hellenic Coast Guard during the operation. On 19 June 2023, the Hellenic Coast Guard informed FRA that they will initiate an internal disciplinary investigation but had not yet done so.

In Safi and Others v. Greece, the ECtHR concluded that there had been shortcomings in the investigation of a shipwreck in the Aegean Sea. [22] The national authorities had not carried out a thorough and effective investigation capable of shedding light on the circumstances in which the boat had sunk.

The Council of Europe Committee of Ministers is supervising the execution of this judgement. The Greek authorities have recently submitted an action plan which is pending approval. [23] Under Rule 9.2 of the Procedural Rules of the Committee of Ministers supervising the execution of the judgment, several NGOs addressed the Committee of Ministers requesting its enhanced supervision. They argue that this judgment reveals structural violations in rescue at sea operations. They also call for the establishment of an independent border monitoring mechanism. [24]

More generally, against the backdrop of persistent and serious fundamental rights violations at the EU's external borders, FRA's recent publications highlight that most victims of rights violations at the EU's external borders do not find redress in national courts. [25] FRA identified several factors that might explain the small number of national criminal cases initiated across Europe, despite continuing reports of rights violations. These include limited interest on the part of victims in filing a case and difficulties in producing evidence of events occurring during darkness in forests or at sea. [26] To get a better overview of the state of play of national investigations into rights violations at borders, FRA is carrying out further research in 2023.

Investigations of shipwreck incidents occurring in the context of a search and rescue operation are complex. Establishing whether the acts and omissions by the responsible authorities may raise issues under the positive obligation of the right to life requires both advanced human rights expertise and significant experience and expertise in maritime search and rescue. In some Member States, national human rights institutions get involved, as the recent announcement by the Spanish Ombudsperson about a shipwreck incident on the way to the Canaries illustrates. [27]

In Greece, according to Article 1 of Law 3938/2011, as amended by Article 188 of Law 4662/2020, [28] the Greek Ombudsman is designated as the National Mechanism for the Investigation of Arbitrary Incidents. The National Mechanism has the mandate to collect data, record, evaluate and forward for disciplinary control, cases of illegal acts allegedly perpetrated by uniformed personnel, including of the Hellenic Coast Guard, during the performance of their duties or in abuse of their powers. The National Mechanism can undertake cases also *ex officio*. In addition to monitoring the disciplinary investigations, the mechanism reserves the right to conduct its' own investigation. Activating such mechanism would be critical for an adequate assessment of the human rights dimension of the incident.

At the EU level, the European Border and Coast Guard Agency (Frontex) informed FRA that they initiated a “Serious Incident Report”. [29] This entails a limited form of investigation focusing on actions by the Agency and delivering recommendations for action.

In addition to criminal and disciplinary investigations, large shipwreck incidents would benefit also from maritime safety-related investigations, as established under EU law for accidents in the maritime transport sector. Under Directive 2009/18/EC laying down the principles governing the investigation of accidents in the maritime transport sector, [30] Member States are obliged to establish independent accident investigation bodies (Article 8) and to investigate accidents (Article 5) depending on their severity. They must publish accident reports (Article 14) and notify the European Commission through the European Marine Casualty Information Platform - EMCIP [31] (Article 17) maintained by the European Maritime Safety Agency (EMSA). There is a common methodology for investigating marine casualties and incidents. In June 2023, the European Commission tabled amendments to this directive. [32]

The EU legislator should consider applying the transparency and accountability principles developed to investigate maritime incidents to shipwreck incidents. These principles currently apply in the context of maritime transport activities but could apply to shipwreck incidents which typically involve overcrowded and unseaworthy vessels, flying no flag, occurring in the context of border management.

There is precedent in the practice of other European coastal states. [33] In those cases, where more than one Member State or the European Border and Coast Guard Agency have been involved, for example through aerial surveillance, they should participate or cooperate in accident investigation.

The latest tragic shipwreck in the Mediterranean is a reminder of the complexity in understanding how these incidents happen. Investigations could benefit from greater transparency to identify the legal responsibilities to protect the right to life.

## 2. Improved search and rescue at sea

Search and rescue at sea needs to be more effective to prevent tragedies. The right to life is one of the most fundamental of human rights. 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. Government as well as private vessels have a duty to assist people and crafts in distress at sea. Such duty is regulated by multiple instruments of the international law of the sea. [34]

> **Those few you see escap'd the storm, and fear,**
> **Unless you interpose, a shipwreck here.**
> **What men, what monsters, what inhuman race,**
> **What laws, what barb'rous customs of the place,**
> **Shut up a desert shore to drowning men,**
> **And drive us to the cruel seas again?**

*Virgil: Aeneid I, 538-541(Translation made available by The Project Gutenberg)*

As this quote from the Latin poem 'Aeneid', on the legend of Aeneas well illustrates, the sea has long presented great danger to humans.

For vessels and persons who are at difficulty at sea, international law of the sea defines three emergency phases: an uncertainty, an alert and a distress phase. 'Distress' is the highest emergency phase and corresponds to a "situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance." [35]

Although search and rescue operations, in principle, fall outside the scope of EU law, two scenarios are relevant for the purpose of this analysis in which EU law and, hence, the Charter of Fundamental Rights, come into play. The first is when rescue operations are part of Frontex-led joint operations at sea. The second situation is when search and rescue are part of EU integrated border management activities, as regulated in the European Border and Coast Guard Regulation. [36]

In the first scenario, Regulation (EU) No. 656/2014 sets out the applicable common rules for sea, air and other assets deployed as part of Frontex-led joint maritime operations. The regulation describes when a vessel or the persons on board should be considered in one of the three

emergency phases (uncertainty, alert and distress). It lists the factors to take into account for determining the uncertainty, alert or distress phase of an emergency situation such as seaworthiness; number of persons on board; availability of fuel, water and food; the presence of qualified crew; the presence of deceased persons or persons in need of urgent medical assistance; the sea conditions. [37]

All assets deployed are under a duty to inform the responsible maritime search and rescue coordination centre as soon as they encounter an emergency, regardless of the phase in which the emergency is, under Regulation (EU) No. 656/2014. [38] This duty also applies to aerial surveillance assets, such as fixed wing aircrafts and drones.

The second scenario where EU law regulates certain aspects of search and rescue is when it occurs in the context of border management activities, as is typically the case with overcrowded and unseaworthy vessels carrying migrants and refugees.

Under Article 3 of the European Border and Coast Guard Regulation, search and rescue is one of the components of integrated border management. [39] In addition, the scope of the European border surveillance system, Eurosur, also has the purpose of contributing to saving lives among other objectives. [40] So called "Eurosur fusion services" include the tracking of vessels or the monitoring of designated maritime areas, for example through the deployment of Multipurpose Aerial Surveillance [41] . This also includes a duty to inform the competent maritime rescue coordination centres of cases of persons in distress at sea. [42]

Although search and rescue operations are primarily regulated by international law, the duty to search and rescue at sea is also covered by EU law, when there is an EU actor (typically Frontex) involved or when it is carried out as part of European integrated border management or triggered by Eurosur services. In these scenarios, the EU is bound by the Charter to respect the right to life, including by putting in place the necessary preventative measures, that the positive obligation flowing from the case law of the ECtHR entails.

A strict interpretation of what constitutes a situation of distress – which under international law triggers the duty to provide **immediate** assistance – is likely to delay life-saving actions and to increase the risk of drowning.

However, it is up to national authorities in charge of search and rescue to determine, the most appropriate course of action in an emergency based on their expertise.

FRA previously expressed concerns as early as 2013 about the strict interpretation of what constitutes a situation of 'distress' by one Southern European Member State, Malta. In practice, this meant that if migrants on an unseaworthy vessel preferred to continue their trip, the authorities 'shadowed' their boat and, if needed, assisted them in their onward journey until the boat entered the adjacent search and rescue area. [43] . Since then, FRA understands that also some other Member States increasingly use similar practices.

When directly or indirectly involved in an emergency situation the EU (within the limits of its existing competences) [44] and its Member States have a due diligence duty. For example, these

situations include when Frontex identifies an unseaworthy vessel through its surveillance activity, or its assets are involved or when the EU funds the search and rescue capabilities of Member States. They have a due diligence duty stemming from the Charter and/or the ECHR as interpreted by the ECtHR to prevent their actions or inactions from contributing to violations of the positive obligations [45] which are part of the protection of the right to life.

To achieve this, the EU and its Member States could consider taking the following actions.

1. The European Commission and EU Member States could agree to record all search and rescue operations where Frontex is operationally involved or present (either through surveillance or patrolling activities) and provide the recorded information to Frontex, EMSA or another independent entity.
2. The European Commission could propose to the recently re-activated European Contact Group on Search and Rescue [46] to develop best practices on search and rescue in the context of border management.
3. The EU Member States should review their search and rescue protocols based on best practices and, if necessary, adjust them for operations involving unseaworthy boats carrying migrants and refugees, refraining from a too strict definition of “distress”.
4. The European Commission could consider linking EU funding to maritime border management to the adoption of operational protocols which duly reflect best practices and ensure timely assistance to people who are in imminent danger at sea. Adherence to such protocols could be assessed during meetings of the monitoring committees established under the funds.
5. Authorities involved in search and rescue operations should ensure that their staff is adequately trained on de-escalation techniques, to facilitate the creation of a relationship of cooperation with the migrants and refugees onboard, thus facilitating the rescue operation.
6. The European Commission recommended that Frontex should carry out needs assessment and provide increased operational and technical support to Member States, “including the deployment of assets, to improve their capabilities and thus contribute to saving lives at sea” and to fully use the capacity of Eurosur for search and rescue. [47] A larger presence of naval and aerial assets in areas where shipwrecks are more likely to occur, according to risk analysis, would, in FRA’s view, contribute to more effective search and rescue in the context of border management.

# 3. Clear disembarkation rules and solidarity for taking charge of rescued people

The trend to delay search and rescue is linked to lack of solidarity for taking charge of disembarked people. In essence, the Member State that rescues migrants at sea is responsible to assess their asylum claim and/or carry out the return procedure. [48] This may discourage or delay rescue or disembarkation. [49]

Against this background, soon after the shipwreck, UNHCR and IOM called for an agreed regional disembarkation and redistribution mechanism for people who arrive by sea. [50] Previously, in December 2022, UNHCR had highlighted that "in rescue contexts—particularly where an incident or ongoing pattern involves significant numbers of arrivals—States of disembarkation should not be solely responsible" and that "suitable responsibility sharing arrangements (intraregional and beyond) are necessary to relieve burdens on particularly affected coastal States and protect the integrity of the search-and-rescue regime by avoiding disincentives to timely rescue and disembarkation." [51]

Efforts at EU level have been made. In June 2022, 21 EU Member States and Schengen Associated Countries established a voluntary solidarity mechanism. The mechanism aimed to primarily support Member States who disembark survivors of rescue operations. It envisages the relocation of persons in need of international protection, giving priority to the most vulnerable ones. The mechanism was set up for one year and can be renewed. [52]

Although over 8000 relocation places were pledged following the declaration, [53] by June 2023, just one year later, only a few hundred people were relocated. [54]

Considering that search and rescue events persist, Member States should continue the voluntary solidarity mechanism established in June 2022 with increased number of relocations. When implementing it, Member States should apply it to all asylum seekers and beneficiaries of international protection, regardless of their nationality.

With the Pact on Migration and Asylum, in September 2020 the European Commission proposed a mechanism to address the specificities of disembarkations following search and rescue (SAR) operations. [55] In essence, the proposal envisaged the creation of additional solidarity measures on top of those for Member States under migratory pressure to assist Member States that disembark migrants and refugees rescued at sea. The Commission proposal was based on the idea that people who are disembarked should be distributed in a proportionate manner among the Member States. [56]

The legislative proposal is now being negotiated. While a solidarity mechanism for people disembarked following a search and rescue operation is still present in the position of the European Parliament, [57] the comprise text in the Council removed it. [58]

In FRA’s view, a special EU level solidarity mechanism, which shares responsibility for all migrants and refugees rescued at sea, would contribute to more effective search and rescue actions.

# 4. Better protection of shipwreck survivors

Shipwrecks can be one of the most traumatic life experiences. [59] Survivors witness tragedies, dramatic situations and loss of family members and friends. Shipwreck survivors have specific needs. They may need specialised help to deal with the traumatic experience and assistance in identifying missing family members. In addition, they have medical and psychological needs that must be responded to.

In most cases, shipwreck survivors are also victims of crime. Under Article 16 of the UN Protocol on Smuggling of Migrants, [60] to which all EU Member States except Ireland are Party, there is a clear obligation to protect the rights of smuggled migrants. Smuggling of migrants is a crime both under international law and EU law. [61] As victims of crime, smuggled migrants are entitled to rights, support and protection as laid out in Directive 2012/29/EU. [62] This entails, for example, the right to be informed and to have access to victims' support services.

There is a protection imperative to treat shipwreck survivors with human dignity, providing the necessary care, including psychosocial care, and allowing for the identification of deceased family members. EU asylum and return procedures need to take this into account.

Greek law explicitly listed persons with post-traumatic stress disorder, particularly shipwreck survivors and relatives of victims of shipwrecks, as one of the categories of vulnerable people. [63] Following legal amendments, only direct relatives of shipwreck victims are considered vulnerable persons with specific reception needs that require particular attention. [64] When visiting the reception facility in Malakasa, FRA observed that the Hellenic authorities gave priority and paid attention to the survivors of the Pylos shipwreck, also by involving the United Nations and civil society actors.

Under EU asylum law, there is an open-ended list of categories of people with specific needs. Shipwreck survivors are not excluded but are also not expressly mentioned. The non-exhaustive list of "vulnerable persons" in Article 21 of the Reception Conditions Directive mentions "minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation". A pending revision of the directive also includes "mental disorders including post-traumatic stress disorder" in such list. [65]

Considering the number of shipwrecks, shipwreck survivors could be explicitly mentioned as a special category of people who need targeted support also in EU law. This would encourage all relevant actors to give more priority to this category of people. The EU Asylum Agency could, for example, develop guidance, including standards and indicators, and provide training for reception staff and asylum officers on how to work with shipwreck survivors. Frontex could complement this with considerations applying to return procedures.

Considering shipwreck survivors as applicants with special needs may also help facilitating survivors' access to victim's support services, protection and other rights victims of crime are entitled to under EU law including effective participation in criminal proceedings.

EU rules on asylum and return proposed as part of the Pact on Migration and Asylum [66] envisage that the asylum applications of people disembarked following a search and rescue operation of nationalities with a low likelihood to receive asylum would be processed at or near the border, usually in an accelerated manner. More specifically, following an agreement within the Council of the EU, which is now being negotiated with the European Parliament, asylum applicants from a third country for which the share of decisions granting international protection is lower than 20% of the total number of decisions for that third country will have to be examined through border procedures. [67]

An express recognition of shipwreck survivors as a category of asylum applicants with special needs would facilitate the application of the safeguards envisaged in the proposed EU rules, which provide, for example, for not applying border procedures in case the specific support the person needs cannot be provided there. [68]

In conclusion, the protection of shipwreck survivors should be better anchored in EU asylum and migration law and existing promising practices could be captured in EU-wide guidance for asylum and return procedures.

# 5. Establishing independent border monitoring

The European Commission has suggested establishing independent monitoring mechanisms to ensure respect of fundamental rights. [69] This was proposed in September 2020, when presenting the Pact on Migration and Asylum. Since then, FRA has promoted the creation of national independent monitoring mechanisms, covering also a range of border management activities. These include border surveillance, apprehensions at land, sea and air borders, and the operation of referral mechanisms.

FRA published general guidance [70] to help EU Member States set up national independent mechanisms to monitor fundamental rights compliance at EU external borders. This was a request by the European Commission in October 2022 following the proposed Screening Regulation tabled by the European Commission. [71] FRA has published the guidance in eight EU languages thus far, including Greek.

When discussing putting the guidance into practice, experts stressed the need for consistency with other national bodies entrusted with the protection of fundamental rights. Experts underlined the important role of national human rights institutions and flagged the need to develop protocols to access information and data from surveillance assets relevant to fundamental rights. [72]

The tragic incident reiterates the value of having independent and effective national mechanisms to monitor fundamental rights at borders. [73] An effective and independent fundamental rights border-monitoring system is preventative, as it reduces the risk of fundamental rights violations. It also enhances the protection of victims of fundamental rights violations, by strengthening the application of fundamental rights safeguards already in place and providing expert advice when needed. At the same time, it can support domestic investigations of allegations against public authorities by providing objective, evidence-based and unbiased analysis and reporting. This improves transparency and accountability, and thus enhances trust in public authorities.

# 6. More accessible legal pathways to the EU

Some argue that the most effective way to prevent tragedies at sea is to avoid migrants and refugees taking to the sea on unseaworthy vessels. From this perspective, the solution lies in combatting migrant smugglers and helping coastal states of departure.

There are some existing cooperation efforts to address migrant smuggling. Under Article 7 of the Protocol against Smuggling of Migrants to the UN Convention on Transnational Organised Crime, State Parties have a duty to cooperate to prevent and suppress the smuggling of migrants by sea. Such cooperation must respect international law, including human rights, humanitarian and refugee law (Article 19). [74] However, FRA has identified fundamental rights risks in border management cooperation with third countries and has suggested mitigating measures. [75]

Experiences from the other 'boat people' situations listed in the introduction of this paper suggest that a purely law enforcement or repressive approach is not likely to succeed in reducing dangerous departures. In the Mediterranean, dangerous crossings continue, despite all actions taken in recent years to combat migrant smuggling in the third countries of departure, including with the support of the EU and its Member States. [76]

Other action is needed. The people that embark on perilous journeys across the Mediterranean have little options to travel lawfully. To escape war, persecution or poverty or to pursue a dream, they are ready to risk their lives and cross to the EU by sea with the help of migrant smugglers.

Safe and legal pathways to Europe would save lives and reduce the desperate need for migrants and refugees to resort to smugglers to get to Europe.

FRA has published a report presenting a toolbox of possible schemes EU Member States could use to enable more people in need of international protection to reach the EU without resorting to migrant smugglers. The report, published in 2015, presents different refugee-specific schemes including resettlement, humanitarian admissions, the issuance of humanitarian visas, the lifting of visa requirements and temporary protection. It also covers regular mobility schemes, such as those available to family members of persons residing in the EU, students, migrant workers and other categories of persons, which could be made more accessible to refugees staying in third countries. [77]

Eight years later, the actual possibilities for people in need of protection to legally enter and stay in an EU Member State remain very limited. In 2022, the EU accepted some 17,300 refugees for resettlement only, some 1,000 less than in 2021. [78] Getting a visa for the EU is difficult for people who want to flee war or persecution. [79] At the same time, refugee protection in the countries from where people depart from by sea has, overall, not improved, at least not to a degree that would discourage attempts to move to Europe. [80]

There are, however, promising examples of legal pathways for refugees to reach Europe. They

offer alternatives to risking one's life at sea. Under the Humanitarian Corridors initiative – a programme supported by the Episcopal Conference and other Catholic-inspired organizations – more than 6000 people have safely reached Italy since February 2016. This is a safe and legal programme of transfer and integration in Europe of vulnerable people, such as children, older persons and people with disabilities fleeing the war in Syria and conflicts in the Horn of Africa. [81] Moreover, the experience of those fleeing the Russian war of aggression against Ukraine, most of whom were allowed to cross into the EU without major difficulties, even when they did not fulfil all requirements to cross the border, [82] shows that orderly entry is possible.

EU Member States can draw inspiration from such good practices and should offer more possibilities for legal pathways to persons in need of international protection. Examples include increasing resettlement places and promoting other humanitarian admission programmes. Such programmes could be given priority when allocating EU funding.

There are some notable initiatives which could offer opportunities for legal migration to the EU. Many people embark on a perilous journey in the hope to find work in the EU and be able to support themselves and their families. [83] More labour migration opportunities to the EU with less expensive and cumbersome procedures through agreements with third countries could offer a legal and safe alternative.

This would help decrease undeclared work, in the EU which – as FRA pointed out – creates heightened risk for labour exploitation. [84] EU Member States face significant labour shortages which they cannot fill with the labour force available in the EU. [85]

The EU identified the need to attract people from third countries with the labour skills needed in Member States when announcing the European Year of Skills from May 2023 to May 2024. [86] In 2023, the European Commission intends to present a legislative proposal on a "Talent Pool". [87] It will support a better matching of skills, talents and needs of the EU.

The European Commission is also developing "Talent Partnerships" with third countries to address the labour market and skills needs of Member States and partner countries. [88] The European Commission announced that the Talent Partnerships will be open to all skill levels in various economic sectors, including agriculture, tourism and construction work. Priority countries listed by the Commission are Egypt, Morocco and Tunisia, which are important as countries of departure and also represent a significant number of nationals embarking on dangerous journeys. [89]

The envisaged Talent Partnerships offer facilitated access to labour migration to the EU. When designing and implementing them, the EU and its Member States should consider how they can also best contribute to discourage people to risk their lives through dangerous sea crossing, if they plan to come to the EU to work. In this context, it is important that the Talent Partnerships cover all economic areas where there are labour shortages. It should also ensure labour mobility covers low-skilled labour and that labour mobility options offered are commensurate to the labour market shortages in the EU. It should be designed so that procedures and requirements to come to the EU to work are not overly cumbersome and expensive. Refugees and other persons in need

of international protection should not be excluded from the Talent Partnerships.

The Talent Partnerships may be assessed on an ongoing basis. Giving priority to Mediterranean coastal countries would enable adjustments to be made to the Talent Partnerships to discourage dangerous irregular migration by sea.

Overall, there are promising examples of legal pathways for refugees and migrants to reach Europe which need to be expanded and become more accessible.

# Endnotes

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