

DIGNITY



Fundamental rights at Europe's southern sea borders



FRA

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Photo (cover & inside): Picture provided by the Italian Coast Guard, rescue operation some 50 miles from Lampedusa

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FRA – European Union Agency for Fundamental Rights
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 158030-699
Email: info@fra.europa.eu – fra.europa.eu

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Fundamental rights at Europe's southern sea borders

Foreword

An Olympic athlete from Somalia pursuing her dream to participate in the London Olympics drowned in the Mediterranean Sea in April 2012, according to media accounts. This FRA report is about those people who risk their lives crossing to the European Union by sea to pursue a dream or escape war or persecution.

It 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. 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 European Union's protection of core rights of individuals.

Boat people are neither new nor solely a European Union phenomenon. The South Chinese Sea in the 1970s witnessed boat people. The strait of Aden in the Red Sea, the Caribbean and the sea between Indonesia and Australia, for example, are witnessing similar challenges. It is, however, in the Mediterranean Sea where this problem has recently gained the most visibility. Migrants seeking safety from persecution or better opportunities for their future agree to or are forced to make the perilous sea crossing.

With its findings, this report intends to contribute to the discussion on finding solutions to a disquieting phenomenon. It also highlights a number of concrete measures that the European Union and its Member States can take to address specific shortcomings identified by this research. The FRA believes, however, that only a comprehensive approach including all states, organisations and other parties involved can succeed in putting to an end the high death toll at sea.

Morten Kjaerum

Director

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Introduction

Each year, hundreds of men, women and children board overcrowded and ill-equipped boats in an attempt to reach Europe, a phenomenon that started in the late 1980s after European countries tightened immigration policies and made it more difficult to enter such countries in a regular way. 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 report describes the fundamental rights issues related to this phenomenon, covering sea border surveillance and disembarkation procedures, as well as general issues such as European Union (EU) policy, training and Frontex-coordinated operations.

Article 1 (5) of the Treaty of Amsterdam established in 1999 the 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 at the same time addressing the humanitarian needs of those who have reached European soil, have guided recent EU policies in this domain.

The first part of the report (Chapters 1–5) examines the fundamental rights challenges that emerge in the context of border surveillance at sea. It analyses the practical obligations border management authorities have to safeguard core fundamental rights, such as the right to life, the principle of *non-refoulement* as well as the need to treat persons rescued or intercepted at sea in a dignified manner. It reviews maritime surveillance systems to examine possible interference with the right to privacy as well as other fundamental rights.

The second part of the report (Chapters 6–8) reviews procedures at points of disembarkation in southern EU Member States affected by sea arrivals, focusing on how migrants are treated upon arrival. It describes the humanitarian response and law enforcement actions in the first hours or days after arrival. It looks at identification and referral procedures as well as at the mechanisms in place for providing migrants arriving by sea with basic necessities – such as healthcare, food, water, clothing and sanitary items.

Finally, a third part reviews more general issues related to this topic. Chapter 9 covers fundamental rights training

and Chapter 10 looks at EU solidarity measures, specifically EU funding and Frontex-coordinated operations, describing the related fundamental rights challenges.

Geographically, the report covers arrivals traversing the Mediterranean Sea and the Atlantic Ocean to southern Europe and the Canary Islands, and, more specifically, to the four EU Member States most affected by migrant boat arrivals: Greece, Italy, Malta and Spain. Neither Portugal nor the other Mediterranean EU Member States have been affected by this phenomenon, with the exception of one boat with 124 migrants which landed on Corsica in January 2010. Boat arrivals to Cyprus are rare. Migrants normally cross from the northern part of Cyprus to the south by land, although some migrants have also sporadically been apprehended when trying to cross by sea. Only limited field research was therefore carried out in Cyprus; this EU Member State is only covered in those parts of the report which compare institutional approaches (mainly Chapters 1, 4 and 9 and sections of Chapters 6 and 10).

Authorities must implement migration policies and sea border surveillance in conformity with fundamental rights. The need to respect the principle of *non-refoulement*, the scope of which the European Court of Human Rights clarified in the *Hirsi* case in 2012, limits the discretion of states on where to disembark migrants intercepted or rescued at sea.

This publication is one of two main reports resulting from a FRA project on the treatment of third-country nationals at the EU's external borders included in its 2010–2012 work programmes. It presents the results of the first phase of this project. A second report, to be published at a later stage, will examine fundamental rights issues at official border crossing points, focusing on policies and practices at large land and air border crossing points.

As explained in more detail in the Annex, this research adopts a socio-legal approach. 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 with migrants, national authorities, fishermen, shipmasters and civil society organisations dealing with sea arrivals in the summer and autumn of 2011. 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, Malta, Madrid 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 Tunisia and Libya pushed up the numbers of arrivals, particularly to Lampedusa.

The FRA contracted a consortium which implemented the research. The International Centre for Migration Policy Development (ICMPD) led the consortium, which included the Hellenic Foundation for Foreign and European Policy, the Forum Internazionale ed Europeo di Ricerche sull'Immigrazione (FIERI), the Observatorio de la Inmigración de Tenerife (OBI Ten), the European University Institute (EUI), and a number of experts in their individual capacity. It carried out qualitative interviews and analysed these at country level. The European University Institute in Florence carried out a review of national training materials. The research was also supported by Frontex, which assisted the FRA in obtaining access to relevant officers as well as information, particularly 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 FRA research does not describe the situation of migrants arriving at border crossing points in ports, whether they are documented or not. Therefore, 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.

The United Nations High Commissioner for Refugees (UNHCR) has presented a 10-Point Plan of Action,¹ which currently offers the most comprehensive guidance on how to deal with mixed flows of migrants at sea borders. It complemented the 10-Point Plan with a handbook containing good practices that suggested how to apply the plan in practice.² In addition, the International Maritime Organization (IMO) published, jointly with the 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

This FRA report complements other recent publications on this issue. These include, in particular, two United Nations Office on Drugs and Crime (UNODC) reports examining smuggling patterns and the experiences of migrants with smugglers, and an International Organization for Migration (IOM) report.⁴ The International Catholic Migration Commission (ICMC) publication *Mayday* examined in 2011 how migrants and refugees are dealt with after disembarkation.⁵ The study identifies, among other things, the absence of response mechanisms for victims of torture and victims of violence, especially women, upon arrival.

In addition, a number of actors have issued reports that cover a certain geographical area or focus on a specific incident, such as the 2009 push backs to Libya from Italy. Some of the more relevant reports include: the European Committee for the Prevention of Torture (CPT) report on Italy;⁶ the Parliamentary Assembly of the Council of Europe report *Lives lost in the Mediterranean Sea: Who is responsible?*;⁷ as well as Pro Asyl⁸ and Human Rights Watch⁹ publications on Greece and Malta.

This FRA report examines practices across the EU Member States researched, adding a comparative element which is absent from most of the reports listed above, particularly as regards maritime border surveillance, an issue which the ICMC publication does not cover. Furthermore, this report looks at Frontex activities. 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 (EU institutions, Frontex and EASO) and Member State level. It should be read in conjunction with the FRA thematic situation report *Coping with a fundamental rights emergency: The situation of persons crossing the Greek land border in an irregular manner*, which was published in 2011.

The report uses the term 'migrant' to refer to persons arriving by sea in an irregular manner. This term 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.

1 United Nations (UN), High Commissioner for Refugees (UNHCR), (2007).

2 UNHCR (2011a).

3 UNHCR and International Maritime Organization (IMO) (2006).

4 UNODC (2010); UNODC (2011a); International Organization for Migration (2010).

5 International Catholic Migration Commission (ICMC) (2011a).

6 Council of Europe, Committee for the Prevention of Torture (CPT) (2010a).

7 Council of Europe, Parliamentary Assembly (PACE) (2012a).

8 PRO ASYL (2007).

9 Human Rights Watch (2012); Human Rights Watch (2009a).

Executive summary 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 European Union's protection of core rights of individuals.

The phenomenon and the risks faced by persons crossing the sea

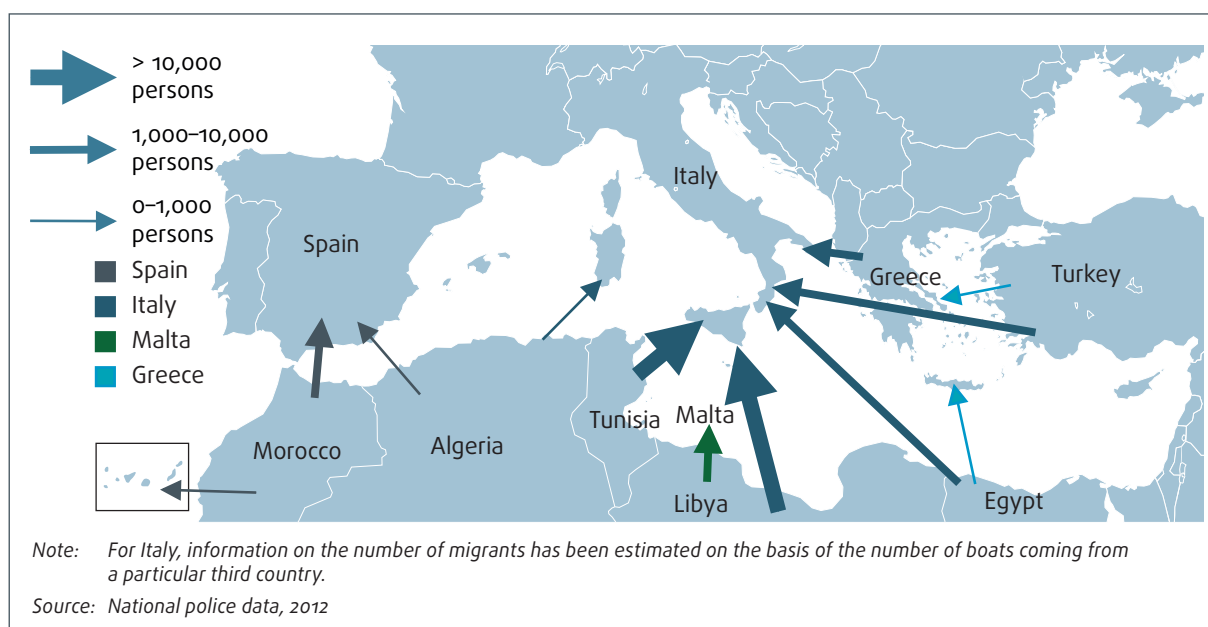
In numeric terms, arrivals by sea constitute only a small percentage of the total number of persons entering the EU or the Schengen area. Comparable data of external border crossings collected during one week in 2009¹⁰ found that approximately 13 million persons crossed the external borders to enter 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 following map 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.

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.



¹⁰ Council of the European Union (2009).

FRA opinion

The European Union 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.¹¹

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 Parliamentary 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.¹²

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.¹³ 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 serious 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 of 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.¹⁴

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.¹⁵

¹¹ UNHCR and IMO (2006).

¹² Council of Europe, PACE (2012a).

¹³ UNHCR (2012a).

¹⁴ 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.

¹⁵ 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.

The EU and its Member States have increasingly been looking 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.¹⁶

While border control measures fall clearly under the scope of EU law (Article 79 of the TFEU), search and rescue operations are regulated by 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 of 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.¹⁷

FRA opinion

After the annulment of Council Decision 252/2010/EU, 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.

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.

¹⁶ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

¹⁷ Court of Justice of the European Union (CJEU), Case C-355/10 [2012], *European Parliament v. Council of the European Union*, 5 September 2012.

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.¹⁸ 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 Spain and Portugal 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.

¹⁸ European Commission (2010b).

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 of 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 examination, 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 Article 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 held persons.

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.¹⁹ 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.²⁰ It also provided a collection of good practices to assist states with how to implement the plan of action.²¹

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.

¹⁹ UNHCR, 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.

²⁰ UNHCR (2007).

²¹ UNHCR (2011a).

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 this report.

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.

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 the FRA carried out its research project, this was primarily the case for Moroccan, Tunisian and Egyptian 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.²²

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.²³ 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.²⁴

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

22 Cassarino, J.P. (ed.) (2010); Balzacq, T. and Centre for European Policy Studies (CEPS) (2008); Roig, A. and Huddleston, T. (2007); Trauner, F. and Kruse, I. (2008).

23 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 (2011g), Table 1.

24 European Commission (2011h).

on the issue and propose a draft resolution and draft recommendation in 2010.²⁵

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.²⁶ 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 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.

²⁵ Council of Europe, PACE, Committee on Migration, Refugees and Population (2010). See also Council of Europe, Committee of Ministers (2011).

²⁶ Council Directive 2005/85/EC, Asylum Procedures Directive, Art. 7, 39 (3).

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.

PART ONE: THE SITUATION AT SEA

1

The phenomenon and the risks faced by persons crossing the sea



This chapter looks at migrant arrival figures and describes the profile of migrants crossing the sea to southern Europe, including their related experiences. Pre-departure migrant experiences of abuse and violence are only recounted when this information is relevant for the EU authorities' responses to the arriving migrants.

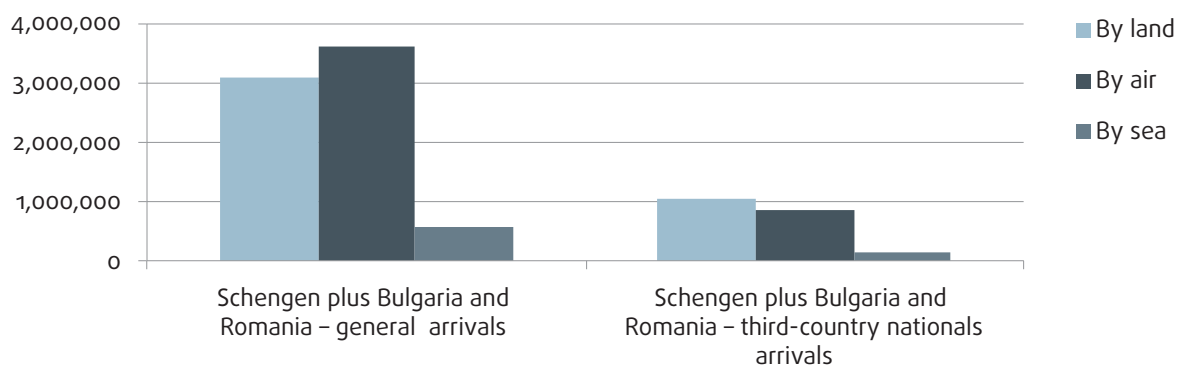
1.1. Number of persons crossing the EU's external borders

In numeric terms, arrivals by sea constitute only a small percentage of the total number of persons entering the EU or the Schengen area. The EU, which collected comparable data of external border crossings in 2009,²⁷

found that approximately 13 million persons crossed the external borders to enter or exit the Schengen area in a specific week. More than half crossed at airports and fewer than 10 % crossed at a sea border.

The figures are similar when considering only third-country nationals. Out of 13 million crossings, 3.5 million were third-country nationals, with 2.1 million not subject to visa requirements and 1.4 million requiring a visa. Fewer than 7 % of these third-country nationals crossed a maritime border. Similarly, of the two million third-country nationals *entering* the Schengen area, only 7 % entered through a sea border, compared to 51 % entering at land borders and 42 % at air borders. In 2011, over 250 million people arrived by air to an EU Member State (figures for arrivals in the Czech Republic, Greece and France not included) from a third country, according to Eurostat.²⁸

Figure 1: Arrivals by air, land and sea to the Schengen area plus Bulgaria, Cyprus and Romania, 2009



Source: Council of the European Union, 2009

²⁷ Council of the European Union (2009).

²⁸ European Commission, Eurostat, data extracted on 14 December 2012, available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database (online data code avia_paexcc).

Third-country nationals can be refused entry at an official border crossing point for not fulfilling all conditions for entry into the EU Member State or Schengen-associated country (Iceland, Liechtenstein, Norway and Switzerland). In 2011, the number of third-country nationals refused entry was highest at land borders with 59,592 refusals, followed by air borders with 49,393 refusals and just over 9,000 at sea borders.²⁹ This suggests that the risk of undocumented arrivals at sea borders is lower than at other borders.

The situation varies from year to year when comparing irregular land or sea border crossings, meaning those entries into an EU Member State or a Schengen-associated country not occurring at an official border crossing point by individuals lacking the necessary travel documents. In 2008, the number of detected irregular entries at sea borders outnumbered those by land. This was followed by a sharp decrease in arrivals by boat in 2009 and 2010, with around 15,000 detected irregular entries at sea borders compared to around 90,000 at land borders.³⁰ In 2011, arrivals by sea increased significantly following the uprisings in north Africa.

Research also indicates that migrants arriving by sea make up only a small portion of the overall population of migrants in an irregular situation living in southern Europe. Italy had 560,000 migrants living in an irregular situation and only one-tenth of them had arrived by sea, according to estimates presented in 2009.³¹ In

Spain, according to National Immigrant Survey data for 2007, the proportion of immigrants illegally entering the country, (for example by boat) amounted only to 1 % of the total number of arrivals, with the majority of foreigners entering the country by air.³²

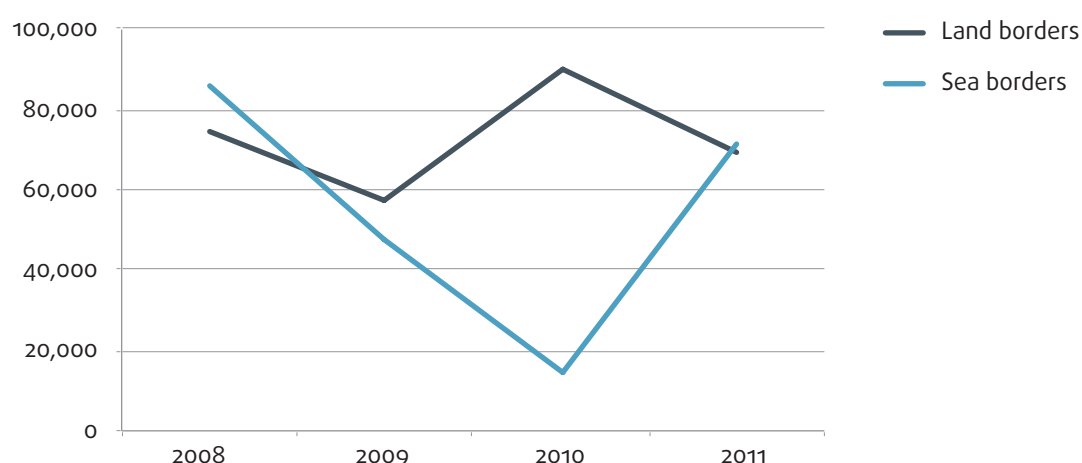
Arrivals by sea have drawn significant public attention. Alarming news of capsized boats and drowning migrants desperately trying to reach European shores have made headlines. Unseaworthy boats crossing the Mediterranean Sea or the sea between west Africa and the Canary Islands remain an enormous challenge for policy makers, humanitarian workers as well as those in charge of border management.

1.2. Figures on irregular arrivals by sea

This section looks at the figures on migrants who arrive to southern Europe in an irregular manner by sea, including geographical trends over several years. This is largely based on official statistics from the four EU Member States most affected by arrivals, namely Greece, Italy, Malta and Spain.

Table 1 provides an overview of officially recorded arrivals by sea from 2001–2012 presented by country of arrival.

Figure 2: Irregular border crossings detected at land and sea borders, 27 EU Member States and Schengen-associated countries, 2008–2011



Source: Frontex, 2012

²⁹ Data extracted from Frontex (2012a), p. 52.

³⁰ *Ibid.*, p. 47.

³¹ Consiglio Nazionale dell'Economia e del Lavoro (CNEL) Caritas (2009).

³² Reher Sullivan, D. et al. (2009).

Table 1: Third-country national arrivals by sea, 2001–2012, four EU Member States

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
EL	6,864	3,926	2,439	3,047	3,371	3,456	9,240	15,314	10,165	1,765	757	1,627
ES	18,517	16,670	19,176	15,675	11,781	39,180	18,656	13,424	7,285	3,632	5,443	3,798
IT	20,143	23,719	14,331	13,635	22,939	22,016	20,165	36,951	9,573	4,406	62,692	13,267
MT	57	1,686	502	1,388	1,822	1,780	1,702	2,775	1,397	28	1,579	1,890

Notes: The table includes spontaneous arrivals as well as persons rescued at sea. Figure 3 provides a graphic illustration of these figures.
EU Member State country codes: EL, Greece; ES, Spain; IT, Italy; and MT, Malta.

Source: National police data, 2012

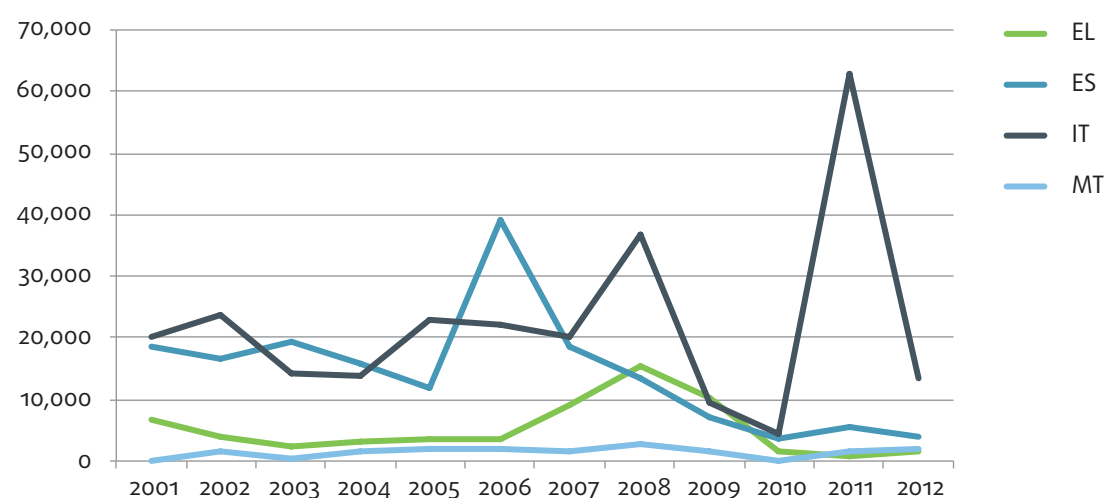
Figure 3 illustrates the data in Table 1 and reveals that changes in migration by sea over the 10-year period are remarkable. Arrivals by sea to the Canary Islands peaked in 2006. In Greece and the central Mediterranean (Italy and Malta), arrival figures were high in 2008 when smugglers considered these routes to be effective for bringing migrants to Europe. In the central Mediterranean, arrivals rose significantly in 2011 following the Arab Spring, dropping again in 2012.

In Greece, arrivals by sea decreased substantially in 2010 when migrant flows shifted to the Greek-Turkish land border, which had been cleared of anti-personnel mines, but then rose again in late summer 2012 when Greece deployed an additional 1,800 police officers to the land border as part of operation *Xenios Zeus*. The number of land crossings dropped from some 2,100 during the first week of August 2012 to fewer than 100 during the last week of that month, while the number of Aegean Sea crossings increased, according to Frontex.

Following the joint Italian-Libyan interception and push-back operations in May 2009, arrivals to the Italian island of Lampedusa and to Malta came to a virtual stop. In late 2010, arrivals resumed following the Jasmine Revolution in Tunisia and continued in 2011 during the conflict in Libya.

Arrivals in Spain peaked in 2006 before Spain, together with its west African neighbours, took measures to reduce the number of boats coming to the Canary Islands. Such measures included Spain's assistance provisions to its west African neighbours, including cooperation in the field of immigration control. Based on agreements between Spain and Mauritania, Morocco and Senegal, joint patrols with its African neighbours were launched near the west African coast which substantially limited the possibility of departing unnoticed. Since then, arrivals in Spain have shifted to the Mediterranean coast, but they have remained substantially lower than the peak arrival periods in the Canary Islands. Figure 4 illustrates arrival trends in the Canary Islands compared to the Spanish peninsula.

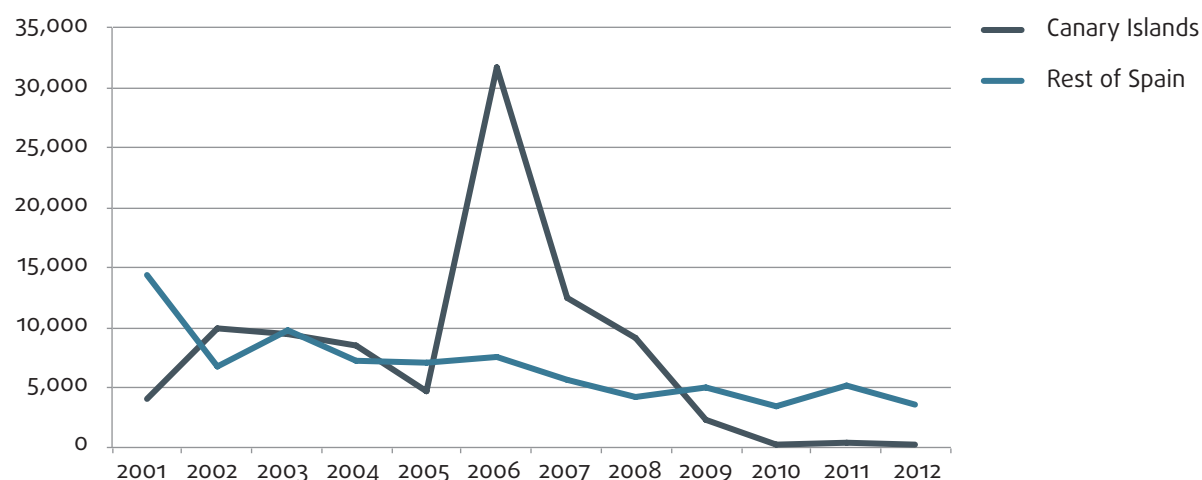
Figure 3: Data trends, 2001–2012, four EU Member States



Note: EU Member State country codes: EL: Greece; ES: Spain; IT: Italy; and MT: Malta.

Source: National police data, 2012

Figure 4: Arrivals in Spain, 2001-2012



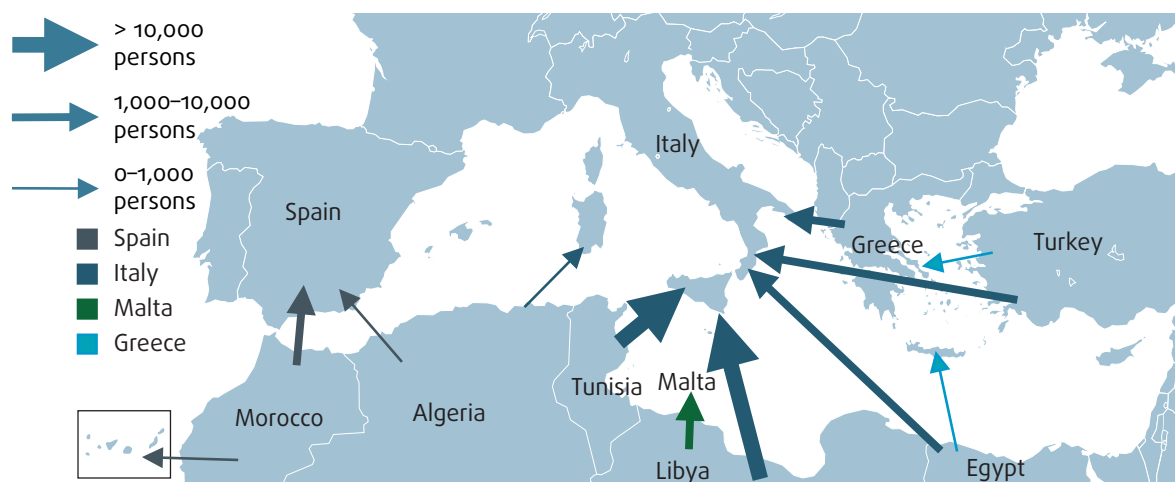
Source: Spanish Ministry of Interior, 2013

While it is beyond the scope of this report to examine the reasons behind changes in migration routes, two general conclusions can be made. First, collaboration with third-country authorities involving some degree of joint patrolling appears to reduce the number of irregular arrivals by sea. On the Canary Island route, for example, Spanish Ministry of Interior numbers show interceptions of: 93 vessels with 8,574 migrants in 2007; 59 vessels with 6,654 migrants in 2008; and 22 vessels with 2,570 migrants in 2009.³³ Such interceptions were accompanied by a substantial

decrease in arrivals to the Canaries as illustrated in Figure 4. Second, events in neighbouring coastal states have the potential to increase arrivals, as was the case in the central Mediterranean in 2011, although uprisings in Egypt and Syria did not lead to a rise in arrivals by sea to the EU.

Figure 5 illustrates several countries from which migrants start their journeys by sea. This figure is based on arrivals recorded in 2011, and it should be noted that routes change over time.

Figure 5: Main countries of departure, 2011



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

33 Spain, Ministry of Interior (2010).

The Tunisian and Libyan coasts were the main points of departure in 2011. The route from Egypt, leading mainly to Crete, has become less relevant since 2008 with only a few arrivals registered via it despite the unstable situation in Egypt. No direct boat arrivals were registered from Syria or Lebanon to Cyprus as most refugees from Syria departed by land to Turkey and other countries. Departures from Turkey continued to take place in 2011, albeit in smaller numbers than in previous years. In contrast to the past, however, more departures took place on larger boats heading towards Italy.

In the western Mediterranean, migrants continued to cross the Alboran Sea from northern Morocco to Andalusia and to a lesser degree from Algeria into southern Spain, with some also from Algeria to Sardinia. Only a few hundred persons reached the Canary Islands from central Morocco.

Migrants typically arrive in the same places, often on small islands that are closest to their points of departures. Places particularly affected by migrant arrivals were the Canary Islands, Lampedusa and, to a smaller degree, Pantelleria in Italy, Malta and the eastern Aegean islands and islets. Between 2006 and 2008, for example, Greece saw 95 % of those crossing from Turkey apprehended on or among the islands of Lesbos, Chios, Leros and Kos, according to a 2009 report by the Greek Ministry of Maritime Affairs.³⁴

In the central Mediterranean, most of the boats reached the small Italian island of Lampedusa, with some 51,000 persons arriving between February and early April 2011. During the same period, over 1,500 persons reached Malta. During the night between April 4 and 5, around 840 migrants arrived in Lampedusa.³⁵

1.3. Migrant profiles

Migrants departing for southern Europe include both nationals of the origin country where the crossings start, as well as persons coming from further afield, such as Asian or Sub-Saharan African.

Although migration flows and routes change over time, Algerian and Tunisian nationals made up most of the arrivals from Algeria and Tunisia in 2011. In contrast, Turkey and Libya were mainly used as transit countries for migrants coming from further away. Departures from Morocco included both Moroccan nationals, particularly

en route to the Canary Islands, as well as nationals from other, mainly African, countries.³⁶

The flow of migrants crossing into Europe is generally described as a mixed one, including individuals who left their home country due to war or persecution as well as individuals who moved for family, economic or other reasons. Individuals migrating as a result of war or persecution are entitled to protection under international as well as EU law. They cannot be removed and sent back to a country where their lives and freedoms are at risk. In order to identify these persons, officials must conduct individual screenings before returning or forcing back migrants to the country of transit or origin.

Although it is not always possible to determine a migrant's nationality at the point of arrival, it is undisputed that significant numbers of arrivals by boat originate from countries such as Afghanistan, Eritrea, Ethiopia, Iraq and Somalia. There is a considerable likelihood that nationals from these countries are in need of international protection. In 2011 national asylum authorities in the 27 EU Member States recognised the following percentage of applications made: for Afghanistan 45 %, for Eritrea 70 %, for Ethiopia 39 %, for Iraq 54 % and for Somalia 68 %, according to Eurostat.³⁷ As described in Chapter 3, neither Turkey nor the transit countries forming the coastline of north and west Africa provide effective protection to persons seeking asylum. Therefore, border management measures aimed at reducing departure and interception measures taken at sea will also impact refugees' chances to find safety.

1.4. Extreme crossing conditions

This section describes migrants' experiences at the point of embarkation and while at sea and aims to illustrate the extreme conditions of such sea crossings. It is based mainly on information collected directly from the migrants, and uses information from other public sources for countries that the FRA research did not cover. The section looks at the experiences of violence and deprivation in the third country, describes the boats used for crossing, the main risks faced, as well as the resources migrants bring, such as food and water.

³⁴ Greece, Ministry of Maritime Affairs Islands and Fisheries, Security Division (2009).

³⁵ Affaritaliani.it (2011).

³⁶ Jesuit Refugee Service Europe (2012).

³⁷ European Commission, Eurostat, database by themes, population and social conditions, population, international migration and asylum, asylum, decisions on applications and resettlement, first instance decisions. Data extracted on 16 July 2012.

An overview of the interviews for this research

The fieldwork for this project consisted of five main strands:

- (1) 143 qualitative interviews with third-country nationals in Greece, Italy, Malta and Spain as well as Morocco, Tunisia and Turkey;
- (2) 64 qualitative interviews with representatives of border management and other related authorities, of which 55 were carried out in the five EU Member States covered by the research and nine were undertaken in third countries;
- (3) 25 qualitative interviews with fishermen and shipmasters;
- (4) focus group and/or individual interviews with 49 stakeholders, primarily international organisations and NGOs in Greece, Italy, Malta, Spain, Tunisia and Turkey.

For more information on the fieldwork, see the Annex

Pre-departure

The research found considerable differences between north Africans, such as Moroccans or Tunisians who start their journey by sea from their own country, and migrants who come from further afield, primarily Sub-Saharan Africans. Individuals who have crossed the Sahara have often experienced violence, exploitation and deprivation in their country of origin, during the travel overland as well as while waiting for an opportunity to embark for Europe. The literature describes the Sahara as the most dangerous part of the trip, where rough natural conditions, corrupt officials and bandits put the life and safety of migrants at risk.³⁸ A recent report published by UNODC highlights that “women migrants across the Sahara, including those who have no intention of working in the sex trade, are subject to rape and other mistreatment. Some may fall into the hands of traffickers and be ‘bought’ and ‘sold’ between rival traffickers”.³⁹

Sub-Saharan African migrants described the deplorable conditions in makeshift camps on the western Mediterranean coast. The migrant communities organise and manage these camps themselves and the Moroccan police regularly dismantle them. Several women interviewed in Spain referred to rape and abuse during the land journey and especially while in Morocco.

“Yes, I arrived to Spain in 2010 [...]. The way to make the journey is not easy [...] And there are abuses, too, because some people [...] come during the night and tell you: Give me sex, give me sex and then I will help you to cross [...].”

(Cameroonian woman, crossed to southern Spain in 2010)

Experiences of deprivation also emerged in Turkey. A Turkish fishermen living near a point of migrant departure described how migrants are kept waiting, locked up in small huts until a sufficiently large group is gathered for crossing to Greece.

“In the forests there are some dirty abandoned houses. No one can live there. There is no heating, no water, no toilet, nothing! Just four walls and one door [...] The shepherd brings them [the migrants] to those houses. They are locked in and must wait there for other migrants. Once a day, the shepherd brings a meal to them. Just flan and water [...] Sometimes they stay there one week or ten days.”

(Fisherman, interviewed in Turkey)

A number of sources have documented the treatment of Sub-Saharan Africans in pre-war Libya, including Human Rights Watch, which described allegations of beatings, rape and other forms of serious ill-treatment.⁴⁰ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), relying on similar accounts from various sources, noted the inadequate detention conditions in Libya, the risk of suffocation during transport to detention facilities in the desert and the risk of collective expulsions.⁴¹ It also stated that the Libyan authorities’ practice of prolonged isolated detention is allegedly widespread and puts detainees at risk of torture and ill treatment.⁴²

North Africans, in contrast, can more easily rely on a network of family and friends before departing from their country and are therefore less vulnerable to exploitation or abuse. Moroccan nationals who made the trip to the Canary Islands between 2004 and 2010, and who have since returned, stressed that those managing the crossing were confident and well-organised. This is, however, not always the case. Interviews with Moroccans near Tangier waiting to depart for Spain indicated that those with little means were placed in overcrowded facilities with rudimentary conditions where they had to wait for several months before attempting a sea crossing. In Tunisia, migrants mentioned that they run the risk of the police discovering and punishing them for attempting to leave the country in an irregular manner:

³⁸ An overview of relevant literature is available at: UNODC (2010), pp. 39–40.

³⁹ UNODC (2011a), p. 17.

⁴⁰ For example, see HRW (2009b).

⁴¹ Council of Europe, CPT (2010a), paras. 41–42, 44.

⁴² *Ibid.*, para. 43.

"During the Tunisian Revolution in 2011, I was among a group of 25 persons waiting in a house in Teboulba city on the sea side, but the police discovered us. Some of us were arrested, but I succeeded in running away. My guess is that the smuggler who got our money went to the police and gave them information on where we were. So the police came, the plan failed and the smuggler disappeared."

(Tunisian man, interviewed in Tunisia)

The boats

Different types of boats are used for crossing the sea. These include inflatable speed boats, wooden or fiberglass boats, old fishing boats or other larger vessels and occasionally also yachts or sailboats. In case of short distances, small inflatable row boats, like those used by children, have also been observed between Turkey and the Greek islands or from Morocco to the Spanish enclaves in north Africa or the areas near Gibraltar.

Several factors determine the type of boat used for the crossing. These include the means available, the distance to cover, the need to avoid border controls at the point of departure and whether the boat will be abandoned after the journey.

In general terms, different types of boats are used for crossings at distinct geographical points. Larger dug-out canoes (*cayucos*) are used by migrants departing from west Africa towards the Canary Islands. These canoes can carry about 60-70 persons, but in some cases have been loaded with over 140 persons, who then travel an average of seven days. Mid-sized wooden boats (called *flouka* in Morocco) generally cross the sea between Morocco

and the Canary Islands carrying around 20 persons. Less frequently, inflatable rubber boats are used for crossings. Migrants crossing from northern Morocco, and less frequently from Algeria, to southern Spain use mid-sized inflatable rubber or wooden boats (*pateras*). Figure 6 depicts the different boats commonly used for crossings.

In the central Mediterranean, migrants typically cross using dinghies and wooden or fiberglass boats about five-to-six metres long.⁴³ Beginning in 2008-2009 and also observed in 2011, old fishing boats were used.⁴⁴ These fishing boats are about 15 metres long and able to hold more than 200 persons. The crossing time depends on the route, the type of boat, weather and sea conditions, navigation skills and other factors. A migrant described the trip length as:

Question: "How many days did you spend on the boat?"

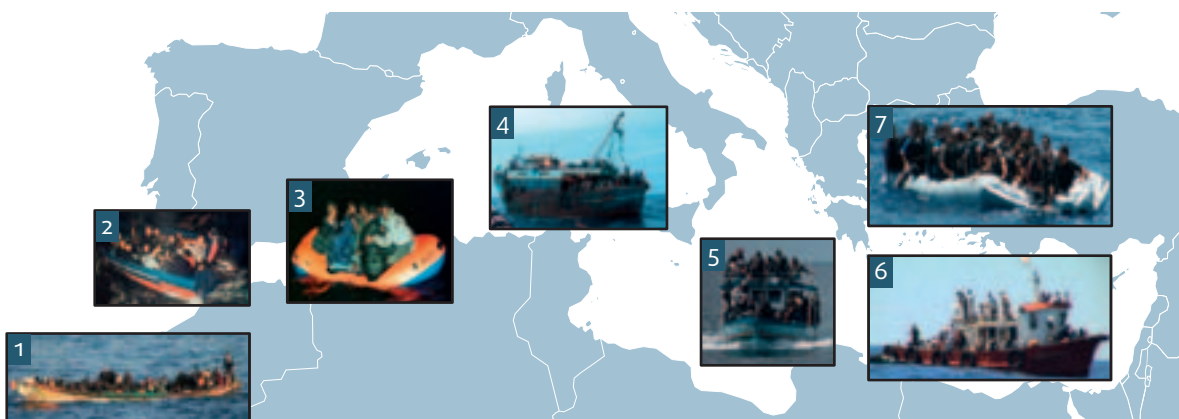
Reply: "Four days. One day the weather was very rough. We were in two boats, but one boat was damaged. My friend from the Ivory Coast died."

(West African man, crossed to Malta in 2007)

Departures from Egypt heading to Crete or Italy may use larger vessels. Inflatable rubber boats (*zodias*) are mostly used for crossings to the eastern Aegean islands, and are either rented, bought second hand or stolen.⁴⁵ In interviews in Turkey, interviewees mentioned the use of other vessels, including yachts. Figure 6 shows the different types of boats used.

In some cases, boats were purpose built for transporting migrants and not used for any other purpose. This is the case with fibreglass boats in Libya, which were

Figure 6: Types of boats used for crossings



Source: Pictures 1 – dug-out canoe (*cayuco*), 2 – mid-sized inflatable or wooden boat (*patera/flouka*) and 3 – inflatable children's boat (pictures provided by the Guardia Civil (Spain)); pictures 4 and 5 – old fishing boats (pictures provided by the Italian Coast Guard; and 6 – old fishing boat and 7 – inflatable rubber boat (pictures provided by the Hellenic Coast Guards (Greece)).

⁴³ Monzini, P. (2008).

⁴⁴ Monzini, P. (2010).

⁴⁵ İçduygu, A. and Toktaş, Ş. (2002).

essentially used to transport migrants, according to law enforcement officials in Malta. In 2009, inflatable boats replaced fibreglass boats, which was probably a reaction to increased Libyan checks, as rubber boats can be inflated at the last minute and are therefore easier to conceal.

The boat conditions vary depending on the smuggler used. In some cases, interviewees reported that boats were in fair condition, equipped with powerful engines. More often, however, the migrants interviewed described the boats as old and in disrepair and typically overcrowded. In Tunisia, one interviewee was a passenger on an 18-metre boat carrying 380 migrants; another interviewee boarded a 14-metre boat with 240 other persons; and a third interviewee was on a boat of about seven metres with 45 passengers. In Greece, migrants said that there were 25, 27 and, in one case, 48 persons in rubber boats designed to carry up to 10 persons.

Several interviewees were shocked when they saw the conditions of the boat that they had to take to cross the sea. At this stage, however, it is often not possible to change one's mind. Migrants interviewed in Italy said that police and the forces of former Libyan leader Colonel Muammar Gaddafi prompted migrants to get on board and threatened to shoot those who refused. In other cases, smugglers forced migrants to board, as described in these two testimonies from Turkey and Tunisia:

"It was February or March 2008. [...] When I saw the boat, I was surprised, because it was a very small plastic boat. Some of us did not want to go with that small boat since it was too small and we were 27 people in total. Then the smuggler with the transporter began to shout and fight with the migrants. He had a knife. An African woman who had a baby began to cry. Then the smuggler took her baby and said that if she continues to cry, they would throw the baby into the sea. So everyone got into the small boat [...] He threw the baby to the woman. Everyone was shocked."

(Palestinian man, interviewed in Turkey)

"I was shocked when I saw the fishing boat; the bad shape of the boat made me think of changing my mind and cancelling my trip; but that was not possible. The smuggler would never allow anyone to go back to the shore. We were all together 240 persons from Tunisia, Egypt and Morocco. [...] We were too many for a boat of 14 metres."

(Tunisian man, crossed to Lampedusa, Italy, in 2008, interviewed in Tunisia after having been returned)

Another risk factor results from migrants being asked to operate the boat themselves, as smugglers generally do not run the risk of being arrested upon arrival. In the past, for example, smugglers in the central Mediterranean recruited professional sailors to transport migrants to Sicily and then pilot the boats back to Tunisia or Libya. In 2002–2003, however, the Italian authorities arrested

dozens of these sailors, prompting smugglers to change tactics and send boats without professional sailors to Lampedusa, which is the shortest route.⁴⁶

Most boats used by the migrants interviewed for this research were operated by a fellow migrant. Migrants arriving from Libya in 2011 on larger boats often could not say who had operated the vessel, as they spent the voyage on a different deck. Interviews carried out in southern Morocco and on the Canary Islands indicated that an Atlantic crossing is more likely to have a captain on board.

Migrants are often taken by surprise that a fellow migrant is piloting the boat.

Question: "Was there someone who operated the boat?"

Reply: "A Ghanaian, [...] He was one who was travelling with us. He was with us in the house, but we didn't know that he will be our pilot, otherwise we would have refused. We were expecting a large boat with a pilot, but it was a small boat driven by an inexperienced migrant."

(Guinean man, crossed to Malta in 2009)

Sometimes migrants operating the boat have limited sea experience. Often, several migrants pilot the boat in shifts, relieving one another, as a woman from the Ivory Coast interviewed in Spain described:

Question: "And was there a captain?"

Answer: "The captain who drove the zodiac? I believe that no one was [a captain], because one was driving and he stopped when he got tired, and then another one drove until we arrived."

(Woman from Ivory Coast, crossed to southern Spain in 2011)

At the last moment, smugglers can give migrants instructions on what to do; one migrant interviewed in Greece said the smugglers told them that they should just follow the lights on the other side. In another case, smugglers accompanied migrants to the high seas and, before turning back to Libya on a zodiac, gave the migrants a compass and instructions on how to continue, said a migrant who arrived in Italy in 2011. In some cases passengers received no explanations at all:

"We thought there would be someone in the vessel to drive it. But there was no one and [the smuggler] told us that you need to get on board and drive it. Luckily we had four men from the Middle East and they knew how to navigate."

(Afghan woman, crossed to Mitilini, Greece, in 2010)

Migrants gave different accounts as regards the presence of navigation equipment onboard. Seven of the 16 migrants interviewed in Tunisia reported that their boats had compasses. Interviews carried out in

⁴⁶ Monzini, P. (2008).

Italy with recently arrived Tunisians indicate that Tunisian vessels were often equipped with a compass or GPS devices. Research carried out in southern Morocco also revealed the use of compasses. In contrast, migrants who cross the Mediterranean or Aegean Seas in smaller boats appear less likely to have navigation instruments with them. In addition, some migrants said smugglers told them to throw overboard their equipment, such as compasses, GPS devices or satellite phones, as soon as they caught sight of the coast guard. A west African national interviewed in Malta noted:

"They removed everything we had, including money, unless you keep the money somewhere they don't see, and you cannot have a telephone. They will kick it into the sea."

(West African man, crossed to Malta in 2007)

Risks during crossing

Hardships during the crossings are very common. As migrants reported, it is not uncommon for them to lose their way at sea, run out of fuel, encounter heavy seas, have engine problems and, most seriously, have the vessel fill with water.

Migrants interviewed in Andalusia spoke of engine breakdowns, which were also documented in the central Mediterranean. In Turkey, there were indications that smugglers wait for relatively bad weather conditions and rough seas to reduce the risk of apprehension.

Migrants interviewed in the Canary Islands reported using a plastic sheet to stay dry despite the constantly inrushing water and to hide from authorities. Other migrants interviewed in Greece described how water started coming in and how they tried to ladle it out using their hands, cloths or plastic cups.

Typically, migrants do not have lifejackets. Only some migrants in Greece, Morocco and the Canary Islands reported having them. Usually, only the captain, if any-one, will have one. One migrant interviewed in Sidni Ifni (Morocco) who crossed the sea in 2008 said that there were some life vests in the boat and that these were distributed to the women. No first-aid kits for medical emergencies have been reported on board the boats used for crossings by any of the migrants interviewed.

Migrants can be at sea for quite some time. Apart from the eastern Aegean Sea, where distances are short, migrants are at sea for more than a day in most cases. The crossing between northern Morocco to Andalusia usually takes around 1½-to-two days. The average crossing time in the central Mediterranean Sea is one-to-three days, which is also the usual time needed to reach the Canary Islands from southern Morocco. Trips to the Canaries from west Africa can take from seven

to 10 days. The speed of the boat, sea conditions and any incidents on the way can substantially impact a crossing's duration.

Communication from the boat in case of an emergency is difficult. Although many migrants have mobile phones, lack of coverage or absence of a functioning phone card limit their effectiveness. In the absence of better communication equipment, however, mobile phones have proven very useful in calling for help, as this Tunisian man's experience shows:

"So we called the 1150, which is the Orange [telephone company] in Tunisia, to ask for help, but when I called an Italian answered. [...] The 115 [the Italian Fire Brigade] answered me. And then I talked with him, I explained where we were and what was going on. I spoke with him in Italian."

(Tunisian man, crossed to Pantelleria, Italy, in 2011)

Fear and anxiety are the most common feelings expressed by migrants in their descriptions of journeys by sea. These feelings can be amplified by bad weather and sea conditions, engine failure or the fear of being lost. Arguments among migrants on the boats are rare. People are silent:

"Some people are afraid and others read the Qu'ran."

(Moroccan man, crossed to the Canary Islands in 2005)

Food and water

Food and water arrangements during the trip differ. When the trip is longer, such as crossing to the Canary Islands, food and water is included in the cost of the trip. The captain distributes the rations and some migrants reported that he or she typically gives children and women priority. When a trip lasts longer than anticipated, food and water become scarce, although migrants also reported that being sea sick prevented them from eating much.

Migrants crossing the Mediterranean or the eastern Aegean tend to organise food themselves and bring water and biscuits, or bread in the case of Tunisians, to the point of departure. Interviews with migrants in Italy, Malta and Turkey indicate that smugglers limit migrants' baggage in order to have more space for additional passengers. Migrants were discouraged or prohibited from bringing food with them. An Ethiopian interviewed in Malta recounted his experience:

"On the way to the camp where they collected us before departure, we bought meat and bread. But when we boarded the boat they told us that they would provide us with everything and they took our food away. They wanted to herd as many people as they could on the boat. We had no water or food."

(Ethiopian man, crossed to Malta in 2011)

Facing food scarcity, a feeling of solidarity can emerge among migrants, as described by a man from Burkina Faso who said that his group was lost at sea for three days. They had only biscuits, which they gave to pregnant women and children. Lack of food can put lives at risk, especially for the weakest passengers:

"My wife could have died because there was no food and nothing to drink; my wife was ready to give birth."

(Man from Ivory Coast, crossed to Italy in 2011)

No migrant reported that they had blankets or a change of clothing with them, with the exception of some who crossed from Morocco to the Canaries and were told to bring a pair of dry trousers for arrival.

Conclusions

The number of persons crossing Europe's southern sea borders using unseaworthy boats amounted to some 10,000 in 2010, increased to over 70,000 in 2011 following the Jasmine revolution in Tunisia and the civil war in Libya, to drop again to some 20,000 in 2012. Most of these crossings are organised by smugglers. In numeric terms, arrivals by sea constitute only a small percentage of the total number of persons entering the EU or the Schengen area.

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.

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. As will be described in more detail in Chapter 4, 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 European Union 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 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.

2

Right to life



Charter of Fundamental Rights of the European Union

Article 2 (Right to life)

1. Everyone has the right to life.

Article 2 of the Charter of Fundamental Rights of the European Union guarantees everyone the right to life. It is one of the core human rights protected at the international and European level. The International Covenant on Civil and Political Rights stipulates that every human being has an inherent right to life (Article 6). As early as 1982, the Human Rights Committee, the covenant's supervisory body, stressed that the protection of this right also "requires that States adopt positive measures".⁴⁷ This means that a state may have a duty to act when loss of life is foreseeable and the state can prevent this loss.

The right to life is also enshrined in European human rights law, namely in Article 2 of the ECHR. According to the ECtHR, this provision also contains, in certain circumstances, a positive obligation for states to take appropriate steps to safeguard the lives of those within their jurisdiction.⁴⁸ Authorities should take preventive measures within the scope of their powers in situations where they knew or ought to have known of a real and immediate risk to the life of an individual or individuals.⁴⁹

In the maritime context, respect for the right to life is incorporated in the long-standing humanitarian duty to provide assistance to persons in distress at sea.

International law of the sea, as will be described in more detail in this report, requires states to take a number of preventive, early warning and response measures to reduce the risk of fatalities at sea. Although the law of the sea is not as such part of EU law, its provisions on search and rescue as well as on the duty to assist persons in distress are of central relevance for maritime border surveillance activities that are sensitive to human rights issues.

EU Member States are bound by the law of the sea framework they have signed up to, including when Frontex-coordinates operations at sea. In this vein, the revised Frontex Regulation requires that relevant maritime law be covered in training activities and that information concerning "international and Union law regarding interception, rescue at sea and disembarkation" be included in operational plans for joint operations.⁵⁰

This chapter provides an overview of deaths at sea based on the patchy data available. It examines the applicable law to uphold the right to life by ensuring the rescue of persons in distress. Finally, it describes the experiences of migrants, fishermen and authorities on how encounters with unseaworthy boats are dealt with in practice.

2.1. Deaths at sea

Unsafe travel conditions, overcrowded boats, the absence of navigation and communication tools, inexperienced boat operators, the lack of life jackets and limited supplies of fuel, food and water increase the

⁴⁷ UN Human Rights Committee (1982a), para. 5.

⁴⁸ ECtHR, *L.C.B. v. the United Kingdom*, No. 23413, 9 June 1998, para. 36.

⁴⁹ ECtHR, *Öneryildiz v. Turkey*, No. 48939/99, 18 June 2002, paras. 62–63.

⁵⁰ Regulation (EU) No. 1168/2011 of 25 October 2011 amending Council Regulation (EC) No. 2007/2004, OJ 2011 L 304/1, Arts. 3a, 5, 8e.

risk of incidents during a sea crossing. In some cases, incidents have fatal consequences.

There are no official statistics on the number of migrants who have died or gone missing while crossing the sea in an attempt to reach Europe. In most cases, fatalities occur far from shore and rescue operations either do not find or recover the dead bodies as priority is given to saving the remaining lives. The number of deaths that are officially recorded include only those where corpses are recovered. These are only a very small portion of those who are believed to have died at sea.

This is illustrated by comparing the numbers of officially registered deaths with UNHCR or civil society estimates. In 2011, for example, the authorities in Lampedusa officially recorded 29 dead bodies.⁵¹ In Spain that year, authorities formally registered 29 immigrants arriving by sea as deceased, most of them in southern Spain (Granada, Murcia, Cádiz) as well as in Ceuta and Melilla.⁵²

In contrast, in January 2012, UNHCR said 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. UNHCR noted that "this makes 2011 the deadliest year for this region since UNHCR started to record these statistics in 2006."⁵³ The Parliamentary Assembly of the Council of Europe (PACE) Committee on Migration, Refugees and Displaced Persons uses the same figure in a report.⁵⁴

Civil society initiatives have tried to estimate the scope of the situation using indirect sources, incidents reported in the press and accounts provided by eyewitnesses. Fortress Europe, a webpage managed by a journalist based in Italy, has compiled the most

comprehensive estimates based on a systematic review of press articles. From the start of this phenomenon some 20 years ago through early December 2011, Fortress Europe counted 13,744 persons dead or missing in the Mediterranean and off west Africa on route to the Canary Islands.⁵⁵ About half of them allegedly died or disappeared in the Sicily Channel, where, from 1994 to July 2011, some 6,226 victims are estimated, including 4,790 missing persons.⁵⁶ It is, however, likely that numbers are even higher as the press does not know of or report all incidents.

Civil society estimates are the only publicly available figures that allow for a comparison over the years. Using such estimates, tables 2 and 3 show the trend of missing and dead persons in the Sicily Channel over 10 years and in Spain over four years. These estimates confirm that in the central Mediterranean the highest number of fatalities occurred in 2011.⁵⁷ Fortress Europe says that in 2011 the risk of perishing when crossing the central Mediterranean was eight times higher for migrants coming via Libya than for those coming via Tunisia. A representative of the Italian Coast Guard interviewed for this research noted:

"The percentage of SAR [search and rescue] events has increased with the arrivals from Libya [...] More than 50 % were SAR events."

(Italian Coast Guard staff, interviewed in Italy)

In Spain, the trend seems to be different. The Spanish NGO Andalusia Association for Human Rights (APDHA) reported almost 600 people dead or missing when trying to reach the Spanish coasts in 2008, a number which dropped to some 200 people in 2011.⁵⁸ Of these, as noted above, authorities officially registered only 29 corpses.

Table 2: Missing and dead migrants in the Sicily Channel, civil society estimates, 2002–mid-2011

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011 (Jan-July)	Total
Deaths	236	413	206	437	302	556	1,274	425	20	1,822	5,691

Source: Fortress Europe, 2012

Table 3: Missing and dead migrants off Spanish coasts, civil society estimates, 2008–2011

Year	2008	2009	2010	2011
Deaths	581	206	131	198

Source: Asociación Pro Derechos Humanos de Andalucía, 2011

51 Information provided to the FRA by the Italian coastguards to the FRA in March 2012.

52 Information provided to the FRA by the Spanish national police in May 2012.

53 UNHCR (2012a).

54 Council of Europe, PACE (2012a).

55 Fortress Europe (2012a): The figure covers the periods starting from 1988 for Spain; 1991 for the Adriatic Sea; and 1994 for the Aegean and the Sicily Channel. In 8,687 of these cases the dead bodies were never found.

56 Fortress Europe (2012b).

57 Fortress Europe (2012c).

58 Asociación Pro Derechos Humanos de Andalucía (2012), p. 18.

In 2011, the most severe incident took place on 6 April, when more than 220 Somali, Eritrean and Ivoirians drowned when their boat capsized 39 miles south of Lampedusa.⁵⁹ This was the worst incident in recent years. Another tragic event happened on 31 July, when 25 migrants suffocated inside a boat, and were found dead after it had docked at the Lampedusa port.⁶⁰ The Parliamentary Assembly of the Council of Europe Committee on Migration, Refugees and Displaced Persons issued a detailed report on a third tragic incident in which a boat with 72 people left Libya and two weeks later, following a failure to provide assistance, drifted back to Libyan shores with only nine survivors.⁶¹ In June 2012, a boat with 55 migrants left Libya and drifted for 15 days in the Mediterranean.⁶² The only survivor, an Eritrean found floating on the remains of the boat and a jerry can by a Tunisian fisherman, reported that all the others had died from dehydration. On 7 September 2012 a boat with 130 people on board coming from Sfax in Tunisia sank about 12 nautical miles away from Lampedusa. The Italian Coast Guard, the Italian tax and financial police (*Guardia di Finanza*) and NATO vessels rescued 56 migrants, but at least one died and many dozens remain missing.⁶³

Fatal incidents also occurred at other places along the maritime borders. In the Aegean, 50 persons died on 26 December 2006 in the south near Marmaris, and 52 persons lost their lives on 9 December 2007 in the middle Aegean near Seferihisar.⁶⁴ On 6 September 2012, 61 persons including many children died when a boat with Syrians and other nationals capsized near Izmir on the Turkish coast.⁶⁵ In the Canaries, on 15 February 2009, 25 migrants, including 17 children and two women lost their lives.⁶⁶

Migrants interviewed for this research also witnessed the sinking of ships, a possible indication that such tragedies are not so rare. A Nigerian who arrived in Lampedusa, Italy, shared the following:

"The boat started and after around 19 km a ship that was sailing in front of us sank and many people died. There was no rescue for them. We could not do anything for them. At that time I felt I was also going to die. I had never been in a boat before. I vomited for around two days."

(Nigerian man, crossed to Italy in 2011)

Inexperience in manoeuvring boats constitutes another risk factor, as illustrated by accounts of fatalities as boats: foundered on rocks in rough seas (Greece); collided with a sand bank and capsized (Italy); or flipped over when sailing parallel to the coast (Canary Islands):

"It [the boat] flipped over, they weren't careful on the approach. They were sailing recklessly, and one of the most careless things to do is to go next to the coast and parallel to it instead of straight in. [...] They were trying to find a spot and when they got close, parallel to the seas, a wave flipped them over."

(Guardia Civil staff, interviewed in Spain)

In spite of the sophisticated rescue systems available in the Mediterranean, this research uncovered gaps. Particularly in certain parts of northern Africa such as in the Libyan search and rescue zone, in 2011 the capacity to intervene was limited or non-existent. The often large presence of private ships in those stretches of sea used for migrant crossing is in itself not sufficient to prevent the drowning of migrants (on the role of fishermen see Section 2.4).

Fatalities can also occur during rescue operations. Frightened passengers may make abrupt movements that capsize the vessel and cause the subsequent drowning of the occupants. This risk is at its highest when migrants are transferred to the rescue vessel. Rescue personnel generally describe such operations as very delicate manoeuvres.

An additional risk factor derives from instructions which smugglers may give migrants. Up to 2008 when the Greek-Turkish sea border saw instances of migrants pushed back to Turkey,⁶⁷ the Hellenic Coast Guard said migrants ripped their own rubber boats in order to force a rescue operation and, in that way, prevent such push backs. An Afghan migrant interviewed in Greece confirmed that when his boat's passengers sighted a Greek patrol vessel they decided to destroy their boat to avoid a push back to Turkey. Since the push backs were recurrent events, it is likely that smugglers gave the advice to rip the rubber. Although not specifically referring to Greece, a recent UNODC paper concludes that it is "part of the modus operandi of many smugglers to take advantage of States' rescue obligations by sabotaging vessels or instructing migrants on board to do so".⁶⁸

⁵⁹ UNHCR (2011b).

⁶⁰ Italy, Parliament, *Camera dei Deputati* (2011).

⁶¹ Council of Europe, PACE (2012a).

⁶² UNHCR (2012b); Council of Europe, PACE (2012b).

⁶³ Amnesty International (2012a); *La Repubblica* (2012);

BBC News (2012); Council of Europe, PACE (2012c).

⁶⁴ Review of Turkish press articles conducted by İçduygu in 2010 for this FRA report. According to the review, during the last 15 years (1995-2010), 17 maritime incidents with fatal accidents were reported: in these cases, 196 migrants in an irregular situation lost their lives, 38 were injured, and 83 went missing.

⁶⁵ Euronews (2012).

⁶⁶ *La Provincia* (2012).

⁶⁷ For a description of practices, see HRW (2008); PRO ASYL (2007).

⁶⁸ UNODC (2011b), p. 40.

2.2. The duty to rescue and render assistance to persons in distress at sea

The shipmaster of any navigating vessel has a duty to assist persons in distress at sea. The duty applies to any person in distress, regardless of his or her legal or immigration status. This duty is part of international customary law. People who are at sea consider this a long-standing humanitarian maritime tradition, not just a legal obligation, some fishermen who were interviewed said.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which all Mediterranean coastal states as well as Mauritania and Senegal are Parties, codifies this duty. According to its Article 98, every state must require the master of a ship flying its flag to render assistance and to rescue persons in distress at sea, inasmuch as he or she can do so without serious danger to his or her ship, crew or passengers. This obligation is not limited to government vessels but applies to any shipmaster. The duty to render assistance is also included in the widely ratified 1974 Convention for the Safety of Life at Sea (SOLAS, Annex, Chapter V),⁶⁹ the 1979 International Convention on Maritime Search and Rescue (SAR Convention, Annex, Chapter 2, at 2.1.10), as well as in Article 10 of the less broadly ratified 1989 International Convention on Salvage, a convention to prevent maritime pollution and the salvage of property.⁷⁰

To ensure the effectiveness of rescue services, coastal states must take preparatory measures. They must promote the establishment, operation and maintenance of an adequate and effective search and rescue service (UNCLOS, Article 98.2). Chapter V of the Annex to the SOLAS Convention, which deals with maritime safety, requires that arrangements are made for “the establishment, operation and maintenance of such search and rescue facilities as are deemed practical and necessary, having regard to the density of the seagoing traffic and the navigational dangers” (Regulation 7).

The 1979 SAR convention introduces a comprehensive regime to ensure that someone is responsible for coordinating rescue operations no matter where a situation of distress at sea occurs. Under this regime, states must establish search and rescue regions and ensure that assistance is provided to any person in distress at sea, regardless of the nationality or status of the person or the circumstances in which that person is found (Annex,

Chapter 2 at 2.1, in particular 2.1.10). Either individually or in cooperation with other states, Parties to the SAR convention are obliged to establish rescue coordination centres which must be operational on a 24-hour basis (Annex, Chapter 2 at 2.3). A three-volume manual – the *International Aeronautical and Maritime Search and Rescue Manual* (IAMSAR Manual) – was developed to assist governments in their search and rescue duties.

The SAR convention also provides a definition of ‘rescue’ and ‘distress’. It defines rescue as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety” (Annex, Chapter I at 1.3.2). ‘Distress’ is the highest emergency phase the SAR convention provides and it defines 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.” (Annex, Chapter I at 1.3.13). All coastal states of the Mediterranean, except Egypt and Israel, have ratified the SAR convention. Malta, however, has not accepted the 2004 amendments relating to the disembarkation of persons found in distress at sea (See Section 3.6).⁷¹

The SAR convention does not contain specific provisions to deal with systemic failures of a coastal state’s search and rescue services, for example due to armed conflict, as was the case in Libya in 2011. The Maritime Safety Committee adopted only non-binding guidelines in 2004 for situations in which a rescue coordination centre responsible for the SAR region does not assume responsibility for an operation. In this case, the first rescue coordination centre that receives the alert remains responsible until the other competent authority assumes responsibility.⁷²

The map in Figure 7 provides an overview of the search and rescue zones in the Mediterranean Sea and in the parts of the western Atlantic this research covers. States declare search and rescue zones individually and these can therefore overlap. The strip of the Atlantic between the Canaries and the mainland falls under Spanish responsibility, but overlaps in part with the Moroccan SAR area. In the western Mediterranean, south of Andalusia, the border between Spanish, Moroccan and Algerian SAR areas runs roughly half-way through the sea. In the central Mediterranean, there is a large Maltese SAR area, which ranges from Tunisia to south of Crete. It includes the Italian islands of Lampedusa and Linosa as well as the rock of Lampione, overlapping with the Italian SAR area. An important strip of sea used for irregular crossings is part of the Libyan

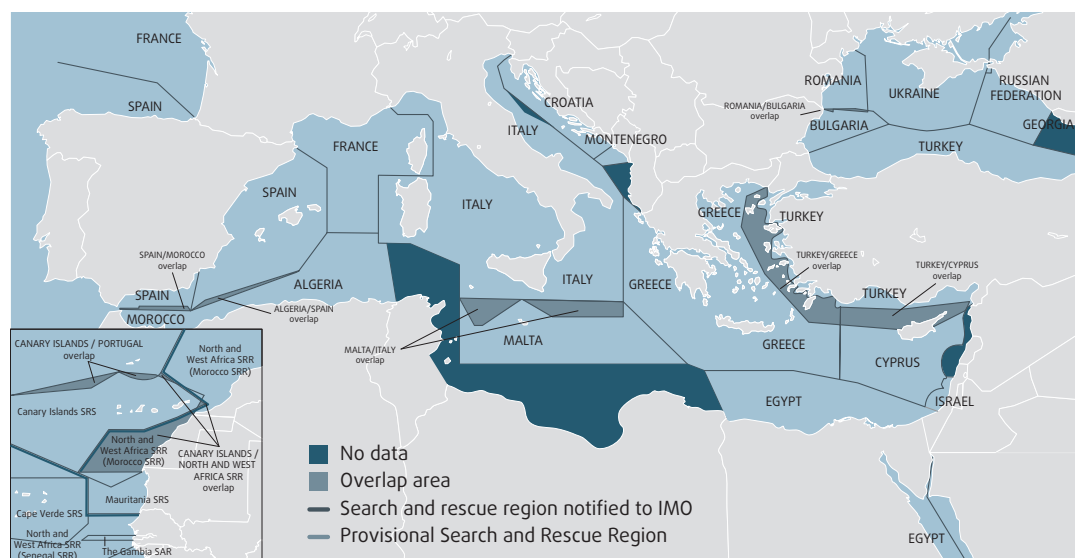
69 Apart from Bosnia and Herzegovina, all coastal Mediterranean states as well as Senegal and Mauritania are party to the 1974 SOLAS Convention.

70 Among the Mediterranean EU Member States, Cyprus and Malta have not ratified the Convention on Salvage, nor is Turkey a party. In North Africa and the Middle East, only Egypt, Syria and Tunisia are parties.

71 Amendments Chapters II, III and IV of the Convention adopted by the Maritime Safety Committee, seventy-eighth session (May 2004) adopted by resolution MSC.155(78), in accordance with Article III of the Convention and communication received by the depositary from the Ministry of Foreign Affairs of Malta on 22 December 2005.

72 IMO (2004a), para. 6.7; See also, IMO (2010), section 2.25.

Figure 7: Search and rescue areas in the Mediterranean Sea



Source: International Maritime Organisation, 2011

SAR zone; during the 2011 war there was in practice no search and rescue services in operation there. In the Aegean, most of the rescue operations take place on the territorial seas between the eastern Greek islands and the Turkish mainland.

The authorities in charge of the Search and Rescue centres in the four EU Member States covered by the research are the Hellenic Coast Guards, the Armed Forces of Malta (AFM), the Italian Coast Guard (*Comando Generale delle Capitanerie di Porto*) and, for Spain, the Maritime Rescue (*Salvamento Marítimo*), which is part of the Ministry of Public Works (*Ministerio de Fomento*). In Greece and Malta, these authorities are also in charge of the surveillance of maritime borders. In Spain and Italy, surveillance is primarily carried out by other forces, namely by a Spanish public security corps also exercising coast guard functions (*Guardia Civil*) and the *Guardia di Finanza* respectively, which are often also called upon to assist in rescue operations.

2.3. Rescue operations in practice

The interviews conducted for this research suggest that calls for assistance to rescue centres can originate from many different sources. These include sightings made by maritime, airborne and land surveillance units and phone calls made by other vessels, often fishing vessels, by private citizens from the coast, by the migrants themselves or by their relatives or friends from a third country (see also Figure 10 in Section 4.3).

A very strong commitment towards the duty to render assistance and rescue emerged from interviews carried

out with authorities in all four countries. Whether or not an event is formally labelled as a search and rescue operation, priority is given to the safety of migrants. In some cases coast guard officers or crew members put their own lives at risk:

"Once I dived in the sea to save them but I shouldn't have done it. But when you see people actually drowning, sometimes you don't think straight. They can drag you down; they don't know how to hold you."

(Hellenic Coast Guard staff, interviewed in Greece)

Migrants interviewed for this research confirm the positive experience in their encounters with rescuers. They generally describe rescue operations as quick and effective.

"Italians picked up us at sea. A helicopter came near us. We have seen it. He turned around us about 10 times and then told us to move in this direction (indicating direction). But the boat did not go, and they realized that the boat could not go, because they gave us directions, but we stood still. Then they came back with a big boat after about 30-45 minutes."

(Man from Ivory Coast, crossed to Lampedusa, Italy, in 2011)

Nevertheless, particularly in the central Mediterranean, boats carrying migrants drifted for a considerable time – sometimes more than a week – before they were rescued. The Parliamentary 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.⁷³ In another case, according to information provided by Human Rights Watch, a boat drifted at sea for 10 days. By the time the AFM

73 Council of Europe, PACE (2012a).

were alerted to the case and intervened, one of the migrants had died.⁷⁴ As mentioned in Section 2.1, a boat with 55 persons drifted for 15 days in June-July 2012 and as a result all but one passenger died.

In the central Mediterranean, Malta appears to apply a strict interpretation of what constitutes a situation of distress. When a Maltese vessel approaches a boat carrying migrants, officers determine if it constitutes a situation of 'distress' and ask the migrants if they want to be rescued by the AFM or whether they prefer to continue on to Italy. Occasionally, migrants may be dissuaded by rescue officers from going to Malta as these are informed that Malta has a mandatory detention policy.

If migrants prefer to continue their trip, the official procedure is to 'shadow' their boat and, if needed, provide assistance for the onward journey until the boat enters the search and rescue area of the adjacent country, usually Italy. According to Maltese authorities, the AFM will in this case also alert the maritime authorities of the neighbouring country, usually Italy, and remain on the scene until the search and rescue authorities of that country arrive. Some people may be rescued if, for example, they are too weak to continue the journey. Maltese authorities said the assistance they provide usually includes the provision of life vests, although according to migrants' accounts, AFM officials have also offered help in repairing a broken engine or provided fuel to continue the onward trip to Italy. One migrant recounted his encounter as follows:

"We saw an island, and when we were near to land, the Maltese soldiers came. The Maltese soldiers said: 'What is the problem? If you want fuel, you go to another country. What can we help you with?' [We said], the radiator is broken, not food. The radiator, a mechanical problem. 'So they say if we just repair that, you can go.' We were supposed to repair that thing and go to Italy. But they cannot repair that problem, so we just go to Malta."

(Eritrean man, crossed to Malta in 2011)

As regards private shipmasters, the risk of facing judicial proceedings for aiding smuggling may discourage them from assisting migrants in distress at sea. On 20 June 2004, a German humanitarian NGO ship, the Cap Anamur, rescued 37 nationals of African states at sea, some of whom were refugees from Sudan's Darfur region. After a long delay, on 12 July, 2004 they were allowed to dock in Sicily. As a result, authorities accused the captain of the Cap Anamur and the other activists of facilitating the illegal border crossing and arrested them. On 7 October 2009, the Tribunal of Agrigento has discharged the NGOs representatives, recognising that a rescue operation that provides transport to a safe

port and saves lives cannot be criminalised.⁷⁵ Though rare, such judicial proceedings may create fear among shipmasters that they could face criminal charges under similar circumstances.

Authorities highlighted the dangers of a rescue operation. The authorities, migrants and fishermen interviewed all described rescue operations as very challenging, dangerous and fearful moments. 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 (transshipment) and communication difficulties all make rescue operations extremely complex and risky.

Although it is not the purpose of this report to describe rescue protocols, a short overview of existing options is provided to understand the context. Rescue officers use the first contact with the migrants to calm them down and give them clear instructions. Officers stressed the importance of effective communication with the migrants and of the need to convince them to remain calm during the transfer operation. Communication with the migrants appears easier when there is a migrant who speaks the language of the people on the rescue vessel. Sometimes, non-verbal communication is used to calm fearful migrants, such as moving away from the migrants' boat until the group grows less agitated.

The specific rescue procedure chosen is determined by the risk factors specific to each situation. If the boat is in good shape and no passenger is in critical condition, then one option is to ask the boat to follow the patrol vessel to port. Such an operation is, however, not without risks, as an incident in Lampedusa in May 2011 makes clear. In this case, a boat which was asked to follow the patrol vessel capsized when it hit the breakwaters of the port in Lampedusa.⁷⁶ As a result, in 2011 the Italian authorities adapted their procedures; once close to port, crew members of the patrol vessel take control of the migrants' boat and steer it into the port.

Another option is to tow the boat to shore, particularly if the distance to cover is not far.

"They roped our boat together with theirs and brought us to shore."

(Afghan woman, crossed to Mitilini, Greece, in 2009)

In other cases, such as when the boat is far from the coast, has taken on water or is not considered sufficiently stable to be towed, passengers are transferred to the rescue vessel. In Malta, to keep migrants from all

⁷⁴ HRW (2012).

⁷⁵ See Italy, Tribunal, Criminal Chamber (2010).

⁷⁶ Sky.it (2011).

moving simultaneously to one side of their boat, which might capsize it, the AFM's current procedure is to use small boats to ferry a few migrants at a time from their boat to the patrol vessel, which then brings the migrants to Malta. This approach has worked quite well.

There is broad consensus about the risks of transferring migrants, particularly if done on rough seas, at night or when passengers get scared and start moving which might overturn the boat. Interviewees in Greece, Italy and Spain mentioned a number of tragic incidents that not only underlined the danger of such rescue operations but also the traumatising effect this can have on rescue teams.

2.4. The role of fishermen

In principle, in all countries covered by the research, the captain of a vessel is required to report a situation of distress to authorities. Refusal to provide assistance and to rescue is a criminal offence.⁷⁷

In some parts of the Mediterranean, fishermen are often present along the routes used by migrants to cross to Europe. Authorities say fishermen have alerted them to situations of distress at sea across all the routes migrants use. Migrants often see fishermen who may alert authorities even if they do not rescue them:

"The trawler saw us, we were very close because it was early and the fishermen were heading out [...] so we greeted and looked at each other but nothing more."

Question: "Didn't they go to your aid?"

Reply: "No, no, they didn't, I think maybe they called the police or whatever, but they didn't stop, no way."

(West African man, crossed to Canary Islands in 2006)

The fishermen's role is particularly important in the central Mediterranean. Tunisian fishermen reported that they regularly sight migrant vessels which they report to the authorities. Sometimes they are directly involved in rescue operations, although the migrants do not always desire this:

"During all these years I have seen many things: I have met boats in difficulty, I have seen dead bodies in the water, I have seen desperate people crying. I have rescued some, while others refused to be rescued because they had lost their way –they simply asked for food and water and how to get to Lampedusa or to Pantelleria or to Sicily."

(Tunisian fisherman, interviewed in Tunisia)

As there are many more fishing vessels at sea than patrol vessels, they are often first in sighting migrants crossing the central Mediterranean. In Italy and Malta, fishermen are under an obligation to report boats in distress to the authorities and await their instructions, which is normally to wait by the boat until rescuers arrive. Migrants recounted experiences of fishing vessels from both countries ignoring them.

Italian fishermen interviewed for this research project underlined that the obligation to save lives at sea is a maritime humanitarian tradition. Fishermen reported that they usually communicate the presence of a boat in distress to authorities, then start to act under authorities' instructions, keeping in regular contact with them. Numerous Tunisian fishermen work on Sicilian fishing vessels and they facilitate communication with migrants, particularly those from north Africa. Depending on the weather conditions and the seaworthiness of migrants' boats, the fishermen interviewed said that they must either await authorities' arrival or start the rescue operation. In the first case, fishermen remain at some distance from the migrants' boat, ready to intervene. It can take several hours for a patrol boat to arrive.⁷⁸ In the second case, fishermen have to engage in rescue operations directly.

Some of the fishermen interviewed expressed increasing concern about their obligation to rescue migrants at sea. They perceive rescue operations as costly – in terms of fuel, lost fishing opportunities, and damage to their boats – as well as perilous. Fishermen said that at times migrants try to get on board the fishing vessel in any way possible, putting the lives of the fishing boat's crew at serious risk. This is particularly true in cases of unfavourable weather and sea conditions and/or other possible factors such as a difference in size between the fishing boat and the migrants' boat, and a lack of migrants' maritime expertise. All these factors can increase confusion and panic, thereby making rescue operations more difficult and risky. Nonetheless, most of the fishermen still felt the moral obligation to save migrants' lives.

"We risked our lives to put them on board and we risked our lives because they clung to us and there at a risk of falling into the sea. The sea was force 6, 7. On these occasions confusion and panic, arise. We helped them, we put all of them here (on the boat), we gave them clothes [...] because it is right to save human lives."

(Italian fisherman, interviewed in Italy)

Maltese fishermen interviewed for this research indicated that their usual practice is to avoid migrants encountered at sea and not to report anything to the authorities, although, they may give them food and

⁷⁷ Greece, 1974 Greek Code for Sea Law, Art. 227; Italy, Royal Decree 1942 (as amended in 2002), Art. 1158; Malta, Merchant Shipping Act, Cap. 234, Art. 305(1) and 306(1); Spain, Penal Code, omission of the duty to provide assistance (*omisión del deber de socorro*), Art. 195.

⁷⁸ La Repubblica (2011).

water and show them the way to Italy. There may be several reasons for this approach, some of which would also apply to fishermen in other countries. First, if the fishermen report a boat with migrants in a situation of distress, they are instructed and legally obliged to rescue the migrants or to remain with the boat until the arrival of the Maltese Armed Forces (AFM). However, given that it can take several hours for the AFM to arrive, the fishermen lose valuable fishing time for which they receive no compensation. Second, there is a concern among fishermen – whether well-founded or not – that if they assist migrants in coming to Malta, they might themselves face prosecution for aiding illegal immigration. While no fishermen have so far been prosecuted for transporting undocumented individuals to Malta, in several cases authorities prevented fishing vessels which had picked up migrants at sea in the Libyan search and rescue area from entering Malta's waters to disembark the rescued migrants. These incidents include the three vessels *Francisco y Catalina* (2006),⁷⁹ *Bufadel* (the so-called tuna pen incident, 2007)⁸⁰ and *Monfalcon*⁸¹ (2007). Finally, fishermen appear reluctant to rescue seaborne migrants out of security concerns. According to fishermen's accounts, if they come too close to a boat carrying migrants, the latter might attempt to board the fishing vessel. Given a fishing vessels typically small crew, migrants might easily overpower them. Indeed, some fishermen interviewed for this report even said they carry arms when they go out fishing to protect themselves from irregular migrants.

Migrants' accounts of their journeys from Libya echoed fishermen's views. Several of the migrants interviewed for this report said that they had unsuccessfully tried to catch the attention of fishing vessels they had seen at sea. In one case, a west African migrant who had travelled from Libya to Malta in 2006 said the fishermen apparently actively tried to prevent the migrants from entering their boat:

"The accident happened like that. We were tired of being at sea. We decided to go to the fishing vessel for rescue. But they didn't want to rescue us. We talked to them more than three times. Still they didn't want to understand us. We said to ourselves, if we don't want to die like this, we go there and let them kill us. So we went there. When we reached there, we started to climb the boat. It was a big fishing vessel. They didn't want to. [...] The fishing vessel started to throw things at us, rubber, so that we go away from them. But they did not understand, we went there for a good reason."

(West African man, crossed to Malta in 2006)

Migrants' accounts also report of sighting Italian fishing vessels which did not render aid.

"[...] There are many boats in the sea [...] We asked: where is Sicily, but they didn't answer."

Question: "Which kind of boats are we talking about?"

Reply: "Fishing boats."

Question: "Were they Italian?"

Reply: "Yes, I saw the Italian flag."

Question: "How many did you encounter?"

Reply: "Two fishermen's boats and a smaller boat."

Question: "Did you try to get close to these boats?"

Reply: "Yes, we approached but they moved away."

(Tunisian man crossed to Sicily, Italy, in 2011)

Fishing boats' crews that get involved in rescue operations lose hours of work, while their vessels consume fuel and sometimes suffer damage. Fishermen find the bureaucratic obligations in the post-disembarkation phase a further burden. Because of this, despite a strong tradition of rendering aid in search and rescue operations, Italian boats owners' attitudes towards the arrival of migrants by sea are changing and they may choose to fish in areas far from the routes taken by migrants.

Fishermen face strong disincentives to rescue migrants, both in financial terms and with regard to their own security. The awards and public recognition for generous and sometimes heroic behaviour may not be sufficient. Addressing this problem would thus arguably also require the introduction of a mechanism which would at least alleviate the disincentives. Fishermen suggested that one relatively simple, although not cost-free, solution to address the financial losses would be to provide financial compensation to fishermen who lose working time when they rescue migrants at sea. Some have, however, rejected such a solution as this would amount to rewarding fishermen for fulfilling their legal obligations.⁸²

⁷⁹ In July 2006, the captain of the Spanish trawler 'Francisco y Catalina' spent one week at sea with 51 rescued Eritreans. They were finally transferred onto two separate Spanish military aircraft, one headed to Italy, the other to Spain. See also, Malta Media (2007); Times of Malta (2011),

⁸⁰ Italian Refugee Council (CIR) (2007), pp. 2–3. The report concerns some 26 persons who were clinging for several days to a Maltese trawler's tuna fish pen north of Libya in May 2007. The Maltese Armed Forces called on Libya to rescue the migrants, who were finally taken aboard an Italian vessel and brought to Lampedusa.

⁸¹ In 26 May 2007, the Spanish fishing vessel *Monfalcon* rescued 26 people from Ivory Coast, which was then at war, allegedly in the Libyan search and rescue area. Malta did not allow the migrants to disembark. The migrants were finally transferred onto a Spanish *Guardia Civil* vessel on 30 May after the situation on the vessel became desperate. See also CIR (2007), pp. 2–3.

⁸² Stakeholder Meeting, Malta, 8 November 2011, views expressed by the Armed Forces of Malta.

2.5. The role of military vessels

Some migrants encountered a second actor during their crossings: the Navy. Military forces monitor a large proportion of the Mediterranean Sea. In 2011, when the research for this study was carried out, a considerable number of military vessels were deployed in the central Mediterranean.

Early in 2011, following UN Security Council Resolutions 1970 and 1973, a no-fly zone was established in Libya's airspace.⁸³ The no-fly zone included parts of the sea used by migrants to cross from Libya to Lampedusa and Malta. The North Atlantic Treaty Organization (NATO) enforced compliance with the no-fly ban, under operation 'Unified Protector' from 25 March to 31 October 2011.⁸⁴ By early April 2011, 17 nations, including 11 EU Member States, had contributed to this operation.⁸⁵

Although military assets deployed in the central Mediterranean in the context of the Libyan crisis were not entrusted with border surveillance activities, in practice they were forced to deal with the overcrowded boats that left Libyan coasts. Various reports document that military vessels encountered migrant boats while patrolling the sea. NATO reports, for example, that their maritime assets directly aided the rescue of over 600 migrants in distress at sea during Unified Protector.⁸⁶ In addition, as Italian aerial border surveillance services could not enter the no-fly zone, the military played an important role in communicating information on boats in distress to the Rescue Coordination Centre in Rome. Indeed, UN Security Council Resolutions 1970 and 1973 had already drawn attention to "the plight of refugees and foreign workers forced to flee the violence", although these documents gave no guidance on how to deal with persons leaving by sea.

The role of military vessels patrolling the central Mediterranean came under strong criticism after the British newspaper 'The Guardian' reported that NATO vessels had left migrants in distress at sea to die.⁸⁷ The Parliamentary Assembly of the Council of Europe (PACE) launched an inquiry into this incident, finding failures by NATO and individual states contributing to operation Unified Protector off the Libyan coast.⁸⁸ The incident, which took place in spring 2011, concerned a dinghy with 72 passengers, including 20 women and two babies, which drifted back to Libyan shores with only nine

survivors two weeks after departure. Survivors reported that on day two a small aircraft, possibly a drone, flew over the dinghy and that a military helicopter later brought them biscuits and water. Although the Italian Rescue Coordination Centre issued a distress call on the second day, nobody came to rescue the migrants who were probably still inside the Libyan search and rescue zone and thus an area under NATO surveillance. Around the 10th day, with half of the passengers already dead, a large military vessel approached the boat and people in military uniforms looked at the migrants through binoculars. The military vessel turned away.

Testimonies by migrants interviewed as part of the FRA research in Italy and Malta reveal similar experiences with military vessels encountered on the first or second day after departing from Libyan shores. An Ethiopian asylum seeker described the journey he took across the Mediterranean as follows:

"They told us that after a few hours we would see NATO and they would rescue us. We saw NATO after 16 hours, something like that. Airplanes and plenty of NATO ships, warships [...] But nothing changed."

(Ethiopian man, crossed to Malta in 2011)

Another interviewee described how his boat tried to approach a NATO ship:

"We saw the NATO boats. We wanted to ask, but when we approached them, they moved away. I know that it was a NATO ship from my studies. They were close to us. We tried to communicate. But they went away. I do not know if they saw us. They left. This was on the second day".

(West African man, crossed to Pantelleria, Italy, in 2011)

Naval and aerial vessels deployed for military purposes normally have sophisticated surveillance equipment on board, which should allow them to sight at least the larger boats Sub-Saharan Africans use to depart Libya. The absence of a responsibility-sharing mechanism for disembarking migrants rescued by military vessels within the Libyan SAR zone does not appear to be conducive to an effective rescue system. In early July 2011, when a Spanish naval asset rescued a group of over 100 migrants, five days of negotiations were needed before the migrants could disembark in Tunisia.⁸⁹ During that time the naval asset could not operate at full capacity.

⁸³ UN, Security Council, Resolution 1970 (2011); UN, Security Council, Resolution 1973 (2011), para. 6.

⁸⁴ North Atlantic Treaty Organization (NATO) (2011a).

⁸⁵ NATO (2011b).

⁸⁶ *Ibid.*

⁸⁷ The Guardian (2011); BBC News (2011).

⁸⁸ Council of Europe, PACE (2012a).

⁸⁹ See Migreurop (2011), which describes how the Spanish vessel Almirante Juan de Borbón rescued over 100 migrants on 11 July and could not disembark them until 16 July. The Maltese authorities informed the FRA in November 2012 that in this case three persons who had urgent medical needs were evacuated to Malta by helicopter.

Conclusions

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. The duty to render assistance applies to all vessels: government as well as private ships.

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 Parliamentary 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.⁹⁰

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.⁹¹ In 2011, 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.

⁹⁰ Council of Europe, PACE (2012a).

⁹¹ UNHCR (2012a).

3

Interception and *non-refoulement*



Charter of Fundamental Rights of the European Union

Article 18 (Right to asylum)

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19 (Protection in the event of removal, expulsion or extradition)

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

This section begins by providing an overview of the various institutions involved in maritime border management before looking at the principle of *non-refoulement* as it applies in the context of border surveillance. In doing so, it first describes checks near third-country coasts, then examines push backs and finally deals with the controversial issue of where to disembark intercepted or rescued migrants.

3.1. The applicability of the principle of *non-refoulement* at sea

The principle of *non-refoulement* bans the return of individuals to persecution, torture or other serious harm. Such duty derives from several human rights instruments, such as the UN Convention Against Torture or

the International Covenant on Civil and Political Rights.⁹² It is also considered to constitute a rule of customary international law.⁹³ The principle of *non-refoulement* is most prominently reflected in the 1951 Convention relating to the Status of Refugees. All EU Member States have ratified the convention which has also been incorporated into primary EU law through Article 78 of the Treaty on the Functioning of the European Union (TFEU). According to Article 33 (1) of the convention:

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

The principle of *non-refoulement* as enshrined in the 1951 convention applies to all refugees. A refugee is defined in Article 1 of the 1951 convention. As soon as a person fulfils the criteria listed in Article 1 of the convention, he or she is a refugee, even if the competent authorities have not yet determined his or her status. A refugee must be protected from *refoulement* even if he or she has not yet lodged an asylum claim or when the competent authorities have not yet examined his or her claim.⁹⁴

⁹² UN, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Art. 3; UN, International Covenant on Civil and Political Rights, Art. 7 as interpreted by UN, Human Rights Committee (1992), General Comment No. 20, para. 9; UN Human Rights Committee (2004), General Comment No. 31, para. 12; UN, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN, Convention against Transnational Organized Crime (2000), Art. 19.

⁹³ UNHCR, Executive Committee on international protection of refugees, Conclusion No. 25 (XXXIII) – 1982 (b).

⁹⁴ This has been also reaffirmed by UNCHR, Executive Committee on international protection of refugees, Conclusion No. 79 (XLVII) – 1996 (j), No. 81 (XLVIII) – 1997 (i) and No. 82 (XLVIII) – 1997 (d), (i).

Article 3 of the ECHR prohibits torture, inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) has clarified in its case law that Article 3 also entails a prohibition to return an individual to a country where there are substantial grounds for believing that the person concerned would face a real risk of being subjected to torture, inhuman or degrading treatment or punishment.⁹⁵

The EU Charter for Fundamental Rights guarantees the right to asylum in Article 18. It also reiterates the prohibition of torture and inhuman or degrading treatment or punishment in Article 4 and bars the return to such treatment in Article 19. The Schengen Borders Code,⁹⁶ which regulates border surveillance, states in Article 12 that “the main purpose of border surveillance shall be to prevent unauthorised crossing, to counter cross-border criminality and to take measures against persons who have crossed the border illegally”. According to its Article 3, the Code – and hence including activities taken to “prevent unauthorised crossing” – must be implemented without prejudice to “the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*” (Article 3). In the application of the Schengen Borders Code, Member States have to respect the Charter provisions. Such duty was also expressly mentioned in paragraph 1.2 of the 2010 Council Decision relating to Frontex operations at sea which was annulled by the CJEU in September 2012:⁹⁷

“No person shall be disembarked in, or otherwise handed over to the authorities of a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle.”

Maritime border surveillance activities can be carried out in different parts of the sea, namely within the territorial waters of an EU Member State, at high seas or in the territorial waters of a third country. This has some implications for the application of the principle of *non-refoulement*.

The territorial sea is a belt of sea not exceeding 12 nautical miles (Article 3 of UNCLOS) from a state's coast. Within such a belt, the coastal state exercises sovereign rights (Article 2 of UNCLOS). Apart from the right of innocent passage through the territorial sea enjoyed by foreign ships, the territorial sea is comparable to the land territory of a state. Once an individual is within

the territorial sea, the EU asylum *acquis* applies.⁹⁸ This means that all substantial and procedural guarantees enshrined in EU law for asylum seekers apply. This includes, but is not limited to, the prohibition on returning any person who has submitted an asylum application before a final decision has been taken on his or her claim.

In contrast, the EU asylum *acquis* does not extend to persons who seek asylum while they are rescued or intercepted at high seas, including within a Member States' search and rescue zone, or in the territorial sea of third countries. Nonetheless, from the moment an individual is under the effective control of a Member State's authority, such a body is bound under the ECHR to respect the principle of *non-refoulement*.

International law requires states to respect human rights provisions also when they exercise their jurisdiction outside their territory. The International Court of Justice has confirmed the applicability of the International Covenant on Civil and Political Rights to acts carried out by states outside their territory.⁹⁹ Similarly, in a case concerning the rescue of 369 migrants and subsequent disembarkation in Mauritania, the UN Committee against Torture confirmed the applicability of the Convention against Torture to those situations in which a State party exercises, directly or indirectly, in practice or in law, control over persons in detention or on board state vessels.¹⁰⁰

Hirsi Jamaa and Others v. Italy **(Hirsi case)¹⁰¹**

The ECtHR issued its first judgment on the interception of migrants at sea in the *Hirsi* case. The ruling reviewed Italy's practice designed to combat illegal immigration, under which authorities immediately handed over migrants intercepted at sea to the authorities of the country of departure. The ECtHR contended that whenever state agents exercise control and authority over an individual, then that state is obliged to safeguard that individual's rights and freedoms under Section 1 of the ECHR, even if the state is operating outside its own territory.¹⁰² In this case, the ECtHR found

95 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.

96 Regulation (EC) No. 562/2006 of 15 March 2006.

97 Council Decision 2010/252/EU, OJ 2010 L 211/20. The CJEU annulled the decision on formal grounds, as the European Parliament was not involved as a co-legislator, see CJEU, C-355/10, *European Parliament v. Council of the European Union*, 5 September 2012.

98 See ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 34 for the quote from the letter by the Vice President of the European Commission to the President of the European Parliament. The proposed recast Asylum Procedures Directive will clarify that its provisions apply to all applications for international protection, including those submitted in territorial waters. While not yet adopted, this provision was not called into question during the negotiations. See European Commission (2009c), Art. 3.

99 International Court of Justice (ICJ) (2004), para. 111.

100 UN, Committee against Torture (CAT), *J.H.A. v. Spain*, Communication No. 323/2007, 21 November 2008.

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

102 *Ibid.*, paras. 74-75, 180-181.

that the Italian authorities exercised full control over the persons who were on board the Italian ships.¹⁰³

The ECtHR clarified that a state “cannot circumvent its ‘jurisdiction’ under the ECHR by describing the events at issue as rescue operations at high seas”.¹⁰⁴ The principle of *non-refoulement* is binding on all state authorities, including those in charge of rescue at sea. Hence, any activity by an EU Member State which is aimed at preventing unauthorised crossing of the external borders of the EU, even when such activity is labelled as a rescue operation, must be carried out in conformity with the principle of *non-refoulement*.

The applicants in *Hirsi* were 11 Somali and 13 Eritrean nationals, part of a group of about 200 migrants, including asylum seekers and others, which the Italian authorities intercepted on the high seas while within Malta’s search and rescue area. The migrants were summarily returned to Libya under an agreement concluded between Italy and Libya, and were given no opportunity to apply for asylum. No record was taken of their names or nationalities. The ECtHR noted that the human rights situation in Libya was well-known and easy to verify. It therefore considered that the Italian authorities knew, or should have known, that the applicants, when returned to Libya as irregular migrants, would be exposed to treatment in breach of the ECHR and that they would not be given any kind of protection. They also knew, or should have known, that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, including Somalia and Eritrea. The Italian authorities should have had particular regard to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR, the ECtHR said.

EU Member States can also carry out border surveillance activities in the territorial sea of a third country based on agreements concluded with it. In such cases, the *non-refoulement* principle would normally not apply to persons turned back while still in the territorial water as, according to the law, the individual is still within the third country territory. Nevertheless, if it can be established that a Member State had effective control over an individual, any action which would expose him or her to a real risk of torture, inhuman or degrading treatment would violate the ECHR. In this vein, Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe called on states to guarantee humane treatment and systematic respect for the human rights of all intercepted persons, including when – based on bilateral agreements – legal or actual jurisdiction is exercised by

taking interception measures in the territorial waters of another state.¹⁰⁵

In order to provide guidance to ship masters, owners, governments, insurance companies and other interested parties, UNHCR and the International Maritime Organisation (IMO) have prepared a joint guide for search and rescue operations involving seaborne migrants and refugees. The guide provides a simple overview of the main duties deriving from the law of the sea and international refugee law. It also gives a list of organisations to contact.



3.2. A multitude of players

While at land and air borders one state entity, typically border guards or border police, are responsible for border management activities concerning persons, at sea, more actors are usually involved. In all four countries reviewed, primary border management responsibilities lie with the police, which are part of the Ministry of Interior, and in Greece, the Ministry of Citizens Protection. The police operate border controls at border crossing points at ports and are in charge of processing migrants after their disembarkation, according to the relevant provisions of the national laws on immigrants or foreigners. Sea patrols and surveillance activities are, however, primarily carried out by other forces, often of a military or semi-military nature.

Authorities responsible for maritime surveillance vary from one country to another. Within countries, there may be differences between those patrolling the territorial sea and those carrying out surveillance activities at high seas. In addition, authorities may set up separate institutions to coordinate rescue at sea operations. Some of the forces involved are military in nature. Table 4 provides an overview of the most important institutions involved.

¹⁰³ *Ibid.*, para. 81.

¹⁰⁴ *Ibid.*, para. 79.

¹⁰⁵ Council of Europe, PACE (2011a).

Table 4: Main authorities involved in maritime border surveillance, by EU Member State

EU Member State	Maritime Surveillance (irregular migration)	Support in maritime surveillance	Search and rescue coordination	Processing migrants after disembarking
EL	Hellenic Coast Guard		Hellenic Coast Guard	Hellenic Police
ES	<i>Guardia Civil</i> (a law enforcement body under the Ministries of Defence and Interior)		Maritime Rescue (<i>Salvamento Marítimo</i>)	National Police
IT	<i>Guardia di Finanza</i> (in territorial sea and contiguous zone) – a law enforcement body under the Ministry of Economy and Finance	Navy (in international waters)	Coast Guard (<i>Comando Generale delle Capitanerie di Porto</i>)	National Police
MT	Armed Forces of Malta (Maritime Squadron)		Armed Forces of Malta (Maritime Squadron)	Malta Police

Note: EU Member State country codes: EL, Greece; ES, Spain; IT, Italy; and MT, Malta.

Source: FRA, 2012

EU Member States have usually established coordination mechanisms to facilitate the work of the various institutions involved. In Italy, for example, the coordination of maritime surveillance is carried out by the Central Directorate for Immigration and Border Police within the Public Security Department of the Ministry of Interior.

Promising practice

Coordinating mechanisms involving humanitarian players

Spain created a national coordination centre that involves various actors and is supported by regional centres. Coordination centres may also involve non-governmental institutions. The Spanish Red Cross, for example, participates in the Canaries Regional Coordination Centre, created in 2006 within the Ministry of Interior and headed by the *Guardia Civil*.

Source: Spanish National Police, 2012

Institutions involved in maritime surveillance are not usually exclusively focused on controlling irregular migration. Their responsibilities may feature other competing tasks, such as combating drug trafficking or smuggling of goods, control over pollution at sea or the use of natural resources.

Officers and staff involved in the management of maritime borders have normally not had the specific training typically provided to border guards. Not all such organisations implement the training tools developed for border guards at a European level, such as the Common Core Curriculum (see Section 9.2). The states which compose the UNHCR's Executive Committee highlighted

the need to provide specialised training to all actors involved in interception operations as early as 2003.¹⁰⁶

3.3. Penalisation of irregular exit by third countries

Most west African and Mediterranean countries witnessing irregular departures by sea to Europe are party to the Protocol against Smuggling to the UN Convention on International Organised Crimes.¹⁰⁷ These countries are under an obligation to criminalise the smuggling of migrants (Article 6).

In addition, the majority of north African countries as well as Turkey have passed provisions prohibiting individuals from leaving their countries in an irregular manner. These provisions allow for the interception of migrant boats leaving the shore even in the absence of evidence of smuggling or of circumstances that would require a rescue at sea.

Table 5 provides an overview of provisions punishing irregular exit in selected third countries from which migrant boats have departed in recent years. The table summarises the punishment for leaving the country in an irregular manner, which means leaving outside an established border crossing point or without the necessary documents (passport and exit visa where required).

¹⁰⁶ UNHCR, Executive Committee on international protection of refugees, Conclusion No. 97 (LIV) – 2003 (a) viii.

¹⁰⁷ Senegal, Mauritania as well as all Mediterranean coastal states, except for Greece, Israel, Morocco and Syria have ratified the UN, Protocol on the Smuggling of Migrants by land sea and air, supplementing the UN Convention against Transnational Organized Crime (2000).

Table 5: Penalties for leaving the country in an irregular manner, selected third countries

Country	Penalty	Applies to		Offence introduced in	Source
		Nationals	Non-nationals		
Senegal	Not an offence				Law No. 78-12 of 29 January 1978 replacing Art. 11 of Law No. 71-10 of 25 January 1971 on entry, stay and establishment of foreign nationals
Mauritania	Not an offence				Law No. 65.046 of 23 February 1965, <i>portant dispositions pénales relatives à l'immigration</i> , Article 1
Morocco	Fine from 3,000 to 10,000 Moroccan dirhams and 1 to 6 months imprisonment.	✓	✓	2003	Law on Entry and Stay of Foreigners (<i>Loi No. 02-03 relative à l'entrée et au séjour des étrangers au Maroc, à l'émigration et l'immigration</i>), November 2003, Article 50
Algeria	Imprisonment from 2 to 6 months and/or a fine from 20,000 to 60,000 Algerian dinar	✓	✓	2009 (together with crime of smuggling and trafficking)	Law No. 09-01 of 25 February 2009 (reforming the Penal Code), Article 175 bis (1)
Tunisia	Nationals: 15 days to 6 months prison sentence and/or a 30 to 120 Tunisian dinar fine; in case of recidivism, the punishment can be doubled Non-nationals: 1 month to 1 year prison sentence and 6 to 120 Tunisian dinar fine	✓	✓	1968 (for non-nationals) and 1975 (for nationals and non-nationals)	Law 1975-40 of 14 May 1975 regarding passports and travel documents (as amended), Article 34 (for nationals and non-nationals), Article 35 (for nationals); Law 68-07 of 8 March 1968 on the situation of foreign nationals, Article 23(1) (for non-nationals)
Libya	Imprisonment in addition to a fine of no less than 2,000 Libyan dinar or either of the two penalties		✓	2004	Law No. 6 of 20 June 1987 Concerning the Regulation of Aliens Entry, Residence and Exit in Libya (amended by Law No. 2 in 2004), Article 19
Egypt	Imprisonment up to six months and a fine of up to 1,000 Egyptian pounds		✓	2005	Law on Entry and Residence of Foreign Nationals No. 89 of 1960 (amended by Law No. 88/2005), Article 41
Turkey	Administrative fine of 1,000 to 3,000 Turkish lira for persons who depart or attempt to depart without passport or proper documentation	✓	✓	1950	Article 33 Passport Law No. 5682 of 1950 (as amended in April 2011 by Articles 7-9 of Law No. 6217)

Note: Third countries are listed following the coastline, starting from West Africa and ending in Turkey.

Source: FRA, based on national legislation: Consortium for Applied Research on International Migration database has electronic copies of most relevant legislation, available at: www.carim.org. In addition, the 2003 Moroccan law is available in French at www.justice.gov.ma/fr/legislation/legislation.aspx?ty=2&id_l=140 and the 2011 amendments to the Turkish passport law are available in Turkish at www.resmigazete.gov.tr/eskiler/2011/04/20110414-1.htm

Six of the eight countries reviewed punish irregular exit. Four of these five countries introduced penal sanctions over the last ten years, after the phenomenon of migration by sea to southern Europe started. In Mauritania and Senegal, no explicit offence prohibiting irregular departures exists. Irregular entry or stay is, however, punishable in both countries.¹⁰⁸

Where the law stipulates a punishment, this might be a fine or imprisonment, depending on the country and the seriousness of the offence. If Tunisian authorities, for example, intercept nationals, they return them directly to the Tunisian port to determine whether they left legally. If they left illegally, the Tunisian immigration authorities impose a fine or determine a prison sentence, the latter typically for repeat offenders. If migrants left legally, for example by transiting through Libya, they are released after questioning.

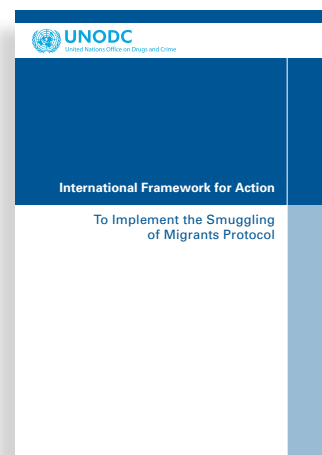
In pre-war Libya, intercepted or returned migrants were usually detained upon return, a pattern that seems not to have changed since.¹⁰⁹ Algerian tribunals have also enforced provisions on irregular exit.¹¹⁰ In Morocco, police systematically interview returned Moroccan nationals and usually detain third-country nationals who are then brought to Morocco's border with Algeria.¹¹¹

3.4. Patrols at points of departure

The contemporary concept of border management extends beyond activities at the physical border of a country. In the absence of ways to effectively address the root causes of irregular migration by sea, one way to reduce boat departures is to collaborate with coastal states from where migrants start their trips.

International law encourages such cooperation. The Protocol against Smuggling to the UN Convention on International Organised Crimes provides in Article 7 that "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea [...]". The UN Office for Drugs and Crime developed a Framework for Action to assist states in implementing this protocol. According to the framework, cooperation to implement the protocol must be

carried out in accordance with international law, including human rights, humanitarian and refugee law.¹¹²



Cooperation can include a variety of measures, such as exchange of intelligence with countries of origin or transit, the posting of liaison officers or capacity building activities in third countries. The EU as well as its southern Member States have provided support to transit countries with a view to increasing their capacity in managing emigration, for example, in the form of provision of training or the donation of patrolling equipment.

Spain has been particularly active in establishing different forms of cooperation with its maritime neighbours. In 2005 with financial support of the AENEAS Program of the European Commission, the "Seahorse Project" was introduced to develop dialogue on migration issues, prevent irregular migration as well as enhance operational cooperation in the Atlantic (see Section 4.2 for more details on the collaboration by Spain with third countries).¹¹³ The project included also training and capacity building activities.

Donation of assets to third countries

Cooperation with third countries can also encompass the provision of equipment, such as aerial and naval vessels, vehicles, binoculars and night vision devices. From an operational perspective, the provision of patrolling equipment is of particular importance, given the limited means that some third countries have to patrol their borders and to undertake rescue operations.

Related EU Member State assistance can prove substantial, as the examples of Senegal, Mauritania, Libya and Tunisia illustrate. In 2007 and 2011, the Spanish Ministry of Interior donated or sold for a symbolic

¹⁰⁸ Mauritania, Law No. 65.046 of 23 February 1965, *portant dispositions pénales relatives à l'immigration*, Art. 1; Senegal, Law No. 78-12 of 29 January 1978 replacing Art.11 of Law No. 71-10 of 25 January 1971 on entry, stay and establishment of foreign nationals.

¹⁰⁹ HRW (2009b); UNHCR (2010a), p. 8; For a report on post-war Libya, see Amnesty International (2012b).

¹¹⁰ Consortium for Applied Research on International Migration (CARIM) (2010), p. 8.

¹¹¹ UN, CAT (2011), para. 26, Jesuit Refugee Service Europe (2012), pp.14, 17-19.

¹¹² UNODC (2011c), p. 117.

¹¹³ The Seahorse project was integrated in 2007 by the Seahorse network project and replaced by the Seahorse Cooperation Centres project in 2009-2010.

amount at least seven patrolling vessels to Senegal and Mauritania.¹¹⁴ The Ministry of Defence also donated other equipment to Senegal, including vessels as well as one helicopter and one aircraft.¹¹⁵ Italy donated at least six patrolling vessels to Libya (three in 2009 and three in 2010) and four patrolling vessels to Tunisia in 2011.¹¹⁶

The provision of patrolling equipment is a contribution to third-country efforts to address international organised crime, including smuggling in human beings. Donating Member States cannot, however, guarantee that the third country will deploy these assets in a way that is sensitive to fundamental rights concerns. Providing targeted human rights training and guidance to the third countries might help reduce such concerns.

Measures taken by third countries to patrol their sea borders vary according to the means they have at their disposal and to political priorities. Third-country authorities intercepted some persons interviewed for this research before they reached the high seas. Migrants are generally disappointed when they are intercepted shortly after departure, as illustrated by a Syrian interviewed in Turkey:

"While we were sailing towards the island, we heard the English announcement of the Coast Guard. We did not stop and continued to go. Then we heard the announcement again. Afterwards, we heard that they fired in the air. Then we stopped [...]. When they came closer, I understood that it was the Turkish Coast Guard's patrol boat. Just 20 minutes after our departure, we were intercepted by the Coast Guard [...]"

(Syrian man, attempted to cross into Greece in 2009, interviewed in Turkey)

Third-country authorities can informally also collaborate and communicate with EU Member State patrols, as a Tunisian Coast Guard officer interviewed in spring 2011 mentioned:

"I do not know whether we have cooperation agreements with our counterparts from Italy and from Libya, but during our patrolling we can see them also patrolling and we can exchange information and greetings over the radio."

(Tunisian coastguard, interviewed in Tunisia)

Joint patrols

Joint patrols are seen as a particularly effective way to reduce irregular departures. The EU's Justice and Home

Affairs Council adopted 29 measures for reinforcing the protection of the external borders and combating illegal immigration in February 2011.¹¹⁷ Under measure four, the council agreed:

"[t]o improve operational cooperation with third countries of origin and transit of irregular immigration, in order to improve joint patrolling on land and at sea, upon consent of the Member State concerned, return, and collection and exchange of relevant information within the applicable legal framework, and other effective preventive measures in the field of border management and illegal immigration."

Joint maritime patrols can involve vessels flying the flag of the third country, vessels flying the flag of the bordering EU Member State and, for Frontex coordinated joint operations, vessels provided by other EU Member States. Joint patrols are carried out at high seas, but in some cases also within the territorial waters of a third country.

The commander of a patrol vessel has jurisdiction over crew and other persons on the vessel, but joint patrols raise the question of who bears responsibility for actions taken to enforce immigration or criminal law. If such actions are taken at high seas, the commander of the vessel who orders measures against a ship is responsible for ensuring respect for the safeguards provided for under the law of the sea in order to ensure freedom of navigation.

The situation is more complex where joint patrols are carried out in the territorial waters of a third country. Although the commander of a vessel has a clear responsibility to rescue persons in distress, an EU Member State official cannot order any measure against a ship. The coastal state usually retains such authority. Practical solutions have emerged to deal with these split responsibilities. In west Africa, for example, EU Member States vessels patrolling the territorial sea carry a host country officer on board who has the authority under national law to stop a boat or a ship or to board the ship to undertake necessary immigration, custom or other relevant inspections or checks. Hence, the third-country officer issues the orders and remains primarily responsible for ensuring that these do not violate human rights. The question remains whether the commander of the EU Member State vessel and his or her crew also bear some responsibility to discourage actions which infringe upon human rights and/or to report human rights violations they witness. In many cases, without their logistical support, the third country would not have been in a position to carry out such an action.

Italy in the central Mediterranean and Spain in the eastern Atlantic have gathered the most practical experience of joint patrols. Italy has primarily conducted its

¹¹⁴ Information provided by the Spanish Ministry of Interior to the FRA in June 2012. See also Spain, Ministry of Interior (2008), p. 19, six vessels to Mauritania and Senegal in 2007 and Spain, Ministry of Interior (2011a), one vessel to Senegal for €100 and one vessel to Mozambique.

¹¹⁵ Spain, Ministry of Interior (2011a), one vessel to Senegal for €100 and one vessel to Mozambique; *Heraldo de Aragón* (2008), one plane and one helicopter to Senegal (2008).

¹¹⁶ Italy, Ministry of Interior (2009), three vessels to Libya; Italy, Ministry of Interior (2010), three more vessels to Libya; Italy, Ministry of Interior (2011a), four vessels to Tunisia.

¹¹⁷ Council of the European Union (2010).

joint operations by placing Italian officers on third-country (Libya) patrol vessels. After Italy donated patrol vessels to Libya, its officers were allowed to accompany Libyan patrols, where they fulfilled a liaison function. While this may have facilitated coordination of surveillance as well as rescue activities, it also raised public concerns. A patrol boat Italy had donated to Libya and manned in part by Italian officers, shot at an Italian fishing trawler on 10 September 2010. The Italian Minister of Interior commented that the patrol boat may have mistaken the fishing boat for one containing illegal immigrants.¹¹⁸ UNHCR reacted to this comment with concern, saying it hoped this did not mean that while it was unacceptable to fire on a fishing boat, it was acceptable to fire on one with migrants and refugees.¹¹⁹

Spain has gained experience of its own assets patrolling the west African coasts. Spain has carried out joint patrols near the coasts of Cape Verde, Gambia, Mauritania and Senegal, and implemented mixed patrols with the Royal Moroccan Gendarmerie. The agreements with Senegal and Mauritania also allow it to conduct patrols in the territorial waters of these two countries. The intensity of EU Member State patrols near or inside third-country territorial waters varies considerably. In northern Mauritania, for example, Spanish vessels constitute the main force deployed to prevent migrant smuggling. Frontex assisted Spain through the joint operation Hera. Vessels deployed under Frontex coordination operated on the basis of bilateral agreements Spain had concluded with Mauritania and Senegal.

From a fundamental rights point of view, border surveillance activities on the territory of third countries raise a number of challenges.

The first question is whether providing assistance to third countries to control irregular departures could constitute a violation of the right to freedom of movement. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) stipulates the right of a person to leave any country, including his or her own. The scope of Article 12 (2) of the ICCPR is not restricted to persons lawfully within the territory of a state but applies to everyone.¹²⁰ Similarly, according to Article 2 of Protocol 4 to the ECHR "[e]veryone shall be free to leave any country, including his own". The ECtHR noted that this "implies a right to leave for such country of the person's choice to which he may be admitted".¹²¹

However, it is also necessary to examine if the support given to third countries would justify restrictions to the right to leave stipulated in Protocol 4 of the ECHR.

No case law has addressed this specific issue. In light of the broad wording of the exceptions provided for in Article 2 (3) of Protocol 4, it remains to be seen whether restrictions to the right to leave implemented with the consent of the coastal state to combat smuggling in human beings will be considered as necessary "for the prevention of crime".

The second question is whether EU Member States can be considered responsible for violations of human rights which take place in the territorial sea or in the territory of a third country. As explained above, responsibility for human rights violations can exceptionally occur for actions that a state undertakes outside its territory. This is the case for international human rights law as well as for the rights set forth in the ECHR: whenever a state exercises jurisdiction, it is bound to respect its human rights obligations. Therefore, in those cases in which a state would exercise, directly or indirectly, actual or legal control over persons, it must respect human rights.¹²² This could, for example, be the case if persons are taken on board vessels flying an EU Member State flag or where an EU Member State manages a detention facility in a third country. By contrast, human rights violations which third-country authorities perform, even if using equipment donated by an EU Member State, would not normally be the responsibility of an EU Member State.

3.5. Push backs

Push-back operations involve intercepting migrants and forcing them back from whence they came. In recent years, NGOs reporting on the situation at borders as well as intergovernmental monitoring bodies have raised the issue of persons intercepted at sea who have been turned back to their points of departure, sometimes to inhumane detention situations. Different parts of the Mediterranean have recorded instances of migrant push backs.

In the years up to 2008, the NGOs Human Rights Watch and Pro Asyl documented a number of instances in which the Hellenic Coast Guard intercepted migrants at sea and forced them back.¹²³ In some instances, the testimonies collected referred to authorities towing the rubber boats towards the Turkish coast and then puncturing them. The two reports describe other forms of alleged mistreatment. Incidents of unsuccessful rescue operations as well as coast guard abuse of migrants also drew media attention. In 2006, a group of immigrants complained that the Hellenic Coast Guard tied them up in plastic handcuffs and abandoned them, resulting in

¹¹⁸ Corriere della Sera (2010).

¹¹⁹ Ansamed (2010).

¹²⁰ UN, Human Rights Committee (1999), para. 8.

¹²¹ ECtHR, *Baumann v. France*, No. 33592/96, 22 May 2001, para. 61.

¹²² UN, CAT, *J.H.A. v. Spain*, Communication No. 323/2007, 21 November 2008.

¹²³ PRO ASYL (2007); HRW (2008).

the drowning of six of their number. The Turkish Coast Guard eventually rescued the 2006 group.¹²⁴

Recently, however, the situation in Greece has changed. Starting from 2010 until the end of 2012, no reports documenting push backs by sea to Turkey emerged. Similarly, the interviews with migrants carried out for this research and who had crossed the sea border after 2009 did not mention any push-back incidents.

The Hellenic Coast Guard said that the current policy is to warn off migrants who are seen entering the territorial sea, by making sound signals and informing them that it is illegal to cross these waters because they are entering the Schengen zone. Once they have entered, however, the use of force to push back migrants is strictly prohibited. The Hellenic Coast Guard's interception operations switch to search and rescue operations as soon as it approaches a vessel carrying migrants. Returns appear only to be implemented through formal channels based on the readmission agreement with Turkey. Another positive development is the recent creation of a new service under the supervision of the Ministry of Citizens' Protection in charge of examining serious incidents of human rights violations committed by security forces.¹²⁵

Interviews carried out with Turkish authorities also testified to the change of practices at the sea border. They said that: "There were cases of push backs by the Greek Coast Guard in our region. [...] But recently, I have to admit that there is a decline in these cases."

Examples of interceptions at sea and immediate return to the country of departure also emerged from Spain. Two Sub-Saharan migrants interviewed in northern Morocco who tried to cross to Spain, one to the mainland in 2010 and the other to Melilla in July 2011, recalled that Spanish vessels intercepted them and handed them over to Moroccan authorities at sea. In both cases the interception took place not far from the Moroccan coast, as Moroccan patrols arrived soon and the return trip to the coast took only 15 minutes in one case, the interviewed migrant said.

"When they [the Spanish vessel] stopped us, we were told to remain in the rubber dinghy and to turn off the engine. Thus, we remained in the rubber dinghy. They alerted the Moroccan police and later the police came."

(Cameroonian man, attempted to cross to Spain in 2010)

Push backs, however, have been most hotly debated in Italy. In 2009, Italian authorities intercepted 777 migrants in nine operations in international waters and returned them to Libya or Algeria. Some of the migrants were minors. The Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) analysed these operations in a report published in April 2010.¹²⁶ In addition, the ECtHR reviewed a specific push-back operation in the *Hirsi* case.

Joint Italian-Libyan interception and push-back operations started in May 2009 based on 2007 bilateral agreements to fight clandestine immigration and following the entry into force of the Treaty on Friendship, Partnership and Cooperation between Italy and Libya.¹²⁷ Neither the agreement nor the treaty is public. At that time, Italian authorities justified push-back operations by invoking various international and national instruments, including the UN Convention and Protocol against Transnational Organized Crime, various Law of the Sea instruments, and relevant national legislation.¹²⁸ Interventions took place in international waters only, although Italian military ships sometimes entered Libyan waters to bring migrants ashore. Different authorities carried out operations as illustrated in Table 6.

¹²⁴ ENET (2006a); ENET (2006b).

¹²⁵ Greece, Law No. 3938/2011 (Official Journal A' 61/31.03.2011) and Presidential decree No. 78/2011 establishing the Office for Incidents of Police Misconduct (Γραφείο Αντιμετώπισης Περιστατικών Αυθαιρεσίας).

¹²⁶ Council of Europe, CPT (2010a).

¹²⁷ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 19–21.

¹²⁸ Information provided by the Italian Ministry of Interior to the FRA in November 2012.

Table 6: Italian push backs, 2009

Date	Authority	No. of persons	Nationality	Place of disembarkation	Men/women/children
6–7 May	Italian Coast Guard and <i>Guardia di Finanza</i>	231	not available, but including Somalia (11) and Eritrea (13)	Libya	191/40/0
8 May	ENI Platform	77	not available	Libya	
9–10 May	Coast guard and Navy	163	not available	Libya	141/20/2
14 June	<i>Guardia di Finanza</i>	23	not available	Algeria	23/0/0
18–19 June	<i>Guardia di Finanza</i>	72	not available	Libya	44/28/0
1 July	Italian Navy	82	Eritrea (76), Ethiopia, Egypt and Morocco	Libya	70/9/3
4 July	<i>Guardia di Finanza</i>	40	not available	Libya	22/16/0
29–30 July	<i>Guardia di Finanza</i>	14	not available	Libya	14/2/0
30–31 August	Italian Navy and <i>Guardia di Finanza</i>	75	Somalia	Libya	57/15/3

Sources: Council of Europe, CPT (2010a); Council of Europe, CPT (2010b); CIR (2010); HRW (2009b); ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012; For 8 May 2009, see *La Repubblica* (2010); *Fortress Europe* (2009). For 30 August 2009, see *La Repubblica* (2009); *La Repubblica* (2010)

The operations provoked strong criticism and concern both domestically and internationally. The CPT issued a report on the incidents. The report noted that these Italian practices violated the *non-refoulement* principle and failed to fulfil international and domestic legal obligations relating to safety and medical care of migrants, and the respect of migrants' individual freedom.¹²⁹

With the start of the Libyan conflict, Italy suspended the implementation of the bilateral agreement and, since then, there have been no reports of interception operations leading to returns to Libya. Summary returns to Tunisia seem, however, to have taken place. In an August 2011 case reported by the press, Italian authorities rescued a group of 112 Tunisians and disembarked those in need of medical assistance at Lampedusa. The *Guardia di Finanza* then escorted the remaining 104 migrants to a Navy vessel which accompanied them back to Tunisian territorial waters.¹³⁰

Malta has thus far not adopted a push-back policy. In July 2010, however, a Maltese patrol boat rescued part of a group of 50 Somalis, whereas the rest was brought to Libya. There are conflicting accounts of this incident. According to migrants on board, the Maltese Armed Forces transferred the women with children to their vessel and continued to stay close to the migrants' boat. Subsequently, another patrol boat arrived which the migrants believed was Italian, and whose crew, they said, told them that they would bring the remaining migrants to Italy. When some of the migrants entered what they believed was an Italian boat, however, they

realised that at least part of the crew was Libyan, as they spoke Arabic. Fearing that they would be brought to Libya, the migrants tried to return to their own boat, but the crew prevented them from doing so. As one of these migrants explained:

"After the 28 went to the Italian ship, the crew told us: 'why don't you join the others'. The Italians came close to us, and tried to take us from our boat. Some of us fell into the water to escape the Italians. One of the 28 on the Italian ship told us, 'These guys are not Italians; they are taking you to Libya, so all of you don't come here'. All of the ones they took from the boat, they didn't just put them on the ship and leave them; they took them to a small room on the ship and locked them up."

(Somali man, crossed to Malta in 2010)

Eventually, half of the group reached Malta and the other half, Libya. Maltese authorities said, however, that there was no element of deception in this operation. A Libyan vessel assisted in the rescue operation and, although it was night, the Libyan flag was clearly visible, they recounted. The two rescue teams did not specifically select persons.¹³¹

There are three core fundamental rights at stake during push backs. The first is the treatment of the persons turned back. Regardless of whether or not the persons are taken on board the patrolling vessel, an interception operation may entail the use of force. The use of

¹²⁹ Council of Europe, CPT (2010a).

¹³⁰ TM News (2011).

¹³¹ Information provided by the Ministry of Justice and Home Affairs to the FRA in November 2012. See also Times of Malta (2010) and the statement by Jesuit Refugee Service Malta (2011). The Maltese authorities informed the FRA that it was later discovered that the wife of the Somali in question was not on the boat but still in Somalia.

force must be proportional and remain within the limits allowed under Article 3 of the ECHR, which prohibits torture, inhuman and degrading treatment or punishment.

The second issue is the prohibition of collective expulsions of aliens as contained in Article 4 of Protocol 4 of the ECHR as well as in Article 19 of the EU Charter of Fundamental Rights. The purpose of this provision is to prevent states from removing aliens without examining their personal circumstances or giving them an opportunity to contest the removal measure.¹³² The ECtHR clarified that the prohibition of collective expulsions also applies to measures taken at high seas, which either keeps migrants from reaching the borders of the state or pushes them back to another country.¹³³

Respect for the prohibition of collective expulsions requires taking into account the personal circumstances of each individual.¹³⁴ In *Hirsi*, the ECtHR noted that the personnel on the military ships which returned the migrants to Libya were neither trained to conduct personal interviews nor assisted by interpreters or legal advisers. It concluded that the absence of such guarantees made it impossible to examine the individual circumstances of each person affected by the return measures.¹³⁵

Finally, the third risk relates to the principle of *non-refoulement* which, as explained in the introduction to this chapter, also applies to actions taken at high seas. The principle of *non-refoulement* does not only prohibit the return to the country of origin of the migrants, such as Somalia or Eritrea, but also to third countries where there is a risk of onward movement to such countries, so-called indirect *refoulement*.

The ECtHR has confirmed the prohibition of indirect *refoulement* in relation to treatment prohibited under Article 3 of the ECHR.¹³⁶ Concerning Article 33 (1) of the 1951 Convention relating to the Status of Refugees, the UNHCR's Executive Committee has also reaffirmed this interpretation on numerous occasions.¹³⁷ The UNHCR Executive Committee also stressed that before returning an asylum seeker to a third country, the authorities must establish that the third country will treat the asylum seeker in accordance with accepted international standards, will ensure effective protection against *refoulement* and will provide the asylum

seeker with the possibility to seek and enjoy asylum.¹³⁸ Under the facilitation of UNHCR in Lisbon in 2002, a set of parameters were developed to assist policy makers in determining whether an asylum seeker could be returned to a transit country or a third country where he or she previously stayed. The parameters suggest that the factors to take into consideration include not only whether asylum seekers in the third country would have access to asylum procedures which are fair and efficient, and whether he or she would be protected from *refoulement*, but also whether treatment would be in accordance with core fundamental rights and the person would have access to means of subsistence sufficient to maintain an adequate standard of living.¹³⁹

Currently, based on these parameters, none of the neighbouring coastal states provide effective protection to persons seeking asylum. First, two of the eight countries of departure are not bound by the 1951 Convention relating to the Status of Refugees; Libya has not ratified it, and Turkey applies this convention only to refugees from Europe.¹⁴⁰ Second, only three of the eight countries reviewed have created a clearly identifiable authority with responsibility for examining requests for refugee status and taking a decision in the first instance, namely Senegal, Mauritania and Algeria.¹⁴¹ Third, even in those countries that have established an asylum authority, UNHCR still essentially carries out refugee status determination under its mandate. As Table 7 shows, UNHCR refugee statistics reveal that the Senegalese national authority, which granted refugee status to eight individuals in 2011, was the only one of these national authorities to grant refugee status to anyone.¹⁴² This is a clear indicator that national authorities in these countries still do not have the capacity or willingness to adjudicate asylum claims in accordance with international standards.

¹³² ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 177.

¹³³ *Ibid.*, para. 180.

¹³⁴ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, paras. 61–63.

¹³⁵ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 183–186.

¹³⁶ ECtHR, *T.I. v. the United Kingdom*, No. 43844/98, 7 March 2000.

¹³⁷ For example, UNHCR, Executive Committee on international protection of refugees, Conclusions No. 58 (XL) – 1989 at f(i).

¹³⁸ UNHCR, Executive Committee on international protection of refugees Executive Committee Conclusion No. 85 (XLIX) – 1998 at (aa).

¹³⁹ UNHCR (2003).

¹⁴⁰ Turkey maintains a geographical limitation whereby it applies the Convention only to refugees from Europe.

¹⁴¹ In Senegal, the National Commission of Eligibility (NCE); In Mauritania, the National Consultative Commission for Refugees (CNCR); In Algeria, the Bureau Algérien pour les Réfugiés et Apatrides (BAPRA).

¹⁴² UNHCR (2012c).

Table 7: Overview of the protection framework in neighbouring coastal states

	Senegal	Mauritania	Morocco	Algeria	Tunisia	Libya	Egypt	Turkey
1951 Convention ratified	✓	✓	✓	✓	✓	No	✓	In part
National asylum authority exists	✓	✓	No	✓	No	No	No	No
National authority has granted refugee status in 2011	✓	No	No	No	No	No	No	No
Asylum applications (2011)	200	378	1,110	1,038	4,505	90	15,493	6,715
Refugees recognised by national authorities (2001)	8	0	0	0	0	0	0	0
Refugees recognised by UNHCR (2011)	0	44	44	12	3,587	0	767	9,329

Notes: Libyan refugees in Tunisia and Egypt during the 2011 war are not included in the table. Third countries are listed following the coastline, starting from West Africa and ending in Turkey.

Source: FRA, 2012; based on a review of national legislations and statistics by UNHCR

A risk of *refoulement* also persists in several of these countries. In Morocco, for example, a common practice to deal with migrants returned by Spain is to escort them to the Algerian border in the desert.¹⁴³ UNHCR has highlighted the risk of *refoulement* in Turkey,¹⁴⁴ and that the situation in Libya remains very volatile. Finally, various actors have strongly criticised detention conditions in immigration facilities in countries such as Libya, Mauritania or Turkey.¹⁴⁵

3.6. Delays due to unclear disembarkation rules

Once governments or private vessels rescue those in distress at sea, the question arises as to where to disembark them. Disagreement between states on this matter have led to delays in the disembarkation of rescued migrants. It also exposes individuals to possible disembarkation to a place where their life and safety are at risk in violation of the principle of *non-refoulement*. This issue is of particular relevance in the central Mediterranean.

International law provides only limited guidance on this question. The IMO, concerned with the rising death toll

among migrants and refugees attempting to cross the sea in unseaworthy and overcrowded vessels, tried to address this gap in 2004. Its Maritime Safety Committee adopted amendments to the SOLAS and the SAR Convention, which entered into force in July 2006.¹⁴⁶ The new paragraph 3.1.9 in Chapter 3 of the SAR Convention establishes a duty of states to coordinate their actions and to cooperate in order to release shipmasters who embarked persons rescued at sea from their obligations “with minimum further deviation from the ship’s intended voyage”.¹⁴⁷ In addition, the survivors must be “delivered to a place of safety”. The same obligations are repeated in new paragraph 1-1 in Chapter V, Regulation 33 of the SOLAS Convention. The SAR amendments (Chapter 4, new paragraph 4.8.5) clarify that the rescue centre concerned “shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea”.

With the amendments to the SAR and SOLAS Conventions, the Maritime Safety Committee also adopted non-binding guidelines to assist states and shipmasters to implement the new provisions.¹⁴⁸ The guidelines specify that “the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.” (at 2.5). They also define a place of safety as a “place where the survivor’s safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met” (at 6.14) and

¹⁴³ See, for example, UN, CAT (2011), para. 26; Amnesty International (2006), p. 25 ff; Jesuit Refugee Service Europe (2012), pp. 14, 17–19. This practice was confirmed by the interviews carried out in Morocco for this research.

¹⁴⁴ UNHCR (2009a).

¹⁴⁵ For Turkey, see HRW (2008), p. 52 ff; United Nations (UN), Human Rights Council (HRC), Working Group on Arbitrary Detention (2007). For Libya, see HRW (2009b); Fédération internationale des ligues des droits de l’Homme (FIDH) (2012); Amnesty International (2012b). For Mauritania, see UNHCR, Working Group on Arbitrary Detention (2008); Amnesty International (2008).

¹⁴⁶ IMO (2004b), Resolution MSC. 153(78), Annex 3 adopted on 20 May 2004 (amending SOLAS) and Resolution MSC. 155(78), Annex 5 adopted on 20 May 2004 (amending SAR).

¹⁴⁷ IMO, Search and Rescue Convention (SAR) amendments, May 2004, Chapter 3, new para. 3.1.9.

¹⁴⁸ See IMO (2004a).

clarify the need to avoid disembarkation of asylum seekers and refugees in territories where their lives and freedoms would be threatened (at 6.17). Finally, the guidelines discourage any screening and status assessment procedures that would unduly delay disembarkation (at 6.20).

In the Mediterranean regions, all state parties to the SAR and SOLAS Conventions accepted these amendments, with the exception of Malta.¹⁴⁹ In practice, this has led to disagreements between Italy and Malta as to whether the nearest 'safe port' to disembark persons rescued at sea is Lampedusa or Malta.

Three examples are illustrative: In 2007, 27 irregular immigrants clambered on to a Maltese tuna pen after their boat sank in Libyan search and rescue waters. The owner refused to allow them on board, and the migrants remained on the tuna pen for over 24 hours while Libya, Malta and Italy wrangled over who was responsible. An Italian navy vessel eventually took them on board and delivered them to Italy.¹⁵⁰ In a similar incident in April 2009, a four-day stand-off between Italy and Malta ensued when a Turkish cargo ship, the MV Pinar E, came across two boats carrying 154 persons in need of rescue 45 nautical miles from Lampedusa. In coordination with the Maltese Armed Forces, the Turkish cargo ship took the migrants on board and then confronted the question of whether to take them to Lampedusa, which was geographically closer, or to Malta, in whose search and rescue region they had been found. For more than four days, the rescued migrants remained on board the Turkish cargo ship with minimal provisions for their health and wellbeing until Italy agreed to transfer them to their patrol boats and admit them on humanitarian grounds.¹⁵¹ In a third incident, in July 2011, more than 100 migrants were stranded on a vessel under NATO command for several days, as Malta, Spain (the flag ship) and Italy debated where to take them.¹⁵² Finally, they were brought to Dehiba refugee camp in Tunisia.

Tensions between Malta and Italy were also observed during this research. In May 2011, for example, the Italian press reported that the Italian Minister of Interior wrote a letter to the EU Commissioner for Home Affairs in which he noted that Italian authorities had to rescue 209 migrants in the Maltese search and rescue zone.¹⁵³

An interview with a fisherman in Mazara del Vallo, Italy highlights the implications of the latent dispute between the two countries:

"Recently it happened to us. We sighted a migrants' boat. [...] So we call the authorities at Lampedusa. Lampedusa forwards the call to Malta."

Question: "So, you spoke with Malta?"

Reply: "Yes. After four or five hours a Maltese military ship came to see [...] and said they would bring the migrants to Lampedusa. They took the migrants on board and took the route to Lampedusa."

Question: "So what happened?"

Reply: "A chaos because Lampedusa didn't want the boat. Lampedusa told: you rescued them in your SAR Zone, why do you want to bring them here?"

(Italian fisherman, interviewed in Italy)

In this particular case, the Maltese authorities told the FRA that their vessels had to travel 100 nautical miles to reach the scene which made a response time of four-five hours not unreasonable. They also noted that the incident was only 17 nautical miles from Lampedusa.¹⁵⁴

The 2010 guidelines for Frontex operations at sea,¹⁵⁵ which the CJEU annulled in 2012 for formal reasons,¹⁵⁶ said that "unless otherwise specified in the operational plan, priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons" (paragraph 2.1 of the guidelines).

While the search and rescue regime is part of the international law of the sea, it cannot be seen in isolation from the system to protect persons at risk of persecution or other serious harm. Italy and Malta signed an agreement in September 2012 which seeks to solve their dispute over the rescue of migrants at sea. The deal sets up a mixed commission and technical teams from both sides to develop a mutual understanding.¹⁵⁷

¹⁴⁹ See IMO (2012), Communication received by the depositary, on 22 December 2005 available on pp. 44, 401: "[...] the Ministry wished to inform that, after careful consideration of the said amendments, in accordance with article [...] of this Convention, the Government of Malta, as a Contracting Party to the said Convention, declares that it is not yet in a position to accept these amendments."

¹⁵⁰ Corriere della Sera (2008).

¹⁵¹ Malta, Embassy of Malta in Italy (2009).

¹⁵² Times of Malta (2011).

¹⁵³ Il Giornale (2011).

¹⁵⁴ Information provided to the FRA by the Maltese Ministry of Justice and Home Affairs in November 2012.

¹⁵⁵ Council Decision 2010/252/EU, OJ 2010 L 211/20.

¹⁵⁶ CJEU, C-355/10 [2012], *European Parliament v. Council of the European Union*, 5 September 2012.

¹⁵⁷ Times of Malta (2012a); Times of Malta (2012b).

Conclusions

The principle of *non-refoulement* bans the return of individuals to persecution, torture or other serious 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 primary EU 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 of 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.¹⁵⁸

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 or in the territorial sea of third countries. As the ECtHR clarifies, 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.¹⁵⁹

The EU and its Member States have increasingly been looking 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 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.¹⁶⁰

While border control measures fall clearly under the scope of EU law (Article 79 of the TFEU), search and rescue operations are regulated by 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.¹⁶¹

FRA opinion

After the annulment of Council Decision 252/2010/EU, 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 concept of joint processing of asylum claims should be explored in this regard.

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.

¹⁵⁸ 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.
¹⁵⁹ For more information, see ECtHR (2012).

¹⁶⁰ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

¹⁶¹ CJEU, Case C-355/10 [2012], *European Parliament v. Council of the European Union*, 5 September 2012.

Operational plans and other documents guiding joint operations and 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.

4

Maritime surveillance systems and fundamental rights



Charter of Fundamental Rights of the European Union

Article 8 (Protection of personal data)

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

This chapter describes the tools the EU and its Member States have developed for maritime border surveillance. All EU Member States have equipment, such as cameras and radars, to monitor their maritime borders. These can be placed on fixed and on mobile assets, such as vessels, aircrafts and cars, and the authorities at a central or local level can usually view the images they deliver. To improve coordination among EU Member States, these national systems are currently being linked to the European Border Surveillance System (Eurosur), a European database administered by Frontex, which essentially serves as a platform for EU Member States and Schengen-associated countries to exchange information on the external sea and land borders among themselves and Frontex. Eurosur is itself expected to become part of a broader concept: the Common Information Sharing Environment (CISE) which will allow exchange of surveillance data collected for various purposes, including maritime safety or fisheries control. Data protection issues are prominent among the fundamental rights issues touched upon when discussing the existing surveillance tools. For a more comprehensive analysis on this subject, consult the 2012 *Opinion of the European*

Union Agency for Fundamental Rights on the proposed data protection reform package as well as the related opinions by the European Data Protection Supervisor and the Article 29 Working Party.¹⁶²

4.1. The concept of integrated maritime surveillance

States monitor movements at sea using a combination of land-based, naval and aerial equipment as well as satellites. Maritime surveillance and patrol activities are not only for immigration control purposes; other objectives also require surveillance and patrol activities, such as control of maritime resources, prevention of pollution, safety of navigation and the fight against the smuggling of goods, including drugs or firearms. In addition, large stretches of sea are observed for defence purposes.

For the purpose of maritime safety, for example, all passenger ships as well as other larger vessels have been fitted with an Automatic Identification System (AIS) since the end of 2004.¹⁶³ The system provides navigating vessels with information on the movement and identity, including port of destination, of ships navigating in the surrounding areas and thus helps to avoid collisions. AIS information is also accessible to border management authorities who may use it to identify suspicious vessels. Building extensively on the SOLAS Convention, the EU created a vessel traffic monitoring and information system (VTMIS) with a view to enhancing safety and minimising the environmental impact of shipping

¹⁶² FRA (European Union Agency for Fundamental Rights) (2012). The full text of the EDPS Opinion is available at: www.edps.europa.eu; Article 29 Data Protection Working Party (2012).

¹⁶³ IMO, SOLAS Convention 1974, Chapter V, Regulation 19.

accidents.¹⁶⁴ By May 2014, the EU requires all fishing vessels over 15 metres long to be fitted with AIS devices that meet IMO performance standards.¹⁶⁵

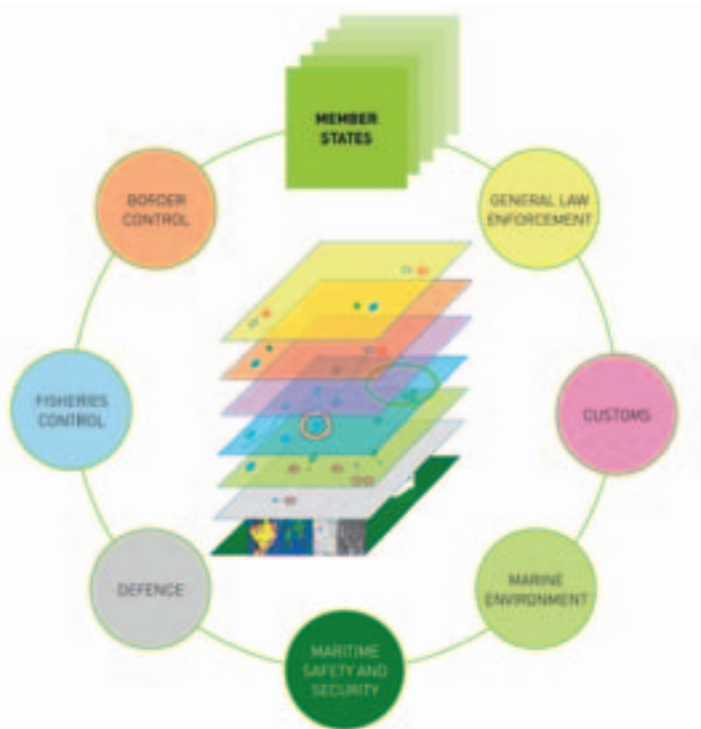
In many cases, the authorities responsible for different aspects of surveillance at sea collect data separately, with surveillance systems developed in response to sector-specific national, EU or international legislation. Responsible national authorities or EU bodies often do not share data, which may result in data being collected more than once. To address these issues and make sea surveillance cheaper and more effective, authorities developed the concept of integrated maritime surveillance. This concept is about providing authorities interested or active in maritime surveillance with ways to exchange information and data.¹⁶⁶

The European Commission together with EU Member States is developing a framework that would enable the

exchange of data and other information through the use of modern technologies. This will lead to the creation of the CISE, making different systems, which collect surveillance data for various purposes, interoperable. The Commission has published a roadmap outlining the different steps to be taken for this purpose.¹⁶⁷ The roadmap also identifies the different users.

The European Commission roadmap acknowledges that the shared information may contain personal data, and that the necessary protection safeguards should be incorporated into the system. It identifies the need to better map where the system may result in shared personal information, which planned pilot projects, for example, may accomplish.¹⁶⁸ The Council of the European Union also stresses, in its 2011 conclusions on maritime surveillance, the need to take all necessary measures to ensure the confidentiality and compliance with personal data protection rules.¹⁶⁹ The guiding philosophy

Figure 8: Users of the Common Information Sharing Environment (CISE)



Source: European Commission, Maritime Affairs, 2010

¹⁶⁴ Directive 2002/59/EC, OJ L 23, pp. 37–47. The Directive was amended in 2009 and 2011 and a consolidated version can be found at: OJ 2002 L59 16/03/2011, pp. 1–33.

¹⁶⁵ Directive 2002/59/EC (as amended in 2011), Art. 6 in combination with Annex II.1.

¹⁶⁶ For more information, see the European Commission maritime affairs webpage, available at: http://ec.europa.eu/maritimeaffairs/policy/integrated_maritime_surveillance/index_en.htm.

¹⁶⁷ European Commission (2010b).

¹⁶⁸ European Commission (2010b); Data protection considerations feature more strongly in the 2009 Commission Communication on the same topic, see European Commission (2009b): "The principles of personal data protection law applicable in the European Union are to be observed in the framework of the common information sharing environment. Personal data should be collected for a legitimate purpose, used and transferred for a purpose that is compatible with the initial purpose of collection."

¹⁶⁹ Council of the European Union (2011a).

of the integrated system is that information should be shared on a need-to-know and a responsibility-to-share basis. Overall, information sharing is encouraged; the requirement to share information, particularly in case of an imminent threat, should be balanced by its owner against the risk of not sharing it.¹⁷⁰

In the area of border control, Eurosur will provide EU-level data for the CISE.

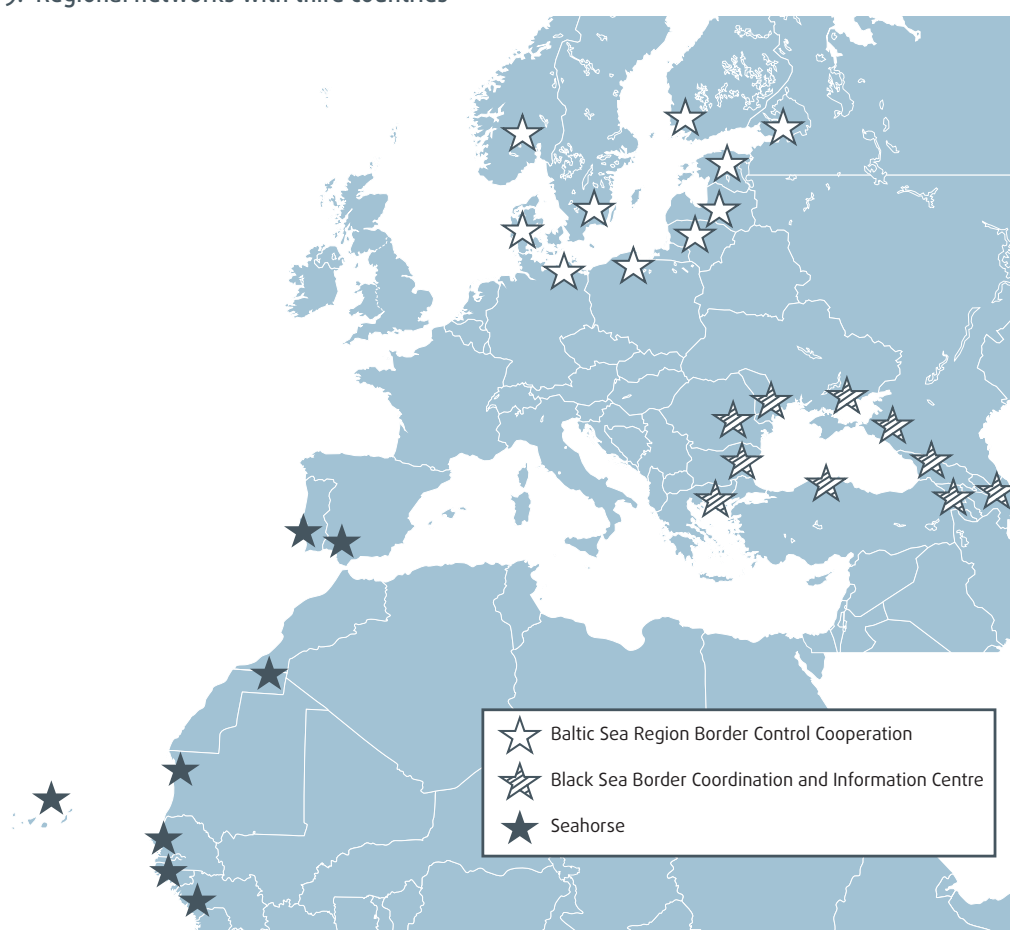
4.2. Surveillance networks for border management

The need for networks to exchange information between coastal states is not limited to maritime safety, fisheries or environmental protection; in the border management field, there is an emerging desire to share operational and other information among relevant law enforcement authorities located along the same sea.

In Europe, three networks have been created to share border management information: the Baltic Sea Region Border Control Cooperation; the Black Sea Border Coordination and Information Centre; and one in the eastern Atlantic, Seahorse. A fourth network is planned in the Mediterranean. The Baltic and Black Sea networks serve a variety of border management purposes of which irregular migration is only one, while Seahorse was established primarily to prevent and address irregular migration flows.

Within the three existing networks, dedicated platforms facilitate interaction and operational information sharing, including protected information, among relevant law enforcement officials in the participating countries. Figure 9 provides an overview map of EU Member States and third countries that are parties to the three existing networks.¹⁷¹ In total, excluding Norway, 10 third countries take part in these networks: Russia (Baltic and Black Sea networks); Georgia, Turkey and Ukraine (Black Sea network); and Cape Verde, Gambia, Guinea Bissau, Mauritania, Morocco and Senegal (Seahorse network).

Figure 9: Regional networks with third countries



Source: FRA, 2012

¹⁷⁰ European Commission (2010b).

¹⁷¹ For a comparative overview of the responsibilities and types of information exchanged in these networks, see European Commission (2011a).

With the exception of the Baltic network, the EU co-funds these networks.¹⁷² In 2005, the European Commission, through its financial and technical assistance programme to third countries in the field of migration and asylum (AENEAS), financially supported a project launched to develop dialogue on migration issues, prevent irregular migration as well as enhance operational cooperation in the Atlantic. The Seahorse project included training and capacity building activities on irregular migration matters as well as provision for equipment, such as jeeps and day and night vision cameras.¹⁷³ The project created a network using secure satellite links among 10 national centres for coordination and information exchange on illegal immigration and other criminal activities carried out at sea.¹⁷⁴ In principle, the system also allows for the tracking of migrant vessels via satellite. The Seahorse project was integrated in 2007 into the 'Seahorse network' project, and this was replaced by the Seahorse Cooperation Centres project in 2009-2010, which is financially supported by the migration and asylum thematic programme of the European Commission Development and Co-operation Instrument (DCI).

Based on the model in the Eastern Atlantic, a similar network between Mediterranean EU Member States and north African coastal states is being developed in the Mediterranean Sea. The plan is to establish the network, dubbed Seahorse Mediterraneo, in 2013.¹⁷⁵ The creation of a co-operation centre is also foreseen, possibly in Italy and/or Malta. The network states are seeking funding from the migration and asylum thematic programme within the European Commission Development and Co-operation Instrument.

The type of information exchanged varies by network and can include incidents reports, data on suspicious vessels and other operational information. The European Commission says that no personal data are shared,¹⁷⁶ although FRA has not verified whether or not any shared information inadvertently contains names, or if any images that depict individuals' faces, such as those taken on board a vessel, could be recognisable if they are transmitted through these systems.

The FRA also finds it unclear whether there is a risk that EU Member States use the existing networks to share information that enables third countries to take law enforcement actions in violation of core human rights, such as the principle of *non-refoulement* or the prohibition of torture, inhuman or degrading

treatment – something which is explicitly prohibited by the proposed Eurosur Regulation (see Section 4.4). This would be the case, for example, if a third country is given the exact location of a group of its own nationals who are fleeing persecution, and that following such communication, its authorities stop and detain the group. While in such cases it is primarily the third-country authorities who bear responsibility for the violation of human rights, the information sharing would deprive individuals fleeing persecution of the possibility of finding safety.

The overall costs for setting up, upgrading and maintaining the technical infrastructure of these regional cooperation centres amounted to €77 million between 2007 and 2010.¹⁷⁷ Two EU funds have substantially supported the infrastructure required to enable the regional networks to operate: the External Borders Fund (EBF) for EU Member States and the Migration Cooperation programme of the European Commission Development Cooperation Instrument (DCI) for third countries. As regards third countries, between 15-25 % of the 2011-2013 DCI funds available for the Mediterranean region in the areas of migration and asylum are to be used for development of surveillance networks amounting to some €10-17 million.¹⁷⁸

4.3. National surveillance systems

Traditionally coast guards patrolling near coastlines have carried out the bulk of maritime surveillance. Over time, patrol vessels have become more sophisticated, equipped with cameras, radars and night vision devices and devices to record and transmit observations to a central location. States have also deployed larger off-shore vessels that can patrol vaster areas and remain at sea for several days.

Aerial and land-based tools complement sea vessel surveillance. Operations coordinated by individual EU Member States or Frontex have deployed aerial means to patrol the Mediterranean, including helicopters, fixed-wing aircrafts as well as unmanned aerial vehicles (drones).

Law enforcement officers in Lampedusa stressed the importance of aerial sightings to deliver early warnings. Before UN Security Council Resolution 1973 established a no-fly zone, Italian aircrafts could patrol close to Libyan and Tunisian territorial waters, detecting boats at an early stage. Several migrants interviewed in Italy mentioned that they first sighted a helicopter or an aircraft

¹⁷² European Commission (2011a), Annex 6.2, pp. 56-57, provides an overview of national and EU funding for the three networks.

¹⁷³ Spain, Ministry of Interior (2011b).

¹⁷⁴ *Ibid.*

¹⁷⁵ European Commission (2011a), Annex 6.3, p. 58.

¹⁷⁶ European Commission (2011b), p. 35.

¹⁷⁷ European Commission (2011a), p. 17.

¹⁷⁸ European Commission (2012a). The total allocated to this region is €68 million.

before the arrival of a rescue vessel. The Council of Europe Commissioner for Human Rights acknowledged the usefulness of air surveillance to reduce deaths at sea and stressed the “need to increase dramatically surveillance – from the air – along the Libyan coast and further out in order to spot any fragile vessels at sea and safely prepare a rescue”.¹⁷⁹

In Spain: the Indalo operation coordinated by Frontex increased aerial and maritime surveillance capacity resulting in an earlier identification of migrant boats and enabling rescue services to intervene as soon as possible. Most migrants interviewed reported that air-planes or helicopters located them before they were rescued.

Finally, a land-based system can also support maritime surveillance. Spain, has established a system that enables border surveillance authorities to monitor the sea and to identify small vessels when they are still several miles from shore. With good weather conditions, the radars, cameras and infrared beams installed on towers along the coastline can take fairly good quality photographs and videos, particularly from a relatively close distance. Development on this Integrated External Surveillance System (*Sistema Integrado de Vigilancia Exterior*, SIVE) started in 2002 around the Strait of Gibraltar and was gradually extended to cover the entire Spanish Mediterranean coast as well as the Balearic

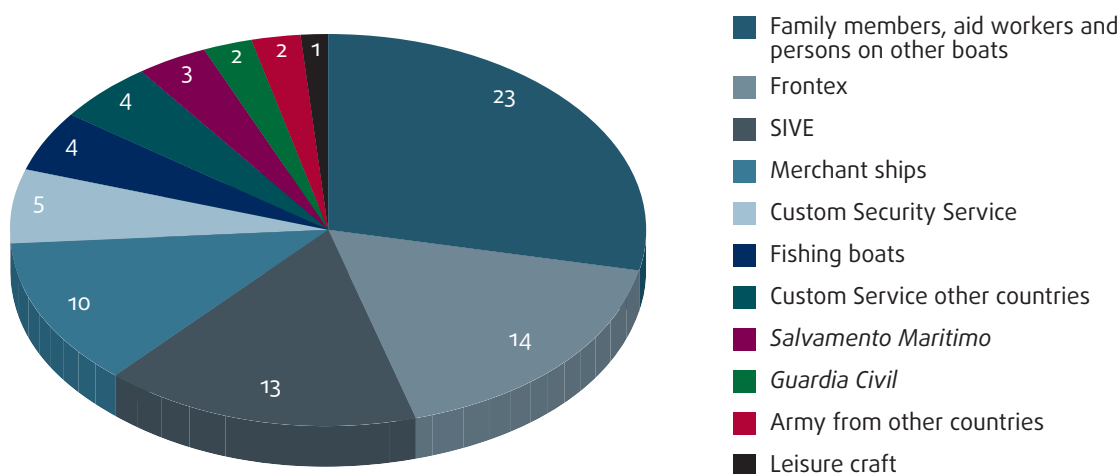
and the Canary Islands. There are plans to extend the system to include Spain’s Atlantic coast.¹⁸⁰

The authorities interviewed gave diverging accounts of the SIVE system’s effectiveness in identifying migrants at sea, although all agreed that this depends on weather and sea conditions. Where aerial means are deployed, small migrant boats can be identified much further out at sea and beyond the range of land-based sensors.

In Almería, for example, SIVE alerts triggered only one out of six rescue operations. The Almería body in charge of rescue operations reported that in 2011, SIVE alerts prompted 13 of the 80 rescue operations in their area of responsibility, which includes the sea by the provinces of Almería, Granada and Melilla. Most alerts came from private persons, such as family members, aid workers, and individuals on other boats. The second most frequent sources of alerts were from means deployed by Frontex through the joint operation Indalo. Figure 10 illustrates the different sources of rescue alerts.¹⁸¹

The SIVE can nevertheless be considered to have a deterrent effect. Other EU Member States are looking at the system. So far, however, only Romania has developed a comprehensive land-based surveillance system for its sea coasts. It uses the system not only for border, but also for fisheries management and for navigation safety. It supports search and rescue activities

Figure 10: Source of rescue alerts, Almería, Spain, 2011



Note: The numbers in the pie chart refer to the number of rescue alerts received from the respective source during 2011.

Source: Salvamento Marítimo, 2012

¹⁸⁰ Spain, Ministry of Interior (2011b).

¹⁸¹ Information provided to the FRA by *Salvamento Marítimo* in July 2012. There were a total of 88 rescue calls, eight of which were false alarms.

¹⁷⁹ Council of Europe, Commissioner for Human Rights (2011a).

and the prevention of maritime pollution.¹⁸² Other Mediterranean countries may have radars and cameras installed in selected locations, but they have not yet developed a comprehensive land-based maritime surveillance system for immigration control purposes.

Northern Europe also has experience with land-based surveillance. Finland, in order to monitor its sea and lake borders with the Russian Federation, developed a system similar to those in Spain and Romania. Through land-based sensors, it collects information on suspected border movements and uses it to plan law enforcement actions.

From a fundamental rights perspective, data protection is one question relating to the operation of such surveillance systems. While surveillance systems have not been designed to identify individual persons, the videos and photographs the system takes when monitoring a vessel or a beach do in practice also depict persons. Pictures and videos of persons may constitute personal data if a natural person can be directly or indirectly identified in these images.¹⁸³ If the images are good quality, modern technologies may make it possible to compare and search for the depicted persons in other national or EU databases. Given the authorities' workload in border surveillance and other priorities, this concern is for the time being more a theoretical than a practical problem.

FRA administrated a questionnaire to the bodies in charge of border management in Finland, Romania and Spain. The responses indicate that practitioners have different perceptions of whether surveillance images collected contain personal data. Finland replied that persons can be identified through the images. Spanish and Romanian border management authorities indicated that their systems do not allow for the recording of personal data. Domestic data protection legislation, which would regulate issues such as the maximum period of data storage, sharing data with third parties, access by data protection supervisors, is therefore not considered applicable to Spain and Romania's surveillance systems, whereas it applies in Finland.

In practice, distance, light, weather conditions and other factors determine if a person on a boat captured on a surveillance system image can be identified. Many EU nationals use this belt of sea near the coast in the Mediterranean for leisure purposes during the summer months, which is when arrivals by sea tend to

increase. If persons depicted on vessels can be fairly easily recognised through the use of information technology tools, then this can substantially interfere with EU nationals' right to privacy, an interference that must be adequately justified.

4.4. Eurosur

To improve coordination among EU Member States, the EU is creating a European Border Surveillance System (Eurosur), which will serve as a platform for EU Member States and Schengen-associated countries to exchange border management information among themselves and with Frontex.¹⁸⁴ Eurosur, essentially a toolkit for sharing certain types of operational and analytical information on the EU's external maritime and land borders, will, over time and in conjunction with other available information, enhance knowledge of smuggling patterns and enable a more targeted deployment of assets.

Eurosur potentially raises two main fundamental rights concerns – that information on migrants shared with third countries might expose them to the risk of, for example, *refoulement* or inhuman treatment, and that personal data might be used inappropriately. While the EU has put some safeguards in place on both accounts, gaps remain, as the following discussion shows. In addition, it still remains to be seen whether the life-saving potential of the system will be fully utilised.

The European Commission presented a roadmap for introducing Eurosur¹⁸⁵ in 2008 and issued two progress reports in 2009 and 2011 which also reported on pilot projects.¹⁸⁶ By year-end 2012, 18 EU Member States had connected to Eurosur by signing a Memorandum of Understanding with Frontex.

The creation of Eurosur runs in parallel with the negotiation of its legal basis. The European Commission presented a draft regulation establishing Eurosur in December 2011,¹⁸⁷ which foresaw a three-phase system establishment, developing the first two phases, which interlink existing national systems and develop common tools, in parallel. The third phase will see the creation of the CISE described in Section 4.1. The European Commission estimates the cost of establishing Eurosur for 2011–2020 at €338 million, although other research estimates put the cost at three times as high.¹⁸⁸ Euro-

¹⁸² Information provided by the Romanian Border Police to the FRA in April 2012.

¹⁸³ Directive 95/46/EC, OJ L 281, Art. 2 (a); See also the definitions proposed by the European Commission in the recent data protection reform package: European Commission (2012b), Art. 4 (1)–(2); European Commission (2012c), Art. 3.

¹⁸⁴ Eurosur will not extend to Ireland and the United Kingdom, whereas Denmark will have to decide whether to apply the Eurosur Regulation within six months after its adoption. See European Commission (2011c), preambles 10–11.

¹⁸⁵ European Commission (2008).

¹⁸⁶ European Commission (2009a); European Commission (2011d).

¹⁸⁷ European Commission (2011c).

¹⁸⁸ Hayes, B. and Vermeulen, M. (2012), p. 71. The estimated amount corresponds to €873.7 million.

pean funding will cover most of the Commission's estimated cost, including through the Internal Security Fund that is to be established.¹⁸⁹

By combining information and data from different sources, EU Member States as well as Frontex will have a better overview of border situations, particularly at maritime borders. For each Member State, a national coordination centre will take responsibility for feeding the system with relevant information collected through national surveillance systems. Currently, each Member State decides which information to make available to whom; in future, the Eurosur regulation will define which core information Member States must share.

Frontex will input that information which is more effectively collected in a centralised manner, such as satellite images or information from ship reporting systems. To that end, Frontex will collaborate with the EU Satellite Centre, the European Maritime Safety Agency, the European Fisheries Control Agency and Europol.¹⁹⁰ The national coordination centres and Frontex should ensure that the system is operational on a 24-hour basis every day.

The shared information will be organised in three different layers: an events layer, such as information on incidents; an operational layer, such as location of patrol assets and weather conditions; and an analytical layer, with strategic information, intelligence and maps. Taken together, these three layers will provide a 'situational picture'. Eurosur will provide three different types of such situational pictures: a national picture, a European-level picture and a common pre-frontier intelligence picture, with information on third countries. The database also allows for tailor-made visualisations of information, which may combine elements from different pictures. The national coordination

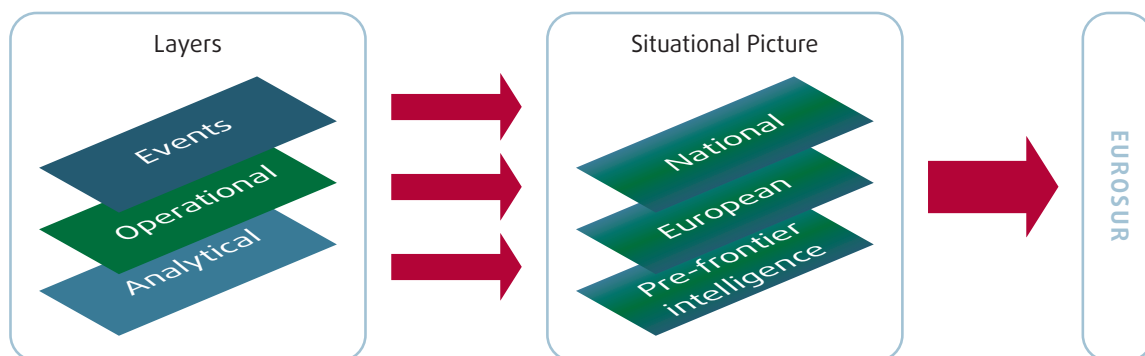
centres provide the first picture, and Frontex handles the other two.¹⁹¹ Figure 11 provides a visual overview of the Eurosur structure.

Eurosur must be seen in the context of the regional surveillance networks, such as the Baltic and Black Sea networks and Seahorse, described in Section 4.2. The draft Eurosur regulation provides for cooperation with third countries (Article 18). Such cooperation will take place in a decentralised manner via the national coordination centres, based on bilateral or multilateral agreements with the third country or countries concerned. National coordination centres may share information contained in Eurosur with third countries. If they share information inserted into Eurosur by other Member States, their approval is required before sharing information (Article 18 (4)).

Sharing information with third countries can enable them to take the necessary steps to rescue persons in distress at sea. International law of the sea encourages coordination of search and rescue operations.¹⁹² At the same time, intelligence exchange can also allow third countries to take operational measures against smuggled migrants, which bears considerable risks from a human rights or refugee law perspective. If a third country, for example, is provided with the exact location of a group of persons fleeing from persecution, and, as a result, the group is stopped, detained and subjected to ill-treatment, such human rights violations are directly linked to the sharing of information.

Conscious of this risk, the European Commission included an important safeguard in the draft Eurosur Regulation prohibiting the exchange of any information that a third country could use "to identify persons or groups of persons who are under a serious risk of being

Figure 11: Information shared through Eurosur



Source: FRA, 2012

¹⁸⁹ European Commission (2011e); European Commission (2011f), draft Arts. 4, 9.

¹⁹⁰ European Commission (2011c), draft Art. 17.

¹⁹¹ European Commission (2011c), draft Art. 8–11.

¹⁹² IMO, SAR Convention 1979, Annex, Chapter 3 and section 3.1.1.

subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights.”

It is the EU Member State that intends to share this information that is responsible for ensuring that such problematic information is not passed along to third countries. The draft regulation does not provide for a mechanism to monitor whether states in practice respect the prohibition to share with third countries information listed in its Article 18 (2). For officers operating Eurosur, it might be useful for the Eurosur handbook (Article 19 of proposed draft regulation) to include guidance on the types of information which can and cannot be shared.

While it is envisaged to entrust Frontex with monitoring Eurosur's technical and operational functions (Article 20), Frontex does not have sufficient fundamental rights expertise or knowledge to assess whether Member States are sharing prohibited information. Given the risks of grave human rights violations for the persons affected by such prohibited information sharing, such as detention in substandard facilities, risk of ill-treatment, risk of *refoulement*, Eurosur needs to provide an effective mechanism for verifying all information that is shared with third countries. This would require that an independent actor equipped with the necessary fundamental rights knowledge is able to regularly examine the type of information transmitted. Although an EU Member State does the transfer, there is an important EU dimension to it: an EU tool is used for information transmission and such transmissions may include Frontex information.

The second fundamental rights issue relating to Eurosur concerns data protection. In principle, information and data shared through Eurosur is not meant to include personal data. At the same time, processing personal data through Eurosur is allowed in specific circumstances.¹⁹³

Events uploaded in the system are essentially text boxes where information on persons could be shared. There are no alert pop-ups or other safeguards to ensure that personal data are not inadvertently included or that text boxes are anonymised. Furthermore, EU Member States are also encouraged to report “information on unidentified and suspect platforms and persons present at or nearby the external borders”. The system also allows for video and picture attachments to an event. Although this attachment function is not yet used in practice, if it enters daily use in the future, it is possible that photographs and videos of particular incidents could also depict persons. The draft Eurosur Regulation does not prohibit the use of videos or photographs to illustrate

the description of an incident or a suspicious situation. If pictures depicting individuals, such as those aboard a migrant vessel, are shared within the system, there is no obligation to render the persons not identifiable before posting these.

Pictures included in Eurosur that allow individuals to be identified, either directly or through special software, raise data protection questions. They also raise other questions, particularly if high resolution videos or photographs illustrating an event are added to a narrative description in the future. If authorities dealing with Dublin II transfers, for example, have access to a Eurosur national coordination centre, one could imagine a situation where, in the absence of good quality fingerprints to verify whether or not a person is registered in the European fingerprint database (Eurodac), authorities might run an asylum seeker's photo against all the uploaded Eurosur pictures of arrivals by sea. Or, in another example of an unintended use of Eurosur records, authorities in charge of tracing unaccompanied minors' family members may wish to consult Eurosur pictures to see if the child arrived accompanied by adults. While these concerns are rather theoretical for the moment, they could gain relevance in the future.

The draft regulation contains a duty to comply with data protection requirements in Article 2 and preamble 7, which the Council of the European Union has further strengthened by inserting a new Article 12a providing for data protection safeguards. These provisions clarify that personal data can only be processed in accordance with EU and national data protection rules.

They do not, however, provide a shield against EU Member States inadvertently including personal data in the system. Given the policy efforts to create synergies among different maritime surveillance actors, all possible safeguards should be put in place to make it impossible or very difficult to accidentally store personal data. This is particularly important as at least nine Eurosur national coordination centres process personal data for border surveillance purposes.¹⁹⁴ The practical handbook envisaged by Article 19 of the draft regulation could be used to provide officers with concrete guidance on how to prevent such data use. Safeguards would also prevent personal data from accidentally being passed on to other agencies that may have access to Eurosur, such as the European Maritime Safety Agency and the European Fisheries Control Agency.

The revised Frontex Regulation only allows Frontex to process personal data for administrative reasons, for return operations and for data collected while

¹⁹³ Council of the European Union (2011b), No. 5238/1312905/12 (not public), Art. 12, p. 52.

¹⁹⁴ European Commission (2011a), pp. 31–32. In addition, one country, Hungary, has future plans to process personal data for border surveillance purposes.



implementing operations. If Eurosur includes personal data, such as non-anonymised high resolution satellite images, the legal basis for Frontex to store and handle such data needs to be looked into.

Given the close link between rescue at sea and maritime surveillance, the FRA stressed in its 2009 opinion on the EU's priorities for the area of justice, freedom and security 2010–2014 (Stockholm Programme) that the “best use should be made of the life-saving potential of the planned EUROSUR system which is likely to provide information on vessels or persons threatened by grave and imminent danger requiring immediate assistance.”¹⁹⁵

To uphold the right to life in practice, there should be a clear duty to forward information on persons in distress at sea to national rescue coordination centres. Ideally, national authorities in charge of rescue coordination centres should be included in the Eurosur national coordination centre. As illustrated in Table 8, in Greece and Malta, the two coordination centres are managed by the same authority. In Italy, rescue coordination authorities are represented in the Eurosur national coordination centre. In Cyprus and Spain, coordination is limited to direct communication and coordination meetings.

Where Eurosur national coordination centre authorities are different from those in charge of coordinating search and rescue, close collaboration between them should be established. These could take different forms, such as placing a liaison officer in the Eurosur national coordination centre or designing the system to send automatic alerts to the responsible rescue coordination centres.

Conclusions

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 an environment, the CISE, which will allow exchanges of surveillance data collected for various purposes. 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 Spain and Portugal

Table 8: Authorities in charge of Eurosur and search and rescue coordination, five EU Member States

	National Search and Rescue Coordination Centres (RCC)	Eurosur National Coordination Centres (NCC)	RCC authorities in NCC	Comments
CY	Ministry of Defence	Port and Marine Police	NO	Direct communication between NCC and Search and Rescue although no staff exchanged
EL	Hellenic Coast Guard (Ministry of Citizens Protection)	Hellenic Coast Guard (Ministry of Citizens Protection)	YES	RCC and NCC are managed by the same authority
ES	<i>Salvamento Marítimo</i>	<i>Guardia Civil</i>	NO	Contact and coordination meetings
IT	<i>Capitanerie di Porto</i> (Italian Coast Guard)	Ministry of Interior	YES	Coast guard representatives work in NCC
MT	Armed Forces of Malta	Armed Forces of Malta	YES	RCC and NCC are managed by the same authority

Note: EU Member State country codes: CY, Cyprus; EL, Greece; ES, Spain; IT, Italy; and MT, Malta.

Source: Frontex, 2012

¹⁹⁵ FRA (2009), p. 8.

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.

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.



5

Treatment on board government vessels



Charter of Fundamental Rights of the European Union

Article 1 (Human dignity)

Human dignity is inviolable. It must be respected and protected.

This chapter provides information on how migrants are treated after EU Member States' patrol or rescue vessels take them on board. It describes where they put rescued migrants, how they meet their basic necessities and what information they give them.

5.1. Taking on board

Migrants interviewed for this research raised very few complaints about how they were treated during the rescue operation. As Chapter 2 reports, rescue operations are dangerous for all persons involved. Migrants moving to one side of the boat jeopardise its stability, risking its capsizing and endangering their lives.

The situation during rescue operations is typically quite tense. Rescue officers interviewed noted that in these situations the priority is to ensure the safety of the migrants. During a patrol observation, a Hellenic Coast Guard crew member explained, for example:

"We have to lift people very quickly. We lift them with our bare hands because they are either drowning or are about to be tipped over in their overloaded vessels. [...] it is very stressful. And you don't just talk with them. You drag them out of the sea[...] Our goal is to save them all."

(Hellenic Coast Guard staff, interviewed in Greece)

In interviews carried out in the Canary Islands, officials and other interviewees considered that the use of

intimidating language employed during an interception or rescue operation was necessary to maintain order during dangerous situations. A representative of a migrant association justified even showing weapons to keep people calm.

Whenever weather and sea conditions allow for it, the practice is that women, children as well as the sick are the first to be taken on board the rescue vessel. Interviews with migrants confirmed this. For example:

"He checked if there were women with problems or sick. Some women were pregnant, and then they took them on the Italian boat. After taking the women, they rescue the children."

(Man from Ivory Coast crossed to Lampedusa, Italy in 2011)

5.2. Placement on board

Migrants interviewed for this research reported that rescue and patrol officers treated them decently overall while they were on board the rescue vessel. Migrants are relieved after the rescue. They are tired and usually stay quiet during the time required to reach port and typically follow the rescue teams' orders. A Pakistani man, interviewed in Greece, said:

Question: "How did they treat you?"

Reply: "They were very polite, very polite."

(Pakistani man, crossed to Greece in 2010)

The few alleged incidents which emerged from the interviews relate primarily to the use of degrading or offensive language. One migrant rescued by the Italian authorities, for example, reported:

"They said bad words [...] They think that we do not understand. We are not animals we are people."

(Tunisian man, crossed to Lampedusa, Italy in 2011)

Rescue crew usually place migrants one next to another on the deck of the rescue vessel. They do not handcuff them, but they typically oblige them to remain confined to specific areas of the boat, usually on the deck. On larger vessels, they may also place them elsewhere. Interviews carried out with migrants trying to reach Spain noted that they put some migrants in cabins in groups of seven to eight persons. There is overall agreement that such restrictions are imposed for technical and logistical reasons, such as lack of other space, speed of the ship or a danger of falling overboard. Such limitations are seen as unavoidable, particularly given the relatively small size of rescue vessels. The migrants interviewed did not complain about these restrictions of movement during the trip following the interception.

Question: "And could you move on the ship?"

Reply: "No, no, no, how can you move? The ship is going very fast, how can you move, if you move you can fall too, so you sit there, you sit and that's it."

(Senegalese man, crossed to the Canary Islands, Spain in 2005)

Larger rescue vessels may have an on-board detention facility. FRA visited a small facility of approximately one-by-two metres on one patrol vessel. Such facilities, if they exist, are not normally used for migrants; they are instead for suspected dangerous criminals who may be arrested during patrolling activities at sea. The FRA has no information on the use of cells during push-back operations.

If possible, the practice is to place women next to one another, although no formal separation from men is normally possible on rescue boats. Exceptionally, in case of specific needs, women are taken inside and stay with the patrol crew, as a Nigerian woman who was rescued with her baby in Spain reported.

While rescue personnel might collect some *prima facie* evidence if one of the migrants appears to be a smuggler or a facilitator, generally rescue vessel personnel do not conduct any further investigations. After disembarkation, police carry out interviews and interrogations.

The Hellenic Coast Guard indicated, however, that they conduct searches for travel documents amongst those rescued or intercepted. They also said that they usually conduct individual body searches in order to detect, on the one hand, any health risks that the rescued migrants might run and, on the other, any illegal substances and/or weapons that they might be carrying. These searches usually take place on the deck and are meant to ensure the safety of the passengers and crew. Under extreme weather conditions, or in cases of overcrowding, they conduct only a very basic search and a more extensive one takes place after disembarkation.

Patrol and rescue officers in Greece, and also in other countries, are primarily male. Some local Hellenic Coast

Guard staff interviewed said that they are training women officers to join the patrol vessel crews. The absence of female crew members on patrol or rescue vessels may pose problems when searches are conducted.

An Afghan interviewee in Greece, for example, said that in January 2009, a rescue ship crew member asked a group of Muslim migrants, including women, to remove their clothes as part of a search for drugs or weapons and health hazards while on the vessel's deck. While the men took their clothes off, they refused to accept the same for the women. As a result, one of the crew members and the migrants quarrelled.

5.3. Food and water

The possibility and the need to provide food and water to migrants vary depending on the type of rescue vessel and on the distance to the port of destination. Many interception or rescue operations take place near the coast and the transfer to land is relatively fast. In addition, migrants may become seasick and lose interest in food.

In general terms, a certain quantity of water as well as some basic food items, usually snacks or biscuits, are available on public authorities' vessels. The FRA visited a small Finnish patrol boat in Greece, which was capable of taking up to 10 persons on board in case of emergency. It carried nine litres of water. A Portuguese vessel deployed in Spain had sufficient drinking water and biscuits on board. In contrast, a Spanish *Guardia Civil* patrol had only slightly more water than the crew needed. The crew explained that they give migrants only a small amount of water in order to avoid sickness and turmoil on the small boat during its distribution. In Lampedusa, the managing body of the reception facility supplies water, food and blankets to the coast guard patrols. They constantly replenish patrols during times of large numbers of migrant arrivals.

Fishing boats called upon to assist in a rescue operation are not specifically equipped for such events, but may share what they have on board.

"We did our best to keep them warm and we gave them bread and tea."

(Tunisian fisherman, interviewed in Tunisia)

The migrants interviewed raised no concerns about the provision of food while on board the rescue or patrol vessel. Most interviewed migrants said that they were given water after being taken on board a patrol or rescue vessel, and a number of them mentioned that they were also given food.

Question: "Didn't they give you food, water or blankets once you were on the ship?"

Reply: "No, only water."

(Moroccan man, crossed to the Canary Islands, Spain in 2011)

Question: "And did they give you water and food, or something? Did they give you anything?"

Reply: "On their boat they gave me coffee and water."

(Nigerian women, crossed to southern Spain in 2010)

"They took women and children first into their boat, there were three boats. They gave us water and everything, it was good."

(Ethiopian man, crossed to Malta in April 2011)

"[The Italian Coast Guard] were taking care of us and inquiring about our situation; we were not in need of any medical assistance but we were rather hungry, so food, juice and water were distributed to all of us."

(Tunisian man, crossed to Lampedusa in 2006 and subsequently returned, interviewed in Tunisia)

5.4. Blankets and dry clothing

Dry clothes and blankets appear to be less systematically available on the rescue or patrol boats. Most migrants interviewed in Andalusia said they received blankets, whereas this was the case for only some interviewees in Greece, Italy and the Canary Islands. This suggests that blankets may be available on the boat, but that there may not be enough if a large number of persons are rescued. A migrant interviewed in the Canaries said:

Question: "Dry clothes, blankets, what did they give you on the Guardia Civil ship?"

Reply: "No, nothing."

(Senegalese man, crossed to the Canary Islands, Spain in 2005)

Vessels deployed during Frontex operations may not be equipped with blankets if they come from EU Member States which do not experience the phenomenon of migrants arriving at sea. As an illustration, the FRA visited a Portuguese vessel deployed in Spain which had no blankets on board when it arrived at the area of operation. However, seeing the need, it immediately requested and received blankets from the Spanish Red Cross. These were available on board when the FRA visited the vessel, a day prior to the vessel being involved in a rescue operation.

Fishing boats performing rescue operations are, however, usually not equipped with relief items. A Tunisian fishermen said:

"In our case, we do not have clothing on board, we only have a few blankets belonging to the members of the crew."

(Tunisian, fisherman, interviewed in Tunisia)

The migrants interviewed made only limited references to receiving dry clothing on the vessels. This could suggest that, particularly on smaller rescue or patrol boats, the distribution of dry clothing is not considered practical at sea and can be better done once on shore when there is time to select clothing of adequate size.

5.5. Medical assistance

Government vessels and fishing boats which may assist in rescue operations carry an emergency kit. For government vessels, the corresponding authority usually determines the contents of the emergency kits, taking into account national rules and standards. The composition of the kits may vary according to the size of the boat and whether it is used for short trips near the coast or for longer trips.

The contents of medical kits also vary from one country to another, as the FRA observed when visiting patrol vessels deployed in Frontex joint operations. Typical items included are: bandages of different types, disinfection material and fever and pain medication. Some kits also contain thermal blankets. Some patrol vessels have resuscitation equipment for those in danger of drowning.

Larger vessels may have more sophisticated equipment. A Romanian patrol vessel deployed during a Frontex joint operation which FRA visited had a first aid kit for the crew as well as a larger medical kit with oxygen masks and intravenous devices, some of whose equipment required advanced first-aid knowledge. A *Guardia Civil* captain said his vessel used the medical kit frequently, including for the successful resuscitation of potential drowning victims. Some larger *Guardia Civil* vessels are equipped with a radio-medical system, under which a doctor can discuss symptoms and direct treatment, he also said. With this system, crew could assist with on-board births, for example.

According to the Frontex Common Core Curriculum (CCC) for border guards, all border guards must receive first-aid training and be able to apply the drowning protocol on a mannequin.¹⁹⁶ First aid training appears to be generally provided to staff operating at sea. A *Guardia Civil* vessel captain interviewed by the FRA stressed, for example, that the crew received regular refresher courses in first aid.

Rescued migrants can be in critical condition. There may be pregnant women or migrants in situations of hypothermia. In many cases the crew takes steps to monitor the migrants' state of health; for example, rescue officers in Spain noted that if the *Guardia Civil*

¹⁹⁶ Frontex (2012d).

identifies persons in need of urgent medical aid during aerial surveillance, they pass this information on to rescue officers who then take Red Cross personnel with them to attend to these people immediately.

Migrants who require emergency medical help are evacuated by helicopter, as evidenced by interviews in Italy, Malta and Spain. In Malta, for example, in 2011 one such airlift was carried out, although in this case with helicopters stationed on the NATO vessel from which the migrants were brought to Malta. The Armed Forces of Malta recently also purchased special material for such airborne operations, such as equipment for winching small children and babies from boats.

Promising practice

Placing medical staff on-board rescue vessels

Vessels belonging to the Italian Coast Guard (*Capitaneria di Porto*) and *Guardia di Finanza* in Lampedusa are equipped with voluntary medical personnel belonging to the Order of Malta. The Order of Malta has two doctors, two nurses and two experienced rescuers in Lampedusa, under an agreement with the Ministry of Interior and cooperation protocols with the *Guardia di Finanza* and the Port Authority. The staff, made up entirely of volunteers, is used in cases of search and rescue. Medical personnel receive a first-aid kit, helping to ensure that migrants in need of medical intervention are assisted even during a rescue event.

Source: Interview with *Corpo Italiano di Soccorso dell'Ordine di Malta*. Rome, 4 October 2011. See also www.orderofmalta.int/wp-content/uploads/archive/pubblicazioni/ITA_Ordine_di_Malta_a_Lampedusa.pdf

5.6. Information provided to migrants while on board

In practice, migrants receive little or no information while on board rescue vessels. The priority is to bring them to a place of safety. Exchanges between migrants and the crew are reduced to a bare minimum, as illustrated by a Tunisian man rescued by an Italian vessel:

"There was no discussion between migrants and the Italian Coast Guard; only a few instructions relating to food and clothes distribution and where to stay on the boat."

(Tunisian man, crossed to Lampedusa in 2006 and subsequently returned, interviewed in Tunisia)

Migrants' interviews revealed that they lacked information on their fate. They were not usually told where they would be brought and what would happen to them. When they are rescued, they are transferred

to the rescue ship with barely a word spoken and there are no translators present.

Crew members often do not speak a language that the migrants understand. Basic information is often transmitted in a non-verbal manner, through hand movements or body language. A Tunisian interviewed for this research tried to use an Italian-speaking Somali companion to find out what was going to happen to them:

"We did not know exactly where they were taking us and we kept asking our Somali fellow to ask them and we were asked to keep quiet until our arrival."

(Tunisian man, crossed to Lampedusa in 2008 and subsequently returned, interviewed in Tunisia)

The psychological state of the rescued migrants, language barriers as well as the practical complications to organise interpretation on board rescue vessels all combine to make it difficult to inform intercepted or rescued migrants about their rights. In practice, as illustrated by a migrant interviewed in the Canaries, provision of information is left to police and judges after arrival.

Question: "And how long did it take to reach land?"

Reply: "About fifty minutes, and we were going fast."

Question: "And they didn't tell you anything or ask how you were?"

Reply: "No, they didn't tell us anything, they didn't say anything, they went there, grabbed the ship, cut the rope, [...] and took the people."

(Senegalese man, crossed to the Canary Islands, Spain in 2005)

Interviews carried out in Morocco with intercepted migrants who experienced being handed over to a Moroccan vessel at sea, said that exchanges between the Spanish and the Moroccan authorities were conducted in Spanish, a language that the migrants interviewed could not understand.

In general, the migrants interviewed did not consider the limited information provided to them as a major problem. None spoke of 'communication barriers', or of authorities' refusal to communicate with them. The gratitude at being rescued was predominant. In contrast, some migrants interviewed in Morocco raised the issue of the confiscation of mobile phones as a way to prevent them from communicating with the outside world.

The limited possibilities for communication and the general state of the rescued or intercepted migrants make it virtually impossible to identify whether migrants are seeking asylum. In none of the countries is asylum information provided during interception, the rescue phase or the subsequent transfer from the

rescue vessel to the port. At these stages, the primary task is to deliver the migrants to a place of safety and to cater for their immediate needs. Procedures come at a later stage, once their lives are no longer at risk. An official interviewed in Spain put this clearly: “Rescue activity is in the sea and immigration activities are done at land.” Similarly, in Italy a representative of the *Guardia di Finanza* explained that:

“[Asylum] is not the priority. At that time we have other priorities. Once you arrive on the ground you have plenty of time to do everything (e.g. asylum application). It makes no sense to do it on the boat.”

(Guardia di Finanza staff, interviewed in Italy)

In practice, it is difficult to imagine how persons in need of international protection could be identified on board. Migrants are exhausted from the trip. Their psychological state would make it difficult to discuss issues with them which go beyond their immediate needs. Identification of persons in need of international protection would also require the existence of multilingual interpretation services on the vessel. In addition, rescue personnel may not have received the necessary training to identify persons who seek asylum. Finally, the presence of another person on board a rescue vessel would add more pressure to the delicate balance of speed and safety that the crew is called upon to maintain in rescue operations.

Indeed, none of the migrants interviewed for this research said that they actually inquired about asylum or related issues while on the rescue vessel. They did not consider this to be relevant at this stage. A UNHCR field worker interviewed by the FRA in Italy stressed that “the patrol vessel is not the right place to collect asylum requests. We think the right time is the day after arrival, after having slept, eaten and taken a shower”. This statement reflects the UNHCR guidance that “processing onboard maritime vessels is generally not appropriate”.¹⁹⁷ The IMO has taken the same approach: “It should also be ensured that the any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety.”¹⁹⁸

Referral mechanisms for victims of trafficking can also not be implemented at this stage due to practical difficulties, although at least theoretically, a suspected victim could be separated from the rest of the group.

Conclusions

As described in Chapter 2, 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 of 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.

¹⁹⁷ UNHCR (2010b), part IV.

¹⁹⁸ IMO (2009), para. 2 (2).

PART TWO: The situation immediately upon arrival

6

Immediate humanitarian response upon arrival



International Covenant on Economic, Social and Cultural Rights

Article 11 (Right to an adequate standard of living)

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing

Article 12 (Right to health)

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

This chapter deals with the immediate response to newly arrived migrants. It covers those migrants who are rescued and brought to port, as well as those who manage to reach EU soil by boat without being intercepted or rescued, provided they are identified and apprehended soon after their arrival and do not disperse in the community. It describes how the authorities in Greece, Italy, Malta, Spain and in part in Cyprus manage the provision of basic assistance to cover the essential needs of migrants arriving by sea. It illustrates the tensions between humanitarian and security considerations that guide the immediate response to arrivals on the pier, healthcare provisioning and placement in appropriate facilities.

The degree to which humanitarian organisations are involved in the reception of migrants arriving by sea illustrates such tensions. In some locations, collaboration mechanisms have been established with civil society actors to cater to the needs of migrants, and in others, the initial processing remains essentially a matter for the coast guards and the police. Another indicator of the priority of humanitarian needs is the timing

of medical care, which in some countries, as will be described, is carried out immediately upon disembarkation, and in others, only at a later stage.

To give due priority and attention to the phenomenon of arrivals by sea but also to facilitate immediate response and the release of funds, Italy declared an emergency situation in March 2002 in regions where arrivals by sea are more frequent, particularly in Sicily. This situation is the result of the adoption of a series of Italian Prime Ministerial Decrees (DPCM) on the basis of the Law on civil defence.¹⁹⁹ Since 2002, when the first DPCM²⁰⁰ declaring an emergency situation was enacted, its effects were subsequently extended by a number of other measures, rendering the emergency situation permanent.²⁰¹ In 2011, Italy extended the emergency situation across its entire national territory, given a serious immigration crisis triggered by large numbers of migrants fleeing Libya.²⁰² Soon after this extension, a Special Commissioner, the Prefect of Palermo, was appointed by a Prime Ministerial Order (OPCM) under Article 5 of the Italian Law on civil defence to manage the crisis. He had to focus particularly on the Lampedusa area, with support from the police, military forces and the Civil Protection Department.²⁰³ The declared emergency situation was later further extended until 31 December 2012.²⁰⁴

199 Italy, Law No. 225 of 24 February 1992, Art. 5.

200 Italy, DPCM of 20 March 2002, No. 21128.

201 See, in particular the following DPCMs of:
11 December 2002 No. 25687; 7 November 2003 No. 12206;
23 December 2004 No. 16289; 28 October 2005 No. 19729;
16 March 2007 No. 25760; 14 February 2008 No. 29956;
19 November 2009 No. 42326; 17 October 2010, No. 49972.

202 Italy, DPCM of 12 February 2011 No. 50936.

203 Italy, Law on Civil Defence by the Prime Ministerial Order (OPCM) of 18 February 2011 No. 3924.

204 Italy, DPCM of 6 October 2011.

The Special Commissioner was given a number of tasks, including defining action plans for emergency response, adopting public security measures and setting up new structures for offering first aid to migrants and identifying their legal status. Until 5 April 2011, arriving Tunisians were provided with a six-month residence permit for humanitarian reasons, subsequently renewed until November 2012.²⁰⁵ In April 2011 the Director of the Civil Protection Department²⁰⁶ took over this emergency response role from the Prefect of Palermo. He managed the relocation process of migrants in Lampedusa to other mainland points and assisted in expanding the capacity to host separated children.²⁰⁷

6.1. Reception upon arrival

Migrants arriving by sea often experience long periods of deprivation and may have been victims of crime or violence. On the boats used for crossing, food and water are typically scarce, migrants have few or no personal and hygienic items with them and their clothing is wet. Upon disembarkation, migrants may need food, water, blankets, clothing, sanitary items as well as the possibility to rest. Humanitarian assistance should be provided as soon as possible, ideally at or near the places of disembarkation or arrival.

A systematic framework for providing humanitarian assistance does not always exist. The humanitarian response varies considerably among EU Member States and arrival points. Although all the EU Member States reviewed have humanitarian actors with expertise in delivering assistance to persons in need, these are not systematically involved. While Italy and Spain have signed agreements to cooperate with NGOs, in Cyprus, Greece and Malta it is normally up to the coast guards and the police to respond to the humanitarian needs of disembarked persons. Law enforcement officers, however, are not usually trained to act as humanitarian workers.

A country-wide humanitarian assistance framework has been established in Spain and in parts of Italy. The Spanish authorities signed an agreement with the Spanish Red Cross, covering all places of arrivals. In Italy, a project was set up in 2006 to respond to the humanitarian and protection needs of migrants arriving by sea in Lampedusa. The *Praesidium* project has since been extended to other arrival locations, although not to all.

²⁰⁵ Italy, DPCM of 5 April 2011, Circular of the Ministry of Internal Affairs of 8 April 2011 No. 2990, DPCM of 6 October 2011 and DPCM of 15 May 2012.

²⁰⁶ Italy, Prime Ministerial Order (OPCM) of 13 April 2011 No. 3933.

²⁰⁷ Italy, Decree of the Delegate Commissioner for North Africa Emergency of 18 May 2011.

Promising practice

Cooperating to assist disembarking migrants

To assist authorities with disembarking migrants, NGOs and international organisations established a permanent presence on Lampedusa island, where they offer medical care, information about migrants' rights and obligations in Italy and help in relocating migrants off the island.

This successful joint NGO, international organisations and public authorities' effort created the so-called 'Lampedusa model', which refers to collaborative procedures to assist and inform migrants, to identify and refer vulnerable cases to adequate assistance and to monitor the compliance



of reception conditions with national and international standards. Initially begun in Lampedusa, the *Praesidium* project has subsequently been extended to other select ports of arrival in Sicily and mainland Italy. Based on the experiences collected, the participating organisations published in 2011 recommendations and good practices in dealing with arrivals by sea of mixed-status migrants, including, for example, asylum seekers and economic refugees.²⁰⁸

Under *Praesidium*, which has been operational since 2006, the International Organisation for Migration, the UNHCR, the Italian Red Cross and, more recently, Save the Children Italy cooperate with the Ministry of Interior, which finances the project with support from EU funds.

Source: *Progetto Praesidium*, 2011

In Greece and Malta, humanitarian NGOs' involvement has been limited.

"We arrived at about 4 p.m. There were mainly armed soldiers. There were also some civilians, but I don't know who they were."

(Ethiopian man, crossed to Malta in 2011)

Question: "What was the first thing that happened when you reached the island?"

Reply: "When we arrived there was a police station, they registered us and then they put us in a car and drove us to the hospital."

(Afghan woman, crossed to Mitilini, Greece in 2009)

Greece has implemented specific projects but has no systematic humanitarian response framework. The Praxis

²⁰⁸ Progetto Praesidium (2011).

mobile support units²⁰⁹ project, for example, co-financed by the EU and the Greek Ministry of Health and Social Security, deploys a team of medical practitioners, social workers, translators and lawyers, to provide newly arrived migrants with medical, social and legal assistance on select Greek islands. For safety reasons, in Malta outside actors are in principle not allowed to be present on the pier, although authorities have made some exceptions for Maltese Red Cross medical staff. After migrants have been transported to police headquarters in Floriana, relief items are distributed to the migrants, either before or after they undergo a police interview. Certain items, such as baby food, are normally not available at police headquarters. Baby food is usually provided at a later stage, once the migrants are transferred to one of the two detention centres on the island. Maltese authorities indicated, however, that when processing times are long, arrangements are made for the provision of baby food at police headquarters.²¹⁰

Even those EU Member States which have drawn up contingency plans involving humanitarian NGOs may not have response mechanisms available at all landing places. While those intercepted or rescued at sea are brought to main ports where some infrastructure exists, some migrants continue to arrive on remote beaches or small islands where little or no support facilities are in place. In some cases, migrants may also try to disperse upon arrival in order to avoid being caught, but land-based surveillance systems or alerts by the local population can make this difficult in practice:

"A light in one house above the place where we disembarked made me realise that somebody had observed our arrival [...] I thought that she may have called the police [...]. Before the arrival of the police, me and the other person went towards the mountain. Suddenly, the police saw us and handcuffed us together with seven other persons."

(Moroccan man, crossed to the Canary Islands in 2004)

As most interlocutors referred generally to the success of response mechanisms during disembarkation on the pier in Italy and Spain, they are described in some detail.

In Spain, Red Cross Emergency Immediate Response Teams (*Equipos de Respuesta Inmediata de Emergencia*) are present at the place of arrival. They are the first to meet the migrants when they disembark from the rescue vessel. As soon as a dinghy is located, authorities inform all key players including the Red Cross by short message service (SMS). They then send a second SMS when the rescue operation is carried out with more accurate information on numbers of migrants and a breakdown by sex and health status. This is followed by a third SMS with information on time and port of arrival, allowing the Red Cross to set up a medical post as well as a cart with food and water or hot drinks in advance of the arrival.

²⁰⁹ ICMC (2011b), p. 7.

²¹⁰ Information provided to the FRA by the Ministry of Justice and Home Affairs, November 2012.

Migrants step down from the rescue boat one by one. A Red Cross doctor sees each person and the Red Cross has ambulances on stand-by to take pregnant women and the seriously ill to the local hospital. All women and children and those in need of medical assistance are brought to the Red Cross facility. Women and children also have the possibility to shower and see a social worker.

In addition to the Red Cross doctor, other staff provide each migrant with basic relief items, including dry clothing, shoes, food and drinks as well as sanitary kits designed for either men or women.

The central and the autonomous government, such as that of the Canary Islands, finance all material resources available to the Red Cross. In the southern Andalusian town of Motril, the FRA witnessed the good relationship and effective cooperation of activities between authorities and the Red Cross.

All migrants interviewed in Andalusia recalled that the Red Cross was at the disembarkation points and gave them food, drinks, dry clothes and blankets. A Senegalese man who had entered Spain through the Canary Islands in 2006 recounted:

"The Red Cross first [...] when we arrived here in the port, they asked if anyone has a fever or something whatever, and everything: a change of my clothes; give us something to eat, water and all that. All the basic needs and then [...] they took us to the police."

(Senegalese man, crossed to the Canary Islands in 2006)

In Lampedusa, NGOs and international organisations involved in the *Praesidium* project deliver humanitarian and other assistance at points of arrivals.

FRA research shows consistent evidence that basic humanitarian assistance with food, water and blankets is normally provided on the pier in Lampedusa. This evidence results from testimonies gathered over several different years.

"They gave us blankets because of the cold, biscuits, milk and water to drink."

(Nigerian man, crossed to Lampedusa, Italy in 2011)

"Many persons were there waiting for us: police agents together with interpreters, doctors, the Italian Red Cross, I was told even journalists were there but I have not met any. Through the interpreter we have been told that we should take a shower: soap and shampoo were given to us. We received also some clothing material, and [...] after disembarkation we boarded several vehicles and escorted by the police we left the place and we were taken to the detention centre. It was around 12.00."

(Tunisian man, crossed to Lampedusa in 2006 and returned to Tunisia in 2010, interviewed in Tunisia)

As noted in this section and also in the context of these promising practices, there are aspects that can be improved. In 2011, challenges emerged in Lampedusa as large numbers of migrants reached the island. A contingency plan was either lacking or was not implemented. This resulted in chaos at the pier, a blurred separation between women, men and minors and a lack of basic necessities. Some Tunisians experienced the lack of organisation as follows:

“When they arrived, there were other people at the pier and some blankets were available. They were really hungry but nobody gave them food. But there was food left by other people and they ate that.”

(Tunisian, crossed to Lampedusa, Italy, in 2011)

“Altogether reception conditions were not good. They left us at the pier, sitting for an entire night. It was 14 May.”

(Tunisian man, crossed to Lampedusa, Italy, in 2011)

Praesidium partners are not the only organisations which were present in Lampedusa during the crisis in 2011; several other organisations such as Doctors without Borders Italy (*Medici Senza Frontiere*), promoter of social and cultural activities *Associazione di Promozione Sociali* (ARCI), rights of the child NGO *Terres des Hommes*, and institutions, such as the National Institute for Health, Migration and Poverty (*Istituto Nazionale per la salute, le migrazioni e la povertà*), were actively providing support. This multi-organisational approach allowed for targeted assistance in each organisation's field of competence, but also made coordination more challenging. Where several actors are involved in the reception process, as is the case in Italy and Spain, it becomes crucial to coordinate among the various players providing humanitarian assistance and deal more generally with the status of the newly arrived migrants.

Cooperation between law enforcement and humanitarian actors from civil society has not always been smooth. Most observers agreed in general that in places with significant numbers of arrivals, such as the Canary Islands and Lampedusa, considerable improvements in the management of landing and referral processes have been made. In Italy, the readiness to collaborate with civil society actors temporarily decreased when the number of arrivals declined following the push backs to Libya in 2009.

6.2. Healthcare

The health conditions of migrants arriving by sea varies, depending on a number of factors, including the duration of the journey, weather and sea conditions, as well as experiences prior to departing to sea. Common health problems include dehydration, hypothermia, bruises caused by the mix of fuel and salted water,

burns caused by the engine, heat stroke and respiratory problems. Migrants who have had a particularly long and difficult journey or witnessed the death of other persons while crossing may also be traumatised. Others may suffer from post-traumatic stress disorder (PTSD), which may reflect their experiences prior to crossing.

The medical response to persons arriving by sea can be provided at different points in time, while still at sea, upon disembarkation or before or after the migrants are placed in accommodation. The first possibility – as is described in Chapter 5 – is emergency assistance provided while still at sea. It primarily includes air evacuations to hospitals, and, in Lampedusa, doctors from the Order of Malta provide services from rescue vessels. Alternatively, depending on the country and place of arrival, arrangements are made for health personnel to be present on the pier during disembarkation. After disembarkation, migrants may also be referred to a medical check before they are placed in accommodation. Finally, detention facilities where migrants are placed have arrangements to provide medical care.

Individual medical screening at the pier

An early identification of persons in need of medical treatment is extremely important. Given that in most cases it is not feasible to screen migrants while still at sea, their arrival at the pier is the first opportunity for an individual screening.

In all four countries, an ambulance can be put on stand-by at the pier whenever rescue officers identify an emergency. In some cases, an ambulance is always deployed, while in other cases, it is only called when needed. In Malta, for example, in the past an ambulance was present at each arrival. From 2011, the procedure changed, with the doctor deciding on-site whether a migrant needed urgent medical attention, and if so, calling an ambulance to transport the migrant to hospital. In Greece, if a person requires emergency healthcare after being rescued at sea, the coast guard crew notifies their colleagues on land to arrange for an ambulance at the disembarkation point. Before 2010, coast guards and local authorities in Lesbos noted that in some cases ambulances were not available and that the person in need had to be transferred by coast guard vehicle to the nearest hospital on the island straight after disembarkation.

With the exception of Greece, FRA research showed that a doctor or a team of medical staff is usually present during disembarkation. For this purpose, in Spain and in Lampedusa the authorities cooperate closely with NGOs. In Spain, based on the agreement signed with the central authorities, Red Cross doctors and nurses are present at the pier during disembarkation. In Lampedusa, a variety of medical actors are present in the

port. In Malta, it is usually the doctor of the port health authority who is present, although sometimes the Red Cross sends nurses to assist.

The FRA found the medical responses at the pier in Spain and in Lampedusa, Italy, to be the most effective. In both cases, a doctor stands dockside and uses basic parameters to triage those in most need of medical care.

In Spain, Red Cross activities are based on a protocol concluded with the central authorities.

Promising practice

Screening health status at the pier

The Red Cross and Spanish authorities collaborate particularly effectively in Motril, Andalusia, where the Red Cross has been involved with arrivals since 2005. Red Cross doctors make an initial health assessment just after migrants disembark, while they are still under *Guardia Civil* custody and before they are brought to a detention facility. Red Cross doctors screen each migrant individually, as the FRA directly observed. Those who need medical follow-up and all women are directed to the Red Cross facility in the port, while others are taken to a police facility.

Red Cross teams deployed for an arrival consist of 10–15 persons, including doctors, nurses, ambulance drivers, social workers and translators. The Red Cross team present during the FRA observation spoke English and had a French interpreter with them. Each operation lasts from three to five hours, although unofficially they continue working while migrants remain detained in the police centre at the port, which can last up to 72 hours.

Source: interviews and observations carried out by the FRA

The screening procedure is very swift, conducted in under a minute per individual. The Red Cross described it as follows:

“Every immigrant has an assessment sheet filled with several clinical data, and the sheet has two bracelets. [...] If we see [that migrants] are fine and do not need health care – only humanitarian aid, hot drink, clothing, shoes [...] they receive one bracelet and] go into police custody [...]. If [their health situation is] bad, [they receive the other bracelet and] they come to the nursing room. [...] [W]e base [the triage] on an adaptation of the star method, which basically is: can walk or cannot walk? We ask them, or if we see that someone cannot walk immediately he goes to the nursing room, if we see that he has a temperature below 33 or above 37 degrees he goes to the nursing room, if we see that maybe they have respiratory problems they go to the nursing room.”

(Spanish Red Cross staff, interviewed in Spain)

The procedure was similar in Lampedusa in 2011. Doctors without Borders Italy (*Medici Senza Frontiere*) explained that one of their doctors is dockside when the migrants disembark and verifies whether there are any emergency cases. Subsequently, as the migrants are at the pier and are given food, a second screening is done. In case of large flows of migrants, medical screenings at the pier are carried out quickly and focus on life-threatening and serious injuries. In contrast to Spain, several organisations provide medical assistance in Lampedusa, which allows for most migrants to be attended to, even when there is a large group. Because there are a number of organisations, they require coordination, particularly given the absence of a shared, standard written procedure.

The local health authority in Lampedusa is competent to provide healthcare services once the migrant is accommodated in a temporary centre, such as the reception facility *Contrada Imbriacola*. Taking into consideration the limits of the island itself and the constraints of the detention condition, the service provided appeared to be acceptable.

Medical clearance at the hospital

In Greece and Malta, the migrants interviewed did not recall any medical screening at the pier. In Malta, however, a doctor is present upon arrival and identifies persons who require hospitalisation. In both countries, migrants who arrived by sea are systematically transferred to the local hospital or clinic for medical clearance. Public health concerns seem to take precedence over humanitarian considerations. The Maltese Port Health Authority said that the primary objective of these medical checks is to protect the population, which also includes other migrants with whom the person will be detained, against potentially infectious diseases.

In Malta, according to the Port Health Authorities, which carries out these medical checks, each migrant is given a ‘full physical check’, including: taking his or her temperature and blood pressure; and examining the abdomen and extremities, with particular attention given to infectious skin conditions. This medical check-up is said to take about 10–15 minutes per migrant and, based upon it, a health report is written for each person. If the doctor determines that a migrant requires immediate medical assistance, an ambulance is called.

The official accounts do not seem to fully align with migrants’ experiences. One migrant interviewed for this report, who arrived in 2011, claimed that no medical check was carried out at the police station, and that the first time he saw a doctor was in detention. Two migrants who had arrived prior to 2011 also said that there were no doctors present during the initial screening process. While this might indicate that

medical checks are not carried out systematically upon arrival, and that a doctor may not always be present, it is also possible that these checks were so brief that the migrants no longer recalled them.

In Greece, coast guard officers escort migrants in groups from the pier to the local hospital. Doctors are responsible for ascertaining whether migrants carry any transmittable diseases or face any health problems. Pregnant women and families with small children are checked first. The health checks consist mainly of an x-ray and a general practitioner's preliminary check. An ultrasound exam is usually performed for pregnant women. There is no interpretation available at the hospital, nor are the migrants seen by psychologists. During times when arrival numbers were high, the local authorities in Lesbos admitted that the process was inadequate.

Medical checks in Greece do not seem to be adequate for identifying persons at risk. Indicative of the deficit in pre-screening and initial health checks is the case of a 19-year-old Iraqi girl who had fresh physical wounds and suffered from post-traumatic stress, yet passed all preliminary medical checks and ended up in a police detention facility in the eastern Aegean Islands. The girl did not receive any medical care during the three days after her arrival and apprehension on the island, fellow detainees said.

Referral to hospitals

Where identified, pregnant women and the seriously ill are referred to local hospitals. In case of dehydration or malnutrition, there is a risk of pre-term delivery. Not all places of arrival have a maternity ward. Pregnant women arriving in Lampedusa, for example, must be taken to Palermo.

The research did not systematically look at healthcare issues once migrants were referred to the relevant facilities. Two issues emerged nevertheless from the interviews.

First, health staff in Spain and authorities on the Greek islands acknowledged the absence of specialised care for people with mental health issues. This also concerns specialised care for survivors of torture, for whom identification procedures are generally weak or lacking.²¹¹

Communication difficulties between migrants and local doctors was another issue that emerged from interviews in Spain and Greece, but may also be relevant for other EU Member States. In Motril, for example, the healthcare centre does not have an interpreter. The Red

Cross sends migrants to the doctor with briefing notes in Spanish, given that the Red Cross lacks the staff and capacity to accompany patients.

6.3. Accommodation during the first hours and days

After their arrival, unless hospitalised, migrants are typically deprived of liberty. They spend the first hours or days in a closed facility. The nature of such facilities varies. They include immigration detention centres, which are used in Malta; cells in police stations, which are used on the Greek islands and in some places in Spain; as well as closed-reception centres, which are used in Lampedusa, where migrants can move freely within the centre but are not allowed to leave. Alternatives to detention are usually not provided for in either law or practice.²¹²

Detention to prevent unauthorised entry

The police arrest migrants upon arrival and take them to a closed facility either immediately or after they receive emergency humanitarian assistance at the pier or undergo a police identification interview. In practice, no alternative open reception possibilities exist at points of arrival, except for those who are hospitalised. Even with hospitalisation, in some cases the police may accompany a person to prevent him or her from absconding.

The purpose of the deprivation of liberty is either to prevent unauthorised entry or to effect the removal of the person. This is in line with Article 5 (1) f of the ECHR on the right to liberty and security of person. As Table 9 illustrates, in three of the five countries reviewed, domestic law requires that detention beyond short-term arrest be accompanied by a removal order. In Malta, a removal order is typically issued to migrants arriving by sea. In other words, once the short-term arrest time limit provided for in domestic law expires, the deprivation of liberty can only be continued if the person is issued an expulsion order. Such a distinction may be relevant when determining the applicable safeguards against arbitrary detention.

211 See Section 6.6 of the handbook; ICMC (2011a), pp. 76–78.

212 Council of Europe, PACE (2010).



Table 9: Removal order requirements for keeping a person in detention beyond a short-term arrest, five EU Member States

	Removal order required by law? (Yes/No)	After what timeframe?	Source
CY	Yes	8 days	The Aliens and Immigration Law, Article 13 (2)
EL	Yes	After 3 days	Law 3386/2005, Article 76 (3)
ES	Yes	72 hours	Law 4/2000, Articles 60 (1), 62 and 64
IT	No		Immigration Law, Article 10
MT	No	<i>In practice a removal order is typically issued upon arrival</i>	Immigration Act, Articles 5 and 14 (2)

Notes: In Malta, according to Articles 5 and 14 (2) of the Maltese Immigration Act, detention is an automatic consequence of a refusal to grant admission or of the issuing of a removal order for a person considered to be a prohibited immigrant as defined in Article 5 of the Act.

EU Member State country codes: CY, Cyprus; EL, Greece; ES, Spain; IT, Italy; and MT, Malta.

Source: Information extracted from domestic legislation, 2011

In Italy, there are two possible procedures. An individual can either be detained following an expulsion order according to Article 13 (2) (a) of the Italian Immigration Law²¹³ or he or she can be rejected at the border according to Article 10 of the Immigration Law. Article 10 of the Immigration Law provides for the removal of migrants who are not entitled to stay in Italian territory at the border. This procedure is not limited to border crossing points; it can also be applied to persons entering the territory by avoiding border controls or for those rescued at sea (Article 10 (2) of the Immigration Law). In such cases, it is referred to as “delayed rejection at the border” (*respingimento differito*), given that in practice they have already entered the territory. The Agrigento police, who are responsible for Lampedusa, typically apply such a procedure.

The delayed rejection procedure is a legitimate procedure under Italian law. The procedure, however, provides for fewer guarantees than the formal removal procedure under Article 13 of the Immigration Law. Under the delayed rejection procedure, a judge does not have to issue an authorisation before the enforcement of the removal order. The ‘delayed rejection’ order is an administrative measure with immediate effect.

In addition, legal remedies following a ‘delayed rejection at the border’ are poorly regulated and ineffective. Complaints should be lodged with the Regional Administrative Courts (TAR), which are usually far from arrival areas and, therefore, difficult to access in practice before the removal is carried out. Moreover, there are

different views on who is responsible for reviewing the lawfulness of a ‘delayed rejection’ order; TAR refused on various occasions to rule on the lawfulness of delayed removal orders²¹⁴ and, at the same time, the ordinary judges (Justices of the Peace) claimed they were competent.²¹⁵ Even if this practice increased the protection of the persons in removal procedures, in line with the requirements of Article 13 of the constitution, such legal uncertainty should be addressed.

The delayed rejection procedure was originally intended for border crossing points, where it is usually possible to quickly reject persons without valid travel documents. Its application to persons rescued at sea or arriving outside official border crossing points in practice results in situations where police deprive persons of their liberty beyond 48 hours, without being brought before a judge, as required by Article 13 of the Italian Constitution.

Safeguards against unlawful or arbitrary detention

Under Article 5 (1) f of the ECHR, detention is permitted to prevent the person “effecting an unauthorised entry in the country”.²¹⁶ Even if it lasts only a few hours, however, detention must respect a number of conditions. It must first be lawful, which means national law provides

²¹³ In this case the person needs to be brought before a judge within 48 hours and the judge has 48 hours to confirm the detention order: Italy, Immigration Law, Articles 14 (3) and 14 (4).

²¹⁴ Italy, Regional Administrative Courts (TAR) Napoli Decision No. 6441/2007; Italy, TAR Catanzaro Decision No. 432/2007; Italy, TAR Sicilia Decision No. 510/2009.

²¹⁵ Italy, Giudice di Pace di Agrigento, decision No. 812/11.

²¹⁶ The ECtHR held in particular that until a state has authorised entry to the country, any entry is unauthorised and the detention of a person who wishes to effect entry and who needs, but does not yet have authorisation to do so, can be, without any distortion of language, to prevent his effecting an unauthorised entry. See, ECtHR, *Saadi v. the United Kingdom*, No. 13229/03, 29 January 2008, para. 65.

for it in a manner that is sufficiently accessible, precise and foreseeable in its application.²¹⁷ According to ECtHR case law, detention must not be arbitrary and must be assessed on a case-by-case basis.²¹⁸ Detention must also be carried out in good faith²¹⁹ and it must be closely connected to the purpose of preventing an unauthorised entry into the territory of the state concerned.²²⁰ In addition, there must be some relationship between the ground of permitted deprivation of liberty used and the place and conditions of detention.²²¹ Arbitrariness is also assessed with regard to detention conditions, which have to be appropriate, taking into consideration their individual features and their cumulative effect on the individual, in particular when she or he belongs to a vulnerable group,²²² as well as the length of the detention, which should not exceed that reasonably required for the intended purpose.²²³ Moreover, Article 5 (2) includes the right to be informed promptly and in a language which the person understands of the reasons for their detention.²²⁴

Article 9 (1) of the ICCPR, which applies to all deprivations of liberty, including those related to immigration control,²²⁵ requires any deprivation of liberty to be lawful and not arbitrary.²²⁶ The deprivation of liberty must be necessary and proportionate.²²⁷ Detainees must have ready access to independent legal advice and assistance,²²⁸ and have the right to judicial review to protect themselves against arbitrary detention.²²⁹

Under EU law, the Return Directive regulates detention of illegally staying third-country nationals. It provides a set of rules concerning the grounds for detention, procedural safeguards and for conditions in detention facilities (Articles 15–17). Under Article 2 (2) (a) of the directive, Member States have, however, the possibility to opt not to apply the Directive to those persons who are “apprehended or intercepted by the competent authorities in connection with the irregular crossing by land sea or air of the external border”. As illustrated in Figure 12, most southern EU Member States do not apply the directive in these cases, although this is not always clear, such as in Spain, from domestic legislation. For EU Member States which have chosen to make use of the optional clause at Article 2 (2) (a) of the Return Directive only core provisions of the directive apply. This means that for them, Article 15 listing the grounds for detention and related procedural safeguards is not applicable, while provisions on detention conditions in Articles 16 and 17 remain nevertheless applicable.²³⁰ As a result, there are fewer safeguards for individuals to whom the Return Directive does not apply.

217 ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, para. 50; ECtHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, para. 55.

218 ECtHR, *Gebremedhin v. France*, No. 25389/05, 26 April 2007, para. 75.

219 ECtHR, *Bozano v. France*, No. 9990/82, 18 December 1986, para. 60.

220 ECtHR, *O'Hara v. the United Kingdom*, No. 37555/97, 16 January 2001, para. 34.

221 ECtHR, *Enhorn v. Sweden*, No. 56529/00, 25 January 2005, para. 42.

222 For example, children: ECtHR, *Muskhadzhiyeva and others v. Belgium*, No. 41442/07, 19 January 2010, para. 73.

223 As Art. 5 (1) f of the ECHR does not contain maximum time-limits, the question whether the detention is unlawful in the light of its length depends on the particular circumstances of the case, for example, see ECtHR, *Rashed v. Czech Republic*, No. 298/07, 27 November 2008, para. 68.

224 For example, in ECtHR, *Saadi v. the United Kingdom* a delay of 76 hours in providing reasons for detention was considered too long and in breach of Art. 5 (2) of the ECHR.

225 UN, Human Rights Committee (1982b).

226 In UN, Human Rights Committee, *Van Alphen v. Netherlands*, No. 305/88, 15 August 1990, the concept of arbitrary detention was described in the following manner: “The drafting history of Art. 9, para. 1, confirms that ‘arbitrariness’ is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to a lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.”

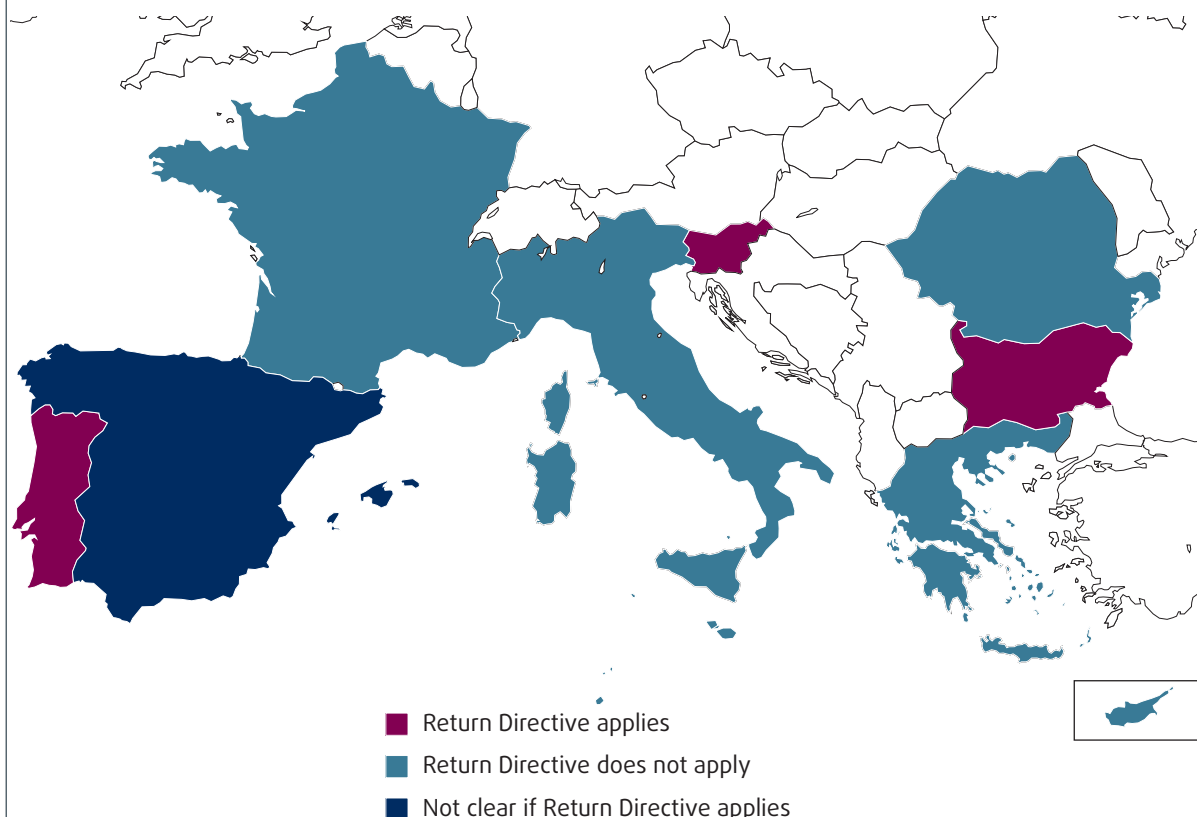
227 UN, Human Rights Committee, *A. v. Australia*, Communication No. 560/1993, views of 30 April 1997.

228 UN, Human Rights Committee, *Berry v. Jamaica*, Communication No. 330/88, views of 7 April 1994.

229 UN, Human Rights Committee, *Hammel v. Madagascar*, Communication No. 155/83, views of 3 April 1987.

230 Directive 2008/115/EC, Return Directive, OJ L 348, Art. 4 (4).

Figure 12: Applicability of the Return Directive to persons apprehended in the context of border crossing, 10 EU Member States



Source: Data extracted from national legislation: Bulgaria, *Law on Foreigners in the Republic of Bulgaria (2006) (as amended in 2011)* which does not contain an express non-applicability clause; Cyprus, *Law of Aliens and Migration as amended by Law 153(I)/2011, Art. 180E (2) (a)*; France, *Code de l'entrée et du séjour des étrangers et du droit d'asile, Art. 511-1, part I*; Greece, *L.3907/2011, Art. 17 (2) (a)*; Italy, *Art. 10, Leg. Decree 286/1998 (as amended)*; Malta, *Common Standards and Procedures for returning Illegally Staying Third-Country Nationals Regulations, 2011, Reg. 11(1)*; Portugal, *Law 23/2007 Art. 181 (1)–(2), 135 (as amended)*; Romania, *OUG 194/2002 (as amended), Art. 82 (21)–(22)*, Slovenia, *Aliens Act, 2011, Art. 64 (1)*; Spain, *Law 4/2000 (as amended)*

As noted, regardless of whether a person is detained to 'prevent unauthorised entry' or for the 'purposes of removal', the individual must have the possibility to challenge the detention decision. The ECHR requires that everyone who is deprived of his or her liberty "must be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (Article 5 (4)).²³¹ The right to judicial review is a cornerstone guarantee to prevent arbitrary detention.²³² Under EU law, the Charter of Fundamental Rights of the European Union provides for a right to an effective remedy before a tribunal under Article 47.

In practice, either the police or a judge order detention, depending on the requirements of domestic legislation. In its 2010 comparative report on *Detention of third-country nationals in return proceedings*, the FRA noted that over half of the 27 EU Member States require a court to endorse a detention order, whenever the deprivation of liberty goes beyond a short-term arrest.²³³ In these cases, the police must bring the case before a judge who is required to endorse the deprivation of liberty, usually within short time limits, as illustrated in Table 10.

²³¹ ECtHR, *Rashed v. Czech Republic*, para. 68; ECtHR, *Amuur v. France*, No.19776/92, 26 June 1996, para. 43.

²³² ECtHR, *Rakevich v. Russia*, No. 58973/00, 28 October 2003, para. 43; ECtHR, *Shamsa v. Poland*, Nos. 45355/99 and 45357/99, 27 November 2003, paras. 58–60.

²³³ FRA (2010a), p. 40.

Table 10: Necessity of obtaining a judicial endorsement of detention decisions, five EU Member States

	Required	Time limit	Source
CY	Yes	8 days	Aliens Act, Article 16 (2)
EL	No		
ES	Yes	72 hours	Law 4/2000, Articles 60 (1) and 62
IT	Yes	48 hours	Constitution, Article 13; Immigration Law, Article 14 (3)
MT	No		

Note: EU Member State country codes: CY, Cyprus; EL, Greece; ES, Spain; IT, Italy; and MT, Malta.

Source: National legislation, 2012

When the decision can be taken without judicial endorsement, the individual must have a right to appeal to a court. Greece²³⁴ and Malta, the two countries among the five which do not require court endorsement of detention orders, both have such an appeals process. The effectiveness of the right to appeal against a detention decisions, however, has been questioned with regard to Greece²³⁵ and Malta.²³⁶

In Greece, this relates in part to the difficulty of accessing lawyers on the Greek islands. In 2009–10, the Aegeas Project provided legal assistance to migrants arriving on the islands of Lesbos, Chios and Samos.²³⁷ UNHCR participated as a partner agency in this project, coordinated by the Prefecture of Samos. Local prefectures of the other two islands and of the region of Evros as well as the Ministries of Public Order and Mercantile Marine took part. The project ended however in 2010.

In late 2012, access to legal counselling and legal aid remained limited in the Aegean islands, particularly when arrivals by sea increased. The NGO METAdrasi (*METAδραση*) provides free legal aid/advice to asylum seekers and refugees as part of the programme *Mayday: Vulnerable groups and interpretation*. The NGO consists of two lawyers in Lesbos and Samos, who may also travel to other islands, who provide information and legal advice on the right to asylum to newcomers and persons in detention.²³⁸ In June 2010, UNHCR deployed consultants in Chios, Crete, Lesbos, Samos (through 2011) and Rhodes. They can visit and

provide information to newly arrived asylum applicants in detention, if the authorities inform UNHCR of their presence. They cannot however provide individual legal counselling as this would undermine their neutrality when, at a later state they give an opinion on the case during the first instance asylum procedure.

Under the Immigration Act of Malta, detention is an automatic consequence for any person considered to be a prohibited immigrant under Article 5 of this law. Hence, detention is an automatic consequence of a removal order or of a decision to refuse admission to the territory. The removal order can be appealed to the Immigration Appeals Board, but not to a court.²³⁹ A judicial review of the legality of the detention is in principle possible under the fundamental human rights provisions in Chapter IV of Malta's constitution and under the European Convention Act.²⁴⁰ Such judicial reviews tend however to be rather lengthy, normally lasting over 18 months and are rarely used in practice.²⁴¹ The ECtHR concluded in 2010 that an 'effective and speedy remedy' for challenging the lawfulness of a detention order was not available to a person held in immigration detention.²⁴²

Facilities used for persons deprived of liberty upon arrival

Greece, Italy and Spain have created special facilities to host newly arrived migrants near the main points of arrival. These are intended only for short-term stays, although in practice migrants' onward movement has not always been swift, as the over-crowding at Lampedusa in March 2011 illustrated (see Section 6.4).

Where no special facility has been created, authorities have put temporary measures into place, installing tarps or camping tents to expand the space available in police

234 Greece, Law 3386/2005, Codification of legislation on entry, residence and social integration of third-country nationals on Greek territory, Art. 76 (3).

235 Amnesty International (2010); PRO ASYL (2012), p. 52; ECtHR, *Mahmundi and others v. Greece*, No. 14902/10, 31 July 2012, paras. 80–82; ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, paras. 117–121; ECtHR, *A.A. v. Greece*, No. 12186/08, 22 July 2010, paras. 47, 71–75; ECtHR, *Tabesh v. Greece*, No. 8256/07, 26 November 2009, para. 62; ECtHR, *S.D. v. Greece*, No. 5354/07, 11 June 2009, paras. 73–77; ECtHR, *Efremidze v. Greece*, No. 33225/08, 21 June 2011, paras. 63–67.

236 UN, Human Rights Council (2010a); Human Rights Watch (2012), p. 28; ECtHR, *Massoud v. Malta*, No. 24340/08, 27 July 2010, paras. 42–46.

237 ICMC (2011a), p. 94; Details of the project can be found at www.unhcr.org/4aa768279.pdf.

238 For more information, see: www.metadrasi.org/content/legal_support.

239 Malta, Immigration Act at 25A.5. In 2005 the Court of Criminal Appeal overturned a decision of the Court of Magistrates, which had granted *habeas corpus* review under Article 409 A of the Criminal Code, see UNHRC, Working Group on Arbitrary Detention (2010).

240 Malta, Constitution of Malta Act, Art. 46; Malta, Chapter 319 of the Laws of Malta, European Convention Act, Art. 4.

241 FRA (2010a), p. 41.

242 ECtHR, *Massoud v. Malta*, No. 24340/08, 27 July 2010, para. 46.

stations, such as the Canary Islands did during times of maximum occupancy. Lampedusa has used other facilities, such as a church parish house or the premises of a protected marine area, when it faced significant migrant flows.

Malta, given its small size, opted against creating new facilities at the port of arrival and instead takes newly arrived migrants directly to the island's immigration detention centres. Concerns have been raised about conditions and overcrowding in Maltese immigration detention facilities, but their description is beyond this report.²⁴³ Similarly, Cyprus has not set up a special facility to detain migrants arriving at sea. It takes migrants to the police detention facility.

The Greek situation has changed substantially over the past five years. Up to 2010, Greece held migrants for several weeks and sometimes months at detention facilities at the border. NGOs and other actors²⁴⁴ have strongly criticised conditions at three of these facilities – a former warehouse (Pagani) in Mitilini on Lesbos Island, the centre in Samos town and the centre in Chios (Mersinidi). Meanwhile, Greece closed two of these centres due to the inhuman conditions in which migrants were held (Pagani and Samos centres),²⁴⁵ and built a new facility in Vathy on Samos.

In 2011, under Article 8 of law 3907/2011, Greece undertook to set up special initial reception facilities for the screening of newly arrived migrants. The Greek Action Plan on Migration Management (paragraph 2.1.4) presented in August 2010 envisages the creation of two screening centres in the eastern Aegean, namely on Samos and Lesbos islands.²⁴⁶ In addition, it plans another initial reception facility on Chios (likely Mersinidi). Greece intended to have these initial reception facilities operational by summer 2011, but they are not yet in place. Through the end of 2012, Greek authorities continued to place newly arrived migrants in cells in police directorates. There are five detention cells with a total capacity of 40–45 persons on Samos and two cells with a total capacity of 15–20 persons on Chios, according to information received from the police directorates. In addition, the authorities came up with ad hoc solutions, placing a group of Syrian migrants, for example, in the empty offices of the Samos Port Police above duty free shops for 13 days in early September.²⁴⁷

Spain established two special facilities to host migrants arriving by sea in Almería and Motril. These function as police detention centres, similar to cells in police offices. The main difference lies in the infrastructure, as migrants are held in prefabricated units or buildings not originally intended for housing people. As a result, such facilities are inadequate for accommodating persons beyond short-term stays. Such centres are used for initial accommodation on the first night and never beyond 72 hours.

Italy set up temporary centres to host newly arrived migrants until they are transferred to an expulsion centre or a reception facility for asylum seekers. These temporary centres are referred to either as 'Reception Centres' (*Centri di Accoglienza*) or as 'Initial Assistance and Reception Centres' (*Centri di Primo Soccorso e Accoglienza*, CPSA). They provide first assistance to irregular migrants apprehended on Italian territory.²⁴⁸ There are three CPSAs and one centre for "very first" reception (*Centro di primissima accoglienza*), according to the webpage of the Ministry of Interior. In 2011, Italy also operated a temporary facility in Pantelleria, which though not formally established as such, operated in practice as an CPSA. The most well-known of these centres is *Contrada Imbriacola* in Lampedusa, which Italy closed in February 2009 after a fire following a riot in reaction to a Ministry of Interior decision to transform the CPSA into an expulsion centre.²⁴⁹ The authorities delayed the re-opening of the centre until 13 February 2011 even though hundreds of migrants had already arrived and many were without shelter.²⁵⁰ Riots in September 2011 partially destroyed the centre,²⁵¹ which led to its temporary closure.²⁵² In March 2012, the Minister of Interior announced the launch of reconstruction work aimed at reopening *Contrada Imbriacola* which was soon used again thereafter.²⁵³

Italian law does not regulate the regime of these centres, which the Council of Europe Commissioner for Human Rights criticised in his 2011 report on Italy.²⁵⁴

²⁴³ HRW (2012).

²⁴⁴ PRO ASYL (2007), pp. 20–25; For Samos, European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2007).

²⁴⁵ Greece, Greek Action Plan for Migration Management, sections 1.2.1 and 2.1.4. (not public).

²⁴⁶ Council of Europe, CPT (2012), p. 35, according to a Minister of Citizen Protection decision, one of these centres will be the facility in Vathy in Samos.

²⁴⁷ Aplotaria.gr (2012); Ikariaki.gr (2012).

²⁴⁸ Italy, Law No. 563 of 29 December 1995, which endorsed the law-decree No. 451 of 30 October 1995 and further regulated by the unpublished inter-ministerial decree of 16 February 2006 and Presidential Decree of 31 August 1999, No. 394, by Art. 22–23 (*Decreto del Presidente della Repubblica 31 Agosto 1999, n. 394 Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286*).

²⁴⁹ Euro-Mediterranean Human Rights Network (2009).

²⁵⁰ Amnesty International (2011); Time World (2011).

²⁵¹ Council of Europe, PACE, Committee on Migration, Refugees and Population (2011).

²⁵² La Repubblica Palermo (2012).

²⁵³ Italy, Italian Parliament, Camera Dei Deputati (2012); Il Fatto Quotidiano (2012).

²⁵⁴ Council of Europe, Commissioner for Human Rights (2011b), para. 61.

These facilities are typically closed: migrants can move freely inside the area of the centre, but can only leave it with permission. This is also the case for *Contrada Imbriacola* in Lampedusa.²⁵⁵ The territorially competent prefect (*prefetto*), who represents the Italian government at provincial level, creates and administers CPSAs.²⁵⁶ The stay in these centres is strictly limited to the time period necessary, usually no more than 48 hours, for status evaluation and transfer to an identification and expulsion centre (*Centri di Identificazione ed Espulsione*, CIE) or to a reception centre for asylum seekers (*Centro Accoglienza Richiedenti Asilo*, CARA). It has, however, often proven difficult to respect these deadlines. Newly arrived migrants were not transferred systematically within 48 hours to another facility on the mainland from either Lampedusa or Pantelleria. In early 2011, migrants were kept at Lampedusa for several weeks. Given that it is a closed facility, this amounted to a deprivation of liberty. The migrants were not, however, brought before a judge as domestic law requires.

Table 11 provides an overview of facilities specifically created at or near points of entry in Italy and Spain. It also lists recent visits by detention monitoring bodies to these centres.

Detention monitoring bodies have visited some of these facilities, usually those most used. They have raised

a number of issues in their reports, some of which have been addressed, while others have not yet been dealt with. UN or Council of Europe monitoring bodies have yet to visit some of these centres, according to information available to the FRA.

Lampedusa is the only Italian centre they have visited. Monitoring bodies in the past have flagged issues such as overcrowding. Both CPT reports raised this, noting how the centre had repeatedly exceeded its maximum capacity at the time of 190 places.²⁵⁷ The CPT also raised the issue of the lack of sufficient interpreters and cultural mediators in the centre²⁵⁸ and commented on contact with the outside world, urging Italian authorities to allow incoming calls on the centre's public phones²⁵⁹ and to authorise humanitarian organisations to operate within the centre.²⁶⁰ The authorities adopted various measures as a result:²⁶¹ increasing the centre's maximum capacity to 380 persons, with the possibility to extend it to 850; establishing the *Praesidium* project described in Section 6.1; and setting up an ad hoc Commission (the De Mistura Commission) to investigate conditions at the different migrant centres. In its 2007 report, the commission highlighted several shortcomings, including: the lack of a clear legislative framework;²⁶² the fact that migrants might be, especially in case of large-scale arrivals, deprived in practice of their liberty for more than 48 hours without the issuing of a judicial

Table 11: Initial facilities in/near ports of arrival in Italy and Spain as of 2012

Place (province in brackets)	Capacity (persons)	Visits by monitoring bodies
Italy*		
Lampedusa (Agrigento)	381	UN Special Rapporteur on the human rights of migrants, November 2004 CPT, June 2006 (French) and November–December 2004 (French) Council of Europe Commissioner for Human Rights, 14 December 2005
Elmas (Cagliari)	220	
Otranto (Lecce)	n/a	
Pozzallo (Ragusa)	172	
Pantelleria (Trapani)	n/a	
Spain		
Port in Almería (Almería)	n/a	CPT, December 2005
Port in Motril (Granada)	200	Spanish Ombudsman, 2009 and 2010

Note: *The webpage of the Ministry contains a map of Italian centres, see Italy, Italian Ministry of Interior (2011b).

Source: FRA, 2012

255 Council of Europe, PACE, Committee on Migration, Refugees and Population (2011), para. 54 ff.

256 Italy, Decree of the President of the Republic No. 394, 31 August 1999, Art. 22.

257 Council of Europe, CPT (2007), paras. 6, 13.

258 *Ibid.*, paras. 19–22; Council of Europe, CPT (2006), para. 46.

259 Council of Europe, CPT (2006), para. 51; Council of Europe, CPT (2007), para. 28.

260 Council of Europe, CPT (2006), para. 30.

261 *Ibid.*, para. 9–12.

262 Italy, Ministry of Interior (2007b), p. 19 ff; Council of Europe, PACE, Committee on Migration, Refugees and Population (2011), para. 92, rec. VI.

order; and the access difficulties NGOs faced to operate within these centres. Not all these recommendations have been acted upon yet. As the UN Working Group on Arbitrary Detention noted in 2008 “the proposals the De Mistura Commission made to address these concerns have not been implemented”.²⁶³

The Spanish national Ombudsman (*Defensor del Pueblo*) visited the Motril detention centre in 2009 and 2010²⁶⁴ and recommended its closure unless reforms were carried out.²⁶⁵ The Ombudsman asked that migrants be provided with beds so that they would not have to sleep on the floor. While beds were apparently purchased, these had not yet been installed when FRA visited the facility in August 2011. In Greece, the repeated visits by the Greek Ombudsmen to the facilities in the eastern Aegean islands are likely to have contributed to the closure of the Pagani centre on Lesbos.²⁶⁶

Members of the European Parliament and Council of Europe Parliamentary Assembly delegations have also issued reports on the situation in detention facilities, and particularly on Lampedusa.²⁶⁷ In some cases, NGOs have also described the situation in the centres. For example, Doctors Without Borders Italy (*Medici Senza Frontiere*) carried out a survey in 2008–2009 of migrants staying in various types of immigration centres in Italy.²⁶⁸

The regime in facilities used for initial reception – including those listed in Table 11 for Italy and Spain, and other facilities used in Greece and Malta – varies. While in all facilities migrants are deprived of their liberty insofar as they are not allowed to leave without permission, a distinction can be made between the migrants hosted in the Italian centres and those detained in Malta on the one hand and those held in Greek and Spanish police facilities on the other. In Italy and Malta, migrants can move freely within the facility, or at least certain parts of it, whereas in Greece and Spain they are confined to their cells.

In general terms, migrants held in all facilities are separated by sex. The separation usually starts at the pier. In Greece and Spain, families cannot typically remain together; placement is done in cells, in which women are systematically separated from men. In Maltese detention facilities as well as in some initial reception facilities in Italy, such as the Loran Base in Lampedusa, it is possible to keep families together. If space is lacking, in Malta, single women are sometimes accommodated with families.

While each of the four EU Member States (Greece, Italy, Malta and Spain) have established care arrangements for separated children, limited availability of space in special facilities, difficulties in the identification of a separated child, and delays in transfer may result in children being kept in detention or in facilities not equipped for their specific needs.²⁶⁹ Upon arrival, children are usually put in the same facilities used for adults, although they may be put in separate cells depending on available space. Separated children are deprived of their liberty in all cases. Greece, Malta and Spain typically keep them in cells. Lampedusa originally kept separated children in another area of the centre with a more lenient regime and, after April 2011, placed them in a separate compound, the Loran base, together with families and single women, provided space was available. In the centre it was difficult to separate children from unrelated adults:

“There was this compound for women and children, but very often adults were everywhere because they were so many and surveillance was hard to carry out. Then also minors jumped the fence to go to the adults because only there cigarettes were given.”

(Save the Children staff, interviewed in Italy)

Civil society organisations play an important role in providing humanitarian assistance and legal and social counselling for newly arrived migrants. The presence, functions and activities of NGOs in the centres used to host new arrivals differs substantially among EU Member States as well as among centres. In Greece, NGO presence in detention facilities of police directorates and departments in the eastern Aegean islands appears sporadic. In Spain, the Red Cross is present in the centres providing humanitarian and medical assistance as well as undertaking social work aimed at identifying women at risk (see Chapter section 7.5). In Italy and Malta, NGOs also provide legal assistance and counselling, although the extent to which this is done in Italy varies from one centre to another. While in Lampedusa a number of international organisations and NGOs provide different forms of counselling and assistance under the *Praesidium* project, in other locations, they have not been systematically granted access to newly arrived migrants (see Chapter section 8.2 for details on an example in Pozzallo in 2010).

6.4. Onward transfer

Newly arrived migrants are placed, with the exception of Malta, in temporary facilities near the point of arrival. The cells in the police directorates in Greece as well as the temporary facilities created at ports of arrival in Italy and Spain are not equipped for longer-term

²⁶³ UNHRC, Working Group on Arbitrary Detention (2009).

²⁶⁴ Ombudsman of Spain (2010), p. 10.

²⁶⁵ El País Andalucía (2010).

²⁶⁶ Greek Ombudsman (2008).

²⁶⁷ Council of Europe, PACE, Committee on Migration, Refugees and Population (2011); European Parliament, LIBE (2012).

²⁶⁸ Doctors without Borders Italy (*Medici Senza Frontiere*) (2010).

²⁶⁹ FRA (2010b); Council of Europe, Commissioner for Human Rights (2011c).

stays. These facilities have been conceived to host newly arrived persons for the short time needed to determine their next stop.

The conditions in Motril, Spain make clear that such temporary facilities are not suited for longer stays. The facility in the port of Motril which the FRA visited in August 2011 consists of eight cells without natural light and ventilation. It has no beds and migrants sleep on the floor on mattresses with blankets. A Spanish official said:

"It is a temporary shelter because, really. [...] It lacks air conditioning system with heat and cold, [...] both for winter and for summer.

(Spanish National Police, interviewed in Spain)

A pregnant woman detained during the winter of 2010 in Motril noted that she had to sleep on the floor.

"There were no beds and we put blankets on the floor to sleep."

(Sub-Saharan African woman, crossed to southern Spain in 2010).

The time during which individuals are kept in such initial facilities is limited to a maximum of 72 hours in Spain, a timeframe which is respected in practice. None of the migrants interviewed for this research was kept in such facility for a longer period and many were moved on the day following their arrival. In Italy, however, serious delays in transfers were noted in Italy from February to April 2011, leading to a situation of unauthorised deprivation of liberty as described under 6.3.

If arrivals continue, delays in transfers lead to overcrowding of the temporary facility, which can lead to tensions with local communities and threaten the safety of migrants. The significant flow of migrants to Lampedusa made relocation off the island a difficult-to-accomplish task. In March/April 2011, the number of migrants outnumbered the local population. The centre director said:

"In the critical period, we had 6,200 people in Lampedusa, not only in the centre. I mean all over the island, it was full of migrants: here, at Loran base, in three other facilities given by the municipalities and 3,500 people at the Port. In all these place we gave food. There was no chance to give full assistance, for example psychological assistance. Even the explanation of what was going on was randomly given, during the food distribution. Priority was food, clothes and public order."

(Director of the Lampedusa Centre, interviewed in Italy)

When, in April 2011, Civil Protection authorities (*Protezione Civile*) took over the relocation process, they moved migrants arriving from Libya out

of Lampedusa within 24–48 hours. After 5 April 2011, however, many adults and minors arriving from Tunisia remained detained in Lampedusa for several weeks awaiting their removal.

As will be described in the next chapter, depending on their profile, newly arrived migrants may be channelled into different procedures. This usually affects where they will be transferred to. In all four Member States, there are pre-removal detention facilities, care arrangements for separated children, and open reception centres for asylum seekers, which can be used to transfer newly arrived migrants. In Spain, centres for women at risk also play an important role. Finally, the authorities also have the option of releasing the migrant, as was the case for certain persons when the research was carried out in Greece.

Authorities typically move persons processed for return to a pre-removal detention facility, where return procedures are initiated. In 2011, Italy created temporary facilities for migrants to be returned through an accelerated process, and have since been closed down (see Chapter 8). When space in detention facilities is lacking, Greece and Italy released migrants with the order to leave the territory.

Asylum applicants can either be transferred to open reception facilities or continue to be detained in a pre-removal detention facility, depending on domestic policies as well as space availability. In broad terms, in Greece, Malta and Spain, those who lodged an asylum application would – at least initially – typically be kept in detention, unless released because of personal vulnerabilities or lack of space. In Italy, their transfer to an open or closed facility would depend on the initial assessment made at the point of arrival, such as Lampedusa.

As regards separated children, release from the closed facility and transfer to a child care centre is quick in Spain, where the law requires this to happen within 72 hours, unless a judge confirms the detention. In the other three Member States, however, this process can be delayed, either because it takes longer to identify a place in an accommodation facility, as is typically the case in Greece where places are limited, or because the identification process leading to release is cumbersome, as is the case in Malta (see Section 7.4). In Italy, delays in transferring children from Lampedusa were observed in early 2011. NGOs were trying to identify suitable facilities based on their knowledge and networks, but sometimes, according to Save the Children, air companies would refuse to transfer minors because they did not have permission to travel from a legal guardian. Only subsequently did the *Protezione Civile* provide reception places on the mainland.

Women late in their pregnancies are often released or offered a place in open accommodation centres. In Spain, they may stay at a Red Cross facility or in one of the NGO-run centres established through the Humanitarian Assistance Program for Immigrants, which is funded by the Ministry of Labour and Immigration.²⁷⁰ Limited possibilities exist, however, in Greece, where – unless they are supported by an NGO or hosted in one of the few facilities for asylum seekers – they would usually depend on community support.

Conclusions

Migrants arriving by sea are usually in need of emergency humanitarian assistance, specifically food, water, warm clothing, medical care and a place to rest. The various EU Member States reviewed 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 NGOs, whereas others do not. While as a rule all new arrivals undergo a medical examination, only two of the four Member States under review 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 ECHR also apply to individuals deprived of liberty in order to prevent 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 held persons.

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.

²⁷⁰ Spain, Royal Decree 441/2007, 3 April 2007 (*Real Decreto 441/2007, del 3 de abril, por el que se aprueban las normas reguladoras de la concesión directa de subvenciones a entidades y organizaciones que realizan actuaciones de atención humanitaria a personas inmigrantes* (B.O.E. 19/4/2007)).

7

Fair screening and identification procedures



Charter of Fundamental Rights of the European Union

Article 5 (Prohibition of slavery and forced labour)

3. Trafficking in human beings is prohibited.

Article 18 (Right to asylum)

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Human dignity is inviolable. It must be respected and protected.

Article 24 (Rights of the child)

1. Children shall have the right to such protection and care as is necessary for their well-being.

As a general rule, states have a sovereign right to control the entry of non-nationals on their territory. Both EU law and the ECHR impose some limits on the exercise of this sovereignty. Nationals have the right to enter their own country. Under EU law, EU nationals have a general right to enter other EU Member States. In addition, as explained earlier, both EU law and the ECHR prohibit the rejection at borders of persons at risk of persecution or other serious harm (principle of *non-refoulement*).

The presence of EU nationals on migrant boats is rare. The FRA is aware of only one case concerning a German mother who fled from Tunisia with her child in early 2011.²⁷¹ Persons fleeing from persecution, war or other serious harm are more commonly among those arriving. In addition, there are other persons, such as separated children or suspected victims of trafficking in human beings, who, based on EU law and on the Council of Europe Convention on Action against Trafficking in Human Beings, deserve particular protection.

²⁷¹ Daily Mail Online (2011).

Finally, the UN Convention on the Rights of Persons with Disabilities (CRPD), which the EU has also ratified, provides protective measures for persons with disabilities, including those resulting from torture.

In order to respect the principle of *non-refoulement* and to ensure that adequate protection and care is given to persons entitled to it, authorities must put mechanisms in place to identify and channel individuals to appropriate procedures. This chapter reviews the currently available mechanisms.

It examines how migrants are informed about their rights, and whether the identification interviews carried out by the police after arrival enable an identification of persons to be referred to protection mechanisms. For more information on post-arrival identification, differentiation and referral for assistance and protection, the reader may consult the International Catholic Migration Commission publication *Mayday*²⁷² (cover page reproduced above) which in general terms matches the findings of the FRA research.

This chapter reviews the policies of the four countries affected by arrivals at sea, namely Greece, Italy, Malta and Spain.

²⁷² ICMC (2011a).



7.1. Police identification interview

Police interview newly arrived migrants in order to identify the migrant, prepare an individual file and decide what further legal steps to take for each individual. Normally, the police interview takes place as soon as possible after arrival and in any case before authorities place migrants in the dedicated facilities described in Section 6.3. There are exceptions for persons who are hospitalised immediately after their arrival and for small children. The following two quotes from migrants in Malta illustrate the two situations:

"There is the Maltese police coming to interview, how you arrived in Malta, and what happened in Libya, how is Tripoli. We give them information about Libya, and about our problems. After that, they give us a check-up, and they give you blankets and other things."

(Eritrean man, crossed to Malta in 2011)

"Me and the other girl, we were taken to hospital first, immediately after we arrived. After five days we were released from hospital we went to detention. After two days the police called us to make the fingerprints. We didn't make the fingerprints with the rest of the group."

(Somali woman, crossed to Malta in 2010)

The procedure is comparable in all four countries. In general terms, three different steps can be distinguished. First, in the case of a rescue operation, the police receive some basic advance information, such as the number, sex and presence of children in the group. In case of a spontaneous landing, the police may receive such information when they are alerted to the presence of a group of migrants.

Second, at the moment of disembarkation, a very first identification is carried out. This may be limited to counting persons, as is the case in Spain, where the Red Cross gives everyone a numbered bracelet and a doctor separates persons in need of healthcare as well as women and children from the rest of the group. In Greece, the Hellenic Coast Guards collect some basic personal information and put together a list with the name, age, and nationality of each person, which they then hand over to police.

Third, the police carry out an identification interview, either directly in the port, if appropriate facilities exist, such as in Almería or Motril, or at the nearest police station, as is the case in Greece or Malta. The Lampedusa identification interview is very brief. It is conducted directly on the pier at the same time as humanitarian organisations provide emergency assistance. A second and more thorough identification interview takes place only at a later stage after the migrant has been transferred to another facility in Sicily or on the mainland.

In broad terms, all four EU Member States collect the same information during these interviews. In addition to personal data, such as nationality, age and sex, they ask migrants about their trip, possible facilitators and about their reasons for coming into the country.

In addition to the police identification interview, the police also take fingerprints and photographs for Eurodac, an EU fingerprints database of applicants for asylum and irregular immigrants, and for a file they open on each migrant. Depending on where the police interview is carried out, they may take fingerprints at the point of arrival or at the facility to which migrants are transferred.

"Fingerprints were taken, here in the CARA [Salina Grande, Trapani]. In Pantelleria they only asked us the name, surname and why we arrived there."

(Tunisian man, crossed to Pantelleria, Italy in 2011)

Two migrants who had arrived at the Canary Islands in 2011 and in Greece in 2010 mentioned instances during the identification process of beating and other aggressive or inappropriate behaviour against migrants who opposed signing a document or giving their fingerprints.

During the identification interview with the police, in two of the four EU Member States reviewed there are usually no interpreters: in Greece and Malta, the police try to identify a migrant within the group who speaks English and who could act as interpreter for the others.

In most cases, no lawyer or NGO representative is present during the identification interview in the police station (legal advice, when available, is usually provided only after the persons are transferred to a reception or detention facility). In Spain, the Red Cross is present during disembarkation but does not observe the police interview. In Lampedusa, except during heavy arrival periods, NGOs may be present when the police conduct the initial identification procedures on the pier.

In all four countries reviewed, irregular entry is unlawful.²⁷³ In Greece and Italy it can be punished by criminal sanctions.²⁷⁴ The Council of Europe Commissioner for Human Rights expressed his concern on the trend to criminalise the irregular entry and stay of migrants in Europe.²⁷⁵

²⁷³ Greece, Law 3386/2005, Art. 83(1); Italy, Immigration Law, Art. 10 bis, Malta, Immigration Act, Art. 5, Spain, Law 4/2000 Organic Immigration Law (*Ley Orgánica de Extranjería*), Art. 53.

²⁷⁴ Greece, Law 3386/2005, Art. 83(1) which provides for at least three years imprisonment and a fine of €1,500; Italy, Immigration Law, Arts. 10 bis(1) which provides for a fine of €5,000–10,000.

²⁷⁵ Council of Europe, Commissioner for Human Rights (2010).

Following the identification interview, the police either start the return and removal process or refer the case to other domestic procedures. This would be the case for potential asylum seekers, suspected victims of human trafficking or separated children, but also for suspected facilitators, against whom criminal charges are initiated. This process takes place while the individuals are still deprived of liberty. Decisions must therefore be made speedily.

Where a removal or return decision is taken, the migrant has a right to appeal. As described in Chapter 8, however, such a right is often only theoretical, as legal support at this stage may be very limited.

7.2. Provision of information to migrants

Access to reliable information is a precondition for an individual to be able to claim his or her rights. Lack of information makes a person more vulnerable to human rights violations. In the border context, it makes it more difficult for persons in need of international protection to lodge a claim and thus increases the risk of *refoulement*.

In general terms, legal advice prior to and during the police identification process is very limited. It is primarily after the police interview, when migrants are transferred to a pre-removal detention centre or a reception facility, that they may have more extensive access to legal advice and NGO support.

Finding effective ways to provide timely information on their legal situation and on existing options to newly arrived migrants is a challenging task. Upon arrival, migrants still suffer from the hardship of the journey as illustrated by a young man from west Africa interviewed in Sicily.

“In Pantelleria there were people who answered the questions but did not even understand what they were talking about. After three days at sea, people asked you questions but you do not even know where you are. For those who answered it is not their fault, after three days at sea”.

(West African man, crossed to Pantelleria, Italy in 2011)

Smugglers may have instructed migrants to distrust certain sources of information. Moreover, there may be important language and cultural barriers. Even when migrants receive information at an early stage, there is no guarantee that they actually understand and register the information. FRA research on asylum seekers in 2010 had similar findings.²⁷⁶

This theme emerged as a recurrent issue in all four countries: migrants have only limited understanding about their situation and what would happen to them. It takes newly arrived migrants days and sometimes weeks to understand their legal situation and the options they have. At the same time, the research revealed that there are situations in which the provision of information to newly arrived migrants is quite effective.

As described earlier, in all four countries migrants undergo an identification interview with the police. Information to migrants can be provided before, during or after the interview. Before the police interview, migrants are usually tired from the journey and therefore less receptive. The first police identification is usually short and only limited information can be provided at that stage. In some cases, however, the identification interview carries substantial consequences for the individual. In Italy, the onward transfer to either a reception facility for asylum seekers or to a detention facility has, all too often, hinged upon whether police identify the individual as a person seeking asylum at the interview immediately after his or her arrival, usually on the pier in Lampedusa, as highlighted by a UNHCR officer interviewed in Italy:

“People have to know their rights and how to claim them. Migrants meet immigration officers right after the disembarkation. This is not the best moment, migrants are tired and they would like to sleep. Moreover, we do not give them information because we do it the day after. But migrants are supposed to express their will to apply for asylum at that moment. Immigration officers ask them the reasons why they come to Italy. Some migrants may answer to work, in order to reassure policemen that they did not come to commit crimes.”

(UNHCR staff, interviewed in Italy).

In all four countries, usually very little information is provided to newly arrived migrants before the police identification interview, which take place just a few hours after the migrants' arrival. Civil society action up to that point is primarily aimed at addressing the healthcare and other humanitarian needs of those disembarking, as described in Section 6.1. A partial exception is the Red Cross in Spain which, as a standard procedure, sees all women and children individually before directing them to the police (see Section 7.5 for more information).

During the identification interview police usually provide migrants with little or no information. The interview process is fast and migrants are tired from the journey. It is possible at this stage to provide written information materials to migrants, as done in Malta, where the police distribute a booklet with basic information regarding migrants' rights and duties and information about the right to asylum. The booklet is, however, currently only available in English, French and Arabic,

²⁷⁶ FRA (2010c).

and is written in a technical language that is unsuitable for migrants with limited education. The majority of migrants interviewed for this research did not seem to have understood the information contained in this booklet. One Ethiopian migrant said:

"They gave us a paper at the immigration police, about the rights we have. Many people didn't understand it."

(Ethiopian man, crossed to Malta in April 2011)

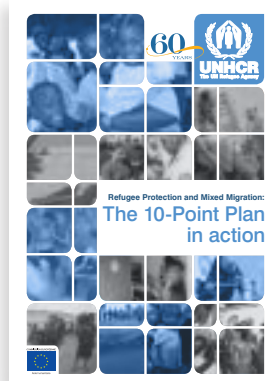
Italy has expended considerable effort to provide information to newly arrived migrants through a collaborative approach among various agencies in the context of the *Praesidium* project. In Lampedusa, migrants are generally provided with information after they are brought to the temporary reception facility. In 2011, during the field research for this publication, *Praesidium* partners could also assist migrants while the police carried out interviews on the pier in Lampedusa.

7.3. Persons in need of international protection

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.²⁷⁷

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.²⁷⁸ It also provided a collection of good practices to assist states with how to implement the plan of action.²⁷⁹ While all EU Member States have established national asylum procedures, practices in handling arrivals at sea diverge substantially among the four countries reviewed. In Malta, virtually all persons who arrived by sea in 2011 lodged an asylum application: 1,575 persons out of a total of 1,579.²⁸⁰ In Greece, before 2010, when migrants were still crossing by sea in great numbers, few applied for asylum when entering the country.²⁸¹

With the reforms of the asylum system introduced in 2010 and 2011²⁸² and the posting of UNHCR staff on the Aegean islands who provide initial information to newly arrived persons on their rights and obligations, including as related to asylum, the number of asylum seekers registered in border locations upon entry increased somewhat.²⁸³ In Italy and Spain, some migrants lodge an asylum application whereas others do not. These differences reflect various factors, including the type of the migrants (for example, north Africans tend not to request asylum), the adequacy and quality of information provided to newly arrived migrants, and the effectiveness and fairness of the asylum system in the country of arrival.



As described in Section 3.2, there are many different authorities in charge of border surveillance whom migrants crossing by sea may meet. Theoretically, each authority could receive an asylum request, although this is rarely the case in practice, since no individual interviews with the migrants take place before disembarkation. The research could not verify what would happen if the coast guard or another authority in charge of maritime surveillance received an asylum application, before the individuals are handed over to the police. The FRA could not see any written instructions on this matter, nor discover whether such instructions exist.

To identify those in need of international protection, it is important to ask them why they left their country. The police identification interview contains questions on the trip and on the reasons for migrating. Such questions are, however, formulated in different ways, focusing either on the reasons for departure or on those for arrival into the host country. A formulation that allows the migrant to say why he or she left the home country makes it easier for the person interviewed to raise asylum-relevant experiences and is preferable from a fundamental rights point of view.

Migrants should also be able to apply for asylum after the identification interview. To facilitate this, they should be given the opportunity to see the immigration

²⁷⁷ UNHCR, Executive Committee on international protection of refugees, Conclusions on International Protection: No. 81 (XLVIII) – 1997 (h); No. 82 (XLVIII) – 1997 (d); No. 85. (XLIX) – 1998 (q); No. 99; (LV) – 2004 (l); No. 108 (LIX) – 2008.

²⁷⁸ UNHCR (2007).

²⁷⁹ UNHCR (2011a).

²⁸⁰ Information provided by the Maltese Refugee Commissioner in December 2011.

²⁸¹ UNHCR (2009b).

²⁸² Greece, Law 3/2011 of 26 January 2011 establishing an Asylum Service and a First Reception Service and Presidential Decree 114/2010 of 22 November 2010 regulating the asylum procedure.

²⁸³ According to figures provided by UNHCR in 2011, 212 persons applied for asylum on Samos, 54 on Chios and none on Lesbos. Data for 2012 were not yet available at the time this report was drafted.

police. For practical reasons, this did not always appear to be possible. In Lampedusa, for example, migrants need the mediation of NGOs or international organisations working in temporary reception centres to get in contact with the immigration police.

The police do not require the applicant to use expressly the word ‘asylum’ in any of the four countries, the FRA research shows. From the information collected, it appears that if an individual expresses fear of suffering persecution or serious harm in any manner whatsoever that is sufficient for him or her to be referred to asylum procedures, a practice in line with the Schengen Handbook.²⁸⁴

In Italy, Malta and Spain, asylum applications are usually not formally registered during the identification interview but at a later stage, after the person is transferred to a pre-removal detention facility or a reception facility for asylum seekers. Spain generally gives no information on asylum during the short identification interview after disembarkation. None of the migrants interviewed in Andalusia recalled having received information on the right to asylum, nor did the FRA observe such information being given when FRA assisted with the arrival of a group of migrants in August 2011. Mechanisms to provide information on asylum start to operate at a later stage, after the person is transferred to an identification and expulsion centre. In Italy, depending on the time available on the pier, some information on asylum may be provided to newly arrived individuals, although various civil society organisations observed difficulties in this regard concerning Tunisians arriving in Lampedusa after 5 April 2011.

Greece, Malta and Spain first transfer all asylum seekers to the same detention facility used for persons pending removal. From there, their release into an open reception facility is considered. In Italy, the differentiation is done upon arrival: asylum seekers are transferred to a CARA reception centre for asylum seekers, and the rest to a CIE identification and expulsion centre (*Centro di Identificazione ed Espulsione*, CIE). Individuals against whom a delayed removal decision will be issued (see Section 6.3 for an explanation of this procedure) are transferred to a CIE. As previously described, the authorities have considerable discretion in deciding whether to follow the delayed removal procedure or not. While it is possible to lodge an asylum application from a CIE, this does not mean the applicant will be released from the centre.

As described in Section 7.2, the provision of timely, objective and reliable information to migrants is a precondition for an effective identification of persons in need of international protection among the large group

of migrants. Unless immediate and irreversible decisions on a migrant are taken beforehand, the provision of information to potential asylum seekers is most effective when it is provided in a user-friendly manner after migrants have rested, the FRA noted.

Promising practice

Providing information sessions on asylum

The Office of the Refugee Commissioner in Malta organises information sessions for third-country nationals. Information about the Maltese asylum procedure and the related rights and obligations is delivered using different communication means to ensure that the information reaches persons of diverse cultural backgrounds and with different levels of education. Office personnel deliver the information orally with the help of interpreters, as well as through a short audio-visual presentation and a booklet, both provided in eleven different languages: Amharic, Arabic, Djoula, English, French, Hawsa, Oromo, Russian, Somali, Swahili and Tigrinya. The booklet text is translated into a further six languages including Urdu and Chinese.

After they have received information about the process, the potential asylum seekers are given the opportunity to ask questions and are asked whether they are interested applying for international protection. Trained interpreters help those who express a desire to seek asylum to fill out a registration form. The sessions are held either in the Office of the Refugee Commissioner’s interviewing centre at Safi, where they have twelve (12) mobile offices fully equipped to cater for the asylum interviews and information sessions, or in its main office in Msida. Since 2009, the Office of the Refugee Commissioner started to ensure that all the persons who enter Malta irregularly by boat are informed of their right to seek international protection in Malta within a few days of their arrival. For those persons who approach the Office to ask for protection personally, the Office also provides them with information on the asylum procedure in Malta. Everyone is invited to attend the information sessions. In addition, the Jesuit Refugee Services and UNHCR are also instrumental in supporting migrants through this process, although their capacity is limited.

Source: Office of the Refugee Commissioner, November 2012

Domestic detention policies may also discourage the lodging of asylum applications by persons in need of international protection. In Greece, at least until new reception facilities are created on the Aegean islands, asylum seekers remain in custody. Asylum seekers have to remain available for the authorities during the time required to carry out the asylum procedure,

²⁸⁴ European Commission (2006), section 10.1.

which in practice means that they remain detained. It is hoped that the implementation of Law 3907/2011 which foresees the creation of initial reception facilities to screen newly arrived migrants and provides for an increase in reception capacities for asylum seekers will address this issue.

7.4. Separated children

Article 20 (1) of the Convention on the Rights of the Child (CRC) entitles a child temporarily or permanently deprived of his or her family environment to a state's special protection and assistance. The Committee on the Rights of the Child clarified that, with regard to unaccompanied and separated children outside their country of origin, two priority actions should be taken. First, separated children should be identified immediately upon arrival at ports of entry or as soon as authorities learn of their presence in the country. This may include an assessment of the child's age, an assessment that must respect certain guarantees. Second, the child should be registered by means of an initial interview.²⁸⁵ Article 21 of the CRC contains further guarantees for children seeking asylum as does the 2007 UNHCR Executive Committee Conclusion on Children at Risk.²⁸⁶

At the European level, the right to protection and special aid for children deprived of their family support is included in Article 17 of the European Social Charter (as revised in 1996). There is limited applicable hard law in the EU. The Schengen Borders Code does not contain detailed provisions on border surveillance. It does not, therefore, provide much guidance on how to deal with separated children arriving in an irregular manner. The Return Directive clarifies that children should only be detained as a last resort and in facilities appropriate to their specific needs. This provision also applies for children who have been apprehended in connection with their irregular border crossing, when an EU Member State may decide not to apply the Return Directive in full (see Section 6.3).

The EU asylum *acquis* provides some guidance, but it is only applicable from the moment a child seeks international protection. To enhance the protection for separated children, the European Commission issued an Action Plan on Unaccompanied Minors²⁸⁷ in 2010. The action plan underlines that from the first encounter, a separated child, for his or her own protection, should be removed from adults to sever relations with traffickers or smugglers and prevent (re)victimisation. Authorities should place separated children in appropriate

accommodation with adequate care arrangements specific to their protection needs and use detention only as a measure of last resort, the action plan stipulates. Frontex should include a module on identifying children at risk at borders, in particular those who may be victims of human trafficking (at 4.1 of the action plan).

The FRA has undertaken extensive research on separated children seeking asylum in 2010, documenting their experiences in 12 EU Member States.²⁸⁸ In principle, all four countries reviewed have a protection system in place for separated children, which regulates their stay until they reach 18 years of age. Greece and Italy cannot deport separated children,²⁸⁹ while such deportation is in principle possible in Spain, which has concluded specific bilateral agreements with Morocco and Senegal for the return of separated children.²⁹⁰ As soon as Malta releases separated children from detention, it provides them with a temporary residence permit which is normally renewed until they turn 18. Maltese law does not seem to prohibit returns of separated children, but the FRA is unaware of any case of a separated child whom Malta has returned.

The protection system can only operate, however, if authorities identify separated children. Procedures for identification vary. Some countries systematically use x-ray tests to assess a child's age, while others never or less frequently resort to them. Spain systematically subjects adolescent children deemed to be unaccompanied to wrist x-rays to determine their age,²⁹¹ conducting the test soon after arrival in order to comply with the 72-hour deadline, after which it must release the person or have a judge endorse his/her detention. When Maltese authorities have doubts about a separated child's age, they refer him/her to an age-assessment team which conducts a psycho-social interview. In practice, in the majority of cases, this is

²⁸⁸ FRA (2010a).

²⁸⁹ Greece, Law 3386/2005, Art. 79; Italy, Immigration Law (Legislative Decree 286/1998 as amended), Art. 19 (2).

²⁹⁰ According to Art. 92 (4) of Spain, Royal Decree 2393/2004 a minor can only be repatriated if this does not put them at risk or danger and if the child is reunited with the family or receives adequate care from protection services in the country of origin. To ensure that children would be returned to adequate care, Spain concluded a Memorandum with Morocco on assisted repatriation of unaccompanied minors in December 2003 and with Senegal in July 2008. The fundamental rights implications of these agreements are beyond the scope of this research, as the returns are not carried out immediately upon arrival in Spain. Moreover, in practice returns are very rare: see the annual report from the Prosecutor's Office, *Memorias de la Fiscalía General del Estado, Memoria 2012*, p.871 which shows that only in four cases 4 were repatriated out of a total of 115 dossiers initiated in 2011.

²⁹¹ Malta, Legal Notice 243 of 2008, Art. 15; Italy, Legislative Decree, No. 25/2008, Art. 19(2); Italy, *Gazzetta Ufficiale* No. 40 of 28 February 2008; Italy, Ministry of Interior (2007a), Circular No. 17272/2007, 6 July 2007; Spain, Royal Decree 557/2011 of 20 April 2011, *BOE* No. 103 of 20 April 2011, Art. 190.

²⁸⁵ UN, Committee on the Rights of the Child (2005), section V.a.

²⁸⁶ UNHCR, Executive Committee on international protection of refugees, Conclusion on Children at Risk No. 107 (LVIII) – 2007.

²⁸⁷ European Commission (2010a), European Commission (2012c).

not sufficient to establish the age of the child and an x-ray test is carried out. The identification is carried out after the children are transferred to the detention facility. In the first seven months of 2012, the average time required for the determination was five days, according to information provided by the Ministry of Justice and Home Affairs.²⁹² Italy, during the 2011 period when large numbers of migrants were arriving, relied on separated children's self-declaration and physical appearance or through documents, when available; it did not usually order radiological exams. The Hellenic Coast Guard normally records the age declared by the migrant although Greece plans to introduce medical tests.²⁹³ In the absence of reliable documents, no exact method exists for determining the age of a child.²⁹⁴

Identification of separated children becomes more challenging when large numbers of migrants are arriving. This occurred in Lampedusa early in 2011, for example. Individuals who were transferred to reception facilities for adults turned out to be children. Onward movement proved difficult:

"There are 19 minors in Mineo (a reception centre for adult asylum seekers). On 19 April they were identified as minors, well today (5 October) they are still there."

(Save the Children staff, interviewed in Italy)

A particular difficulty in the identification process emerged in Greece, where some children appear to be reluctant to declare their true age, in part because this could lead to longer detention at the point of entry. Under this system, children would namely remain in detention until their transfer to a special facility is organised, which takes time. The National Centre for Social Solidarity of the Ministry of Health took over responsibility for managing the system of referrals of unaccompanied children to reception facilities²⁹⁵ in 2012 and improved the procedure to identify a reception place for separated children. Nevertheless, a child may still spend up to several weeks in detention.²⁹⁶ The procedure works so: the authorities inform the National Centre about the existence of an unaccompanied minor, the latter informs the reception centres for minors in

order to check for vacancies and request permission for admission; the centre grants the permission under the condition that the minors are in good mental health and carry no transmittable diseases; the police book an appointment for the child's check-up, find an interpreter and provide a police escort throughout the process. Only then can transport to the reception centre be organised. The fact that minors remain in the detention centre until their transport to a special facility combined with the lengthy administrative process of their referral discourage not only the children but also the authorities from recording someone as an unaccompanied minor.

Delays in the identification process and the release from detention also surfaced in Malta. In the first seven months of 2012, the average time until release was 13 days,²⁹⁷ but individual cases can take longer. One child who arrived in Malta in 2009 spent eight months in detention. Some minors who arrived in 2011 were only released from detention after six to eight months, the Jesuit Refugee Service told FRA. Such delays cover the time during which the Agency for the Welfare of Asylum Seekers (AWAS) conducts its assessment and identifies appropriate accommodation.

Guardians are not necessarily nominated immediately following the identification of a separated child. Greece, however, does so: the Prosecutor General is by law the temporary guardian until the child is transferred from the border facility to an accommodation centre. In practice, however, the Prosecutor General takes only limited steps during this phase to ensure that the child's best interests are given primary consideration. In Malta, once the child is identified as separated, the Ministry for Justice, Dialogue and the Family issues a care order.²⁹⁸ Based on this, the Children and Young Persons Advisory Board within the Ministry appoints each child a social worker who draws up a care plan for the child which the board must approve.

Italy and Spain usually appoint guardians once a child has been transferred to his or her temporary place of accommodation. In Italy, a special judge (*giudice tutelare*) responsible for the region in which the child is staying appoints the guardian. In Spain, child protection services of the region where the child is transferred carry out the role of guardian. During the disembarkation and immediate post-arrival phase NGOs, if present, may take steps to promote the best interests of the child. They may be entrusted with general child protection tasks, as is the case in Lampedusa for Save the Children who operates under the *Praesidium* project.

²⁹² Information provided to the FRA by the Ministry of Justice and Home Affairs of Malta, November 2012.

²⁹³ In Greece, the procedure for the use of medical tests for age assessment purposes is currently being laid down.

²⁹⁴ See the detailed analysis on this issue in the Ombudsman of Spain (*Oficina del Defensor del Pueblo*) (2011).

²⁹⁵ Greece, Ministerial decision No. 93510/28-07-2011 (Government Gazette 2016, vol. B'/09-09-2011).

²⁹⁶ Greece, Law 3907/2011, Art. 32 (1) says: "Unaccompanied minors and families with minors are detained as a last resort only if no other adequate but less restrictive measures can be applied for the same purpose and for the minimum the required time." A 2012 report by the Greek Council for Refugees on the situation in Evros at the Turkish-Greek land border says that in Fylakio, until March 2012, minors would normally be detained for 1.5 month; Greek Council for Refugees (2012), p. 22.

²⁹⁷ Information provided by the Maltese Ministry of Justice and Home Affairs to the FRA in November 2012.

²⁹⁸ Malta, Children and Young Persons Act, Art. 9, Chapter 285 of the Laws of Malta.

A recurrent issue that emerged from the research is that separated children appear not to know what will happen to them and where they will be moved. They may receive contradictory information from different sources, including from other migrants. In Greece, for example, some persons interviewed for this research mentioned that as children they had not understood why others were released from detention but they were not. Similarly, some interviewed in the Canary Islands said that as children, authorities had not informed them about where they would be moved. Limited information as well as absence of child-sensitive social and legal counselling hinders the self-identification of separated children.

There are also more general factors which may discourage the self-identification of separated children, as several different interlocutors in Greece mentioned. These include the remote location of the few existing reception centres for minors which are unattractive particularly to older children, who are interested in finding work and pursuing their education and do not wish to remain socially isolated in the reception centres. Furthermore, children may view Greece as a transit stop. They do not reveal their real age in the hopes they will be released from detention as soon as possible and with the intention to leave Greece.

7.5. Victims of human trafficking

Pursuant to Article 79 of the TFEU, the EU shall develop enhanced measures to combat trafficking in human beings, in particular women and children. The Stockholm Programme reiterates the need to fight trafficking in human beings (at 6.1.6).

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.

All four EU Member States have created some form of protection mechanisms. Victims of trafficking – if they have been identified and they agree to cooperate with the justice system in line with Directive 2004/81/EC²⁹⁹ – are entitled to a renewable residence permit. In Greece

and Italy, residence permits are not necessarily tied to cooperation with criminal procedures.³⁰⁰

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.

While mechanisms put in place to identify suspected victims of trafficking were found to be weak or non-existent in Greece and Malta, Italy and Spain have introduced some promising initiatives. Spain is the only country in which interviewees mentioned the existence of specific internal instructions to identify potential victims of trafficking;³⁰¹ if human trafficking is suspected, the first action is to separate the victim from the rest of the group, although this may not necessarily mean releasing him or her, authorities said.

Promising practice

Identifying women at risk

The Spanish Red Cross provides healthcare and emergency humanitarian assistance on the pier as migrants disembark. In response to the increasing number of pregnant women and babies arriving and of reports of experiences of forced prostitution and sexual exploitation en route, the Red Cross introduced a social mediation service in 2007. All women and children, regardless of their health situation, are interviewed individually in presence of a translator to try to detect situations of increased vulnerability, such as potential asylum seekers or victims of trafficking. The interviews are conducted in parallel with the health check-up and before the police identification interview. This arrangement helps establish a minimum bond of trust to enable women and children to tell their stories.

In Lampedusa, IOM provides information and leaflets on the national anti-trafficking hotline immediately after migrants disembark. However, this timing does not offer the best conditions to carry out a proper identification:

"In particular we inform Nigerian women, but it is highly unlikely that women reveal themselves as victims of trafficking in Lampedusa. First of all, because the exploiter often travels with them. Then, many women, even when they know they will work as prostitutes, they do not know the harsh living and working conditions."

(IOM staff, interviewed in Italy)

²⁹⁹ Greece, Law 3386/2005, Art. 50; Malta, Permission to Reside for Victims of Trafficking or Illegal Immigration who co-operate with the Maltese Authorities Regulations, 6 July 2007, Legal Notice 175 of 2007, Subsidiary Legislation 217.07 of the Laws of Malta; Italy, Art. 18 Legislative Decree No. 286/1998; Spain, Law 4/2000, Art. 31 bis and implementing decree Royal Decree (Real Decreto) 557/2011, 20 April 2011, Art. 144.

³⁰⁰ Greece, Law 3386/2005, Art. 50 (cooperation being only one among three conditions), Art. 44 as amended by Art. 42 of Law 3907/2011; Italy, Art. 18 Legislative Decree 286/1998.

³⁰¹ Spain, Instruction No. 59 bis/2010 by the Secretary of State.

In Lampedusa and other reception centres such as Mineo and Manduria, some pregnant women were identified as potential victims of human trafficking.

“In many cases, Nigerian women at the hospital declared they are not married but in Lampedusa there is a man who declares to be the husband and asks to be reunited with his wife. We need to pay attention. The same happened in Mineo and Manduria.”

(UNHCR staff, interviewed in Italy)

In Malta, the Agency for the Welfare of Asylum Seekers (AWAS) uses a checklist to identify vulnerable persons, and it contains some questions about human trafficking. The placement of migrants in detention, however, does not facilitate their identification. Moreover, detention staff is predominantly male. While a system exists to identify vulnerable persons in detention, as described in the next section, it needs improvement to help identify vulnerabilities which are not easily visible.

Greece does not conduct adequate medical screening soon after disembarkation that would identify potential victims of torture or human trafficking. The creation of Initial Reception Centres under law 3907/2011 could be an opportunity to employ social workers and psychologists specialised in the field of trafficking in human beings, which could help in identifying at least those persons who were abused before their entry into Greece.

7.6. Other persons at risk

In addition to the categories already described, there are other persons with specific needs who may arrive at the EU's external borders. These could include persons with disabilities, in particular persons with mental health problems as a result of experiences of torture or violence. More generally, as Chapter 1 illustrated, they could be victims of serious crime, including sexual abuse or exploitation, committed during the journey. In some cases such persons may fall under one of the groups described in Sections 7.3–7.5, such as asylum seekers for example, but this is not necessarily always the case.

Neither the CRPD, nor the various conventions prohibiting torture contain an express duty for parties to these instruments to take proactive measures to identify victims of crime or victims of torture when they arrive at borders. EU law is also silent on it; the Reception Conditions Directive operates only once a person seeks asylum.³⁰² Similarly, the provisions on vulnerable persons in Article 14 of the Return Directive apply to persons whose removal has been postponed or who agree to depart voluntarily.

³⁰² Council Directive 2003/9/EC, OJ 2003 L 31/18, Art. 3, pp. 18–25.

Some guidance exists in relation to detention, where the Return Directive requires paying particular attention when individuals who belong to a vulnerable group are detained (Article 15 (3)). Vulnerable groups include persons with disabilities, pregnant women and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (Return Directive, Article 3 (9)). The ECtHR found that the detention of persons with mental health problems in facilities which were not equipped to cater for their needs to be arbitrary and in violation of Article 5 of the ECHR, and in some cases said it also raised issues under the prohibition of torture and inhuman or degrading treatment or punishment of Article 3 of the ECHR.³⁰³

This is reflected in practice, where procedures may exist to avoid detention of persons belonging to vulnerable groups. Malta, for example, has a mandatory detention policy under Article 14 (2) of the Immigration Law. The AWAS is responsible for identifying vulnerable persons in detention and organising their release. The system is based on referrals from the police or organisations working in the detention facility. Persons with ‘non-visible’ vulnerabilities, such as those with mental health issues or victims of trafficking may, however, be overlooked. Moreover, the release of vulnerable persons takes time, usually two-to-three weeks, but sometimes also longer.

One woman interviewed in Spain reported that she had yet to receive a birth certificate for her baby who was born in the boat while crossing to Spain. The absence of a birth certificate may expose the child to a risk of *de facto* statelessness, depriving him or her of basic rights in future, regardless of whether he or she will stay in Spain or return.³⁰⁴

Conclusions

In order 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 reviewed the police carry out an interview to identify the individual and decide his or her

³⁰³ ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010; ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011; ECtHR, *M.S. v. the United Kingdom*, No. 24527/08, 3 May 2012. See also, non-immigration cases ECtHR *Price v. the United Kingdom*, No. 33394/96, 10 July 2001.

³⁰⁴ For more information on negative consequences of children returned without a birth certificate, see UN International Children's Fund (UNICEF) (2011).

further position under the law. Usually, the identification interview 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.

Article 20 (1) of the 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. 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 this report.

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.

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.



8

Fundamental rights in the context of return and readmission



Charter of Fundamental Rights of the European Union

Article 18 (Right to asylum)

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19 (Protection in the event of removal, expulsion or extradition)

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Article 47 (Right to an effective remedy and to a fair trial)

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

The previous chapter described the various avenues that a migrant arriving by sea can be channelled into after disembarkation. Typically, these include referral to asylum procedures, protection mechanisms for minors or victims of human trafficking, but also return decisions and subsequent removal. These procedures and the related fundamental rights challenges are beyond the scope of this research and FRA has covered some aspects of it in other reports.³⁰⁵ Chapter 3 covers the

situation of those intercepted at sea and directly pushed back to the country of departure. There are, however, individuals who, upon arrival, are speedily returned to the country of departure through a simplified procedure. This chapter focuses on such returns, which can sometimes take place within a few days.

Most countries of arrivals have tried to implement swift removals when this was not prevented by legal bars, such as asylum applications, or practical obstacles. In practice, during the time the FRA carried out its research project, it has primarily been Moroccan, Tunisian and Egyptian nationals who at different points in time were swiftly returned from Italy or Spain to their country of origin. 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.³⁰⁶

The fast implementation of removals can have a deterrent effect, discouraging future migrants from attempting the dangerous sea crossing.³⁰⁷ Depending on how they are implemented, however, accelerated removal procedures may also erode existing safeguards, particularly as regards the respect for the principle of *non-refoulement*.

Returns are usually made possible through the conclusion of readmission agreements and bilateral discussions at the political as well as operational level relating to their implementation. Even if readmission

³⁰⁵ For information on asylum, see FRA (2010c); FRA (2010d); for information on protection of separated children, see FRA (2010b); for information on detention pending removal, see FRA (2010a).

³⁰⁶ Cassarino, J.P. (ed.) (2010); Balzacq, T. and CEPS (2008); Roig, A. and Huddleston, T. (2007), p. 363–387; Trauner, F. and Kruse, I. (2008).

³⁰⁷ See for example the impact on the implementation of returns from Italy to Tunisia in April 2011 described in Frontex (2011a), p. 19.

agreements must be seen as part of the broader relationships with a particular country, they constitute an important practical tool. Therefore, this chapter devotes particular attention to them.

Readmission agreements can be useful for both the repatriation of nationals of the readmitting country as well as for the return of non-nationals. For the former group, readmission agreements often clarify and facilitate procedures and can also simplify the processing. For non-nationals, readmission agreements often create the legal basis enabling their readmission back to the country through which they transited. Under international law, a state has a duty to accept its own nationals. A transit country has, however, no obligation to readmit non-nationals who used its territory to enter a third-country in an irregular manner. Removing an individual to his or her home country is costly and takes time. States have, therefore, looked into ways of returning persons who unlawfully crossed their land or sea borders to the neighbouring country through which they transited, particularly when the migrant was caught while crossing or immediately thereafter. For those who arrive by air, international law already has an obligation for carriers of non-admitted passengers to return them to their point of departure.³⁰⁸

8.1. Readmission agreements concluded by the EU

Both the EU and individual Member States can conclude readmission agreements. While traditionally EU Member States have concluded a large number of bilateral agreements with third countries, over the last decade, there has been an effort to negotiate agreements at the EU level. The Stockholm Programme lists the conclusion of "effective and operational readmission agreements on a case-by-case basis at Union or bilateral level" (6.1.6) among the priority measures to combat illegal immigration. It calls for a comprehensive approach to return and readmission, and highlights the need to step up cooperation with countries of origin and transit.³⁰⁹ The legal basis for EU readmission agreements is spelled out in Article 79 (3) of the TFEU:

"The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States."

From 2005 to 2012, the EU concluded 13 readmission agreements, all of which have entered into force.³¹⁰ None of these agreements, however, concern countries from where migrant boats to the EU are departing. The Council of the European Union has, however, authorised the opening of negotiations to conclude readmission agreements under Article 218 of the TFEU for another five countries,³¹¹ including Algeria, Morocco, and Turkey. Although the European Commission received a mandate to negotiate with these three countries in 2002, no agreements have yet been concluded or signed yet, although the agreement with Turkey was initialled in June 2012.

EU readmission agreements follow a standardised approach, based initially on the model recommended by the Council of the European Union for bilateral readmission agreements.³¹² They may include a simplified procedure for persons apprehended in border areas.³¹³ While timeframes for such simplified procedures are to be negotiated between the parties, Council guidance suggests that their total time, comprising the submission and answering of all requests, should not exceed 48 hours (Article 1 (2)); formalities should be simple. Local border authorities would carry out return notifications.

All EU readmission agreements include clauses for the readmission of third-country nationals. Of the 13 agreements already in force, six contain a simplified procedure clause.³¹⁴ These clauses provide for the possibility of submitting a readmission application within two days of a person's apprehension. In all six cases, the request for an accelerated procedure is conditional upon the fact that the person concerned has been apprehended in the border region of the requesting state after illegally crossing the border coming directly from the territory of the requested state. There is one further condition in the Ukraine agreement which requires the person to be apprehended within 48 hours of the illegal border crossing (Article 5 (3) of the EU-Ukraine readmission agreement).

EU readmission agreements also contain a safeguard whereby obligations deriving from international law remain unaffected. In the majority of cases, the agreements make an explicit reference to one or more of the

³⁰⁸ UN, Convention on International Civil Aviation (1944), Annex 9, Chap. 5.

³⁰⁹ European Council (2010), p. 31.

³¹⁰ 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 (2011g), Table 1.

³¹¹ European Commission (2011g), Table 2.

³¹² Council of the European Union (1996a), p. 20 ff.

³¹³ Council of the European Union (1996b), p. 25 ff.

³¹⁴ EC-Russia Readmission Agreement, Art. 6 (3); EC-Ukraine Readmission Agreement, Art. 5 (3); EC-FYROM Readmission Agreement, Art. 6 (3); EC-Serbia Readmission Agreement, Art. 6 (3); EC-Moldova Readmission Agreement, Art. 6 (3); EU-Georgia Readmission Agreement, Art. 6 (3).

following instruments: the 1951 Convention relating to the Status of Refugees, the ECHR or the UN Convention Against Torture. For Macao, Hong Kong and Sri Lanka, however, the wording of this clause is weaker and of a very general nature.³¹⁵ The readmission agreement concluded with Pakistan does not contain any human rights safeguard clause.³¹⁶

The above-mentioned model agreement envisages suspending the agreement “on important grounds, in particular on the grounds of the protection of State security, public order or public health”.³¹⁷ In line with that, four EU agreements contain a temporary suspension clause with regard to third-country nationals and stateless persons, for reasons of “security, protection of public order or public health”.³¹⁸ Suspension is not explicitly envisaged for situations of serious violations of human rights of persons returned under the readmission agreement.

Under Article 218 of the TFEU, since the Treaty of Lisbon, the European Parliament must consent to EU readmission agreements. In order to facilitate the exercise of its new role, the Parliament commissioned a study on readmission policies which was published in 2010.³¹⁹ The report also discusses fundamental rights. One particular issue raised with regard to EU readmission agreements is the need for monitoring indirect *refoulement*, in other words the risk that a person returned on the basis of a readmission agreement is then expelled to a country where he or she fears persecution or is exposed to a real risk of other serious harm.³²⁰

The European Commission published an evaluation of EU readmission agreements in 2011.³²¹ The evaluation gives considerable attention to fundamental rights. It does not limit itself to an analysis of the legal framework, but also examines practical issues which may put respect for fundamental rights at risk. The evaluation suggests possible actions to enhance human rights guarantees in future readmission agreements, namely:

- a safeguard clause for accelerated re-admission procedures;
- a statement whereby the agreements only apply to persons whose return or removal has not been suspended;
- a clause suspending an individual’s readmission, when it would lead to a violation of fundamental rights and a clause temporarily suspending the agreement in case of “persistent and serious risk of violation of human rights of readmitted persons”;
- a commitment to give preference to voluntary departures;
- an express commitment to treat third-country nationals in compliance with key international human rights law.

These steps would go a long way towards ensuring respect for the human rights of third-country nationals who are returned on the basis of EU readmission agreements and further reduce the risk of *refoulement*. As no new agreement has been concluded since the evaluation’s publication, it remains to be seen to what extent the findings of the evaluation will be implemented in practice.

In addition to classical readmission agreements, there are at least some 30 other agreements concluded in the past by the EU and the European Communities which contain an enabling readmission clause.³²² These include the euro-Mediterranean agreements concluded with Algeria, Egypt, Morocco, Tunisia as well as the Cotonou Agreement covering Mauritania and Senegal.

³¹⁵ Hong-Kong, Art. 16; Macao, Art. 16; Sri Lanka, Art. 16.

³¹⁶ Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, OJ 2010 L 287/52.

³¹⁷ Council of the European Union (1996c), Annex to Annex II.2, Art. 13, p. 20 ff.

³¹⁸ EC-FYROM agreement, Art. 22 (4)); EC-Bosnia and Herzegovina agreement, Art. 22 (4)); EC-Montenegro agreement, Art. 22 (4)); EC-Serbia agreement, Art. 22 (4).

³¹⁹ Cassarino, J.P. and European University Institute (2010).

³²⁰ *Ibid.*, pp. 20–22.

³²¹ European Commission (2011h).

³²² European Commission, Treaties office (2011).

Table 12: Clauses on readmission in euro-Mediterranean and Cotonou agreements

Country	Date of Signature	Entry into force	Article on readmission	Key provision(s)
Cotonou agreement (covering Mauritania and Senegal) OJ, 15/12/2000, L317, 3	23/06/2000	1 April 2003	Agreement Article 13	Commitment to negotiate readmission agreements, which may also cover third-country nationals and statement that the EU will provide adequate assistance
Morocco OJ, 10/03/2000, L70, 2	26/02/1996	1 March 2000	Joint Declaration	Commitment to adopt bilateral measures for the readmission of own nationals
Algeria OJ, 10/10/2005, L265, 2	22/04/2002	1 Sept. 2005	Agreement Article 84	Duty to readmit nationals unlawfully residing in the other country and commitment to negotiate readmission agreements which may also cover third-country nationals
Tunisia OJ, 30/03/1998, L97, 2	17/05/1995	1 March 1998	Agreement Article 69	Duty to conduct regular dialogue on return
Egypt OJ, 30/09/2004, L304, 39	25/06/2001	1 June 2004	Agreement Article 69	Commitment to negotiate readmission agreements which may also cover third-country nationals and, for the EU, to support (also financially) its implementation

Note: Third countries are listed following the coastline, starting from west Africa.

Source: FRA, 2012, based on texts of the readmission agreements

8.2. Accelerated returns under readmission agreements

In the absence of EU readmission agreements, a large number of standard and non-standard bilateral agreements linked to readmission regulate returns to the country from which migrants have departed.³²³ In respect of the countries of departure referred to in Tables 5 and 7 of this report (Algeria, Egypt, Libya, Mauritania, Morocco, Senegal, Tunisia and Turkey) the southern EU Member States have concluded at least 26 agreements linked to readmission:³²⁴ Italy, 15; Spain, six; Greece, four; and Malta, one. Table 13 outlines selected agreements between these EU Member States and third countries.

Only a few of these agreements are readmission agreements in the traditional sense, focusing exclusively on the modalities of returns of unlawfully staying migrants. Some are broader cooperation agreements in which readmission and fighting irregular migration are treated alongside other migration, economic or security

issues. Others are less formal operational cooperation arrangements between law enforcement authorities, which are not public and deal with details for handling readmission requests or for cooperation in patrolling the sea.

Most Mediterranean countries have concluded agreements linked to readmission with its neighbours from where migrant boats usually depart. The formal conclusion of readmission agreements is not necessarily a precondition for return. Conversely, the existence of an agreement does not necessarily mean that it will be fully and consistently implemented. The 2001 Greek-Turkish readmission agreement is a good example: the number of persons returned to Turkey under the agreement remains low. Readmissions could for several years only be effected at the land border, which would mean that the Aegean islands could not benefit from it. It was only in 2010 that the two countries agreed upon the port of Dikili near Izmir as a new readmission point, allowing for direct returns from the Aegean islands.

As noted above, accelerated returns observed during the implementation of this FRA project primarily concerned Moroccan nationals removed from Spain, and Egyptian and Tunisian nationals removed from Italy. In all three cases, migrants were repatriated to their home countries. Operational details and deadlines for accelerated or simplified returns are often transparent. These may be readjusted depending on particular events or needs. Prior to the simplified returns of Tunisians in April 2011, for example, the Italian Minister of Interior visited Tunis

323 For an analysis of readmission agreements in the Mediterranean, see Cassarino, J.P. (ed.) (2010).

324 For a list of agreements linked to readmission, see European University Institute, Return Migration and Development Platform. Such a list has served as a basis for this section and the distinction between agreements, memoranda of understanding, administrative arrangements, police cooperation agreements, has been maintained.

Table 13: Selected readmission agreements between third countries and four EU Member States

EU Member State	Country	Type of Agreement	Date
EL	Tunisia	Police cooperation agreement linked to readmission	19 May 1990 (S)
	Egypt	Police cooperation agreement linked to readmission	27 July 2000 (V)
	Turkey	Police cooperation agreement linked to readmission Agreement	5 August 2002 (S) 24 April 2002 (V)
ES	Algeria	Protocol regarding circulation (including a readmission clause)	18 February 2004 (V)
	Morocco	Provisional agreement	13 February 1992(S) 21 October 2012 (V)
		Memorandum of understanding	23 December 2003 (S)
		Police cooperation agreement linked to readmission	20 May 2012 (V)
	Mauritania	Provisional agreement	21 July 2003 (V)
	Senegal	Memorandum of understanding	5 December 2006 (S)
	Turkey	Police cooperation agreement linked to readmission	1 December 2009 (V)
IT	Algeria	Agreement	18 October 2006 (V)
		Police cooperation agreement linked to readmission	22 July 2009 (S)
	Egypt	Police cooperation agreement linked to readmission	18 June 2000 (V)
		Agreement	9 January 2007 (V)
	Libya	Administrative arrangements	12 December 2000 (S)
		Administrative arrangements	3 July 2003 (S)
		Memorandum of understanding	18 January 2006 (S)
		Police cooperation agreement linked to readmission	29 December 2007 (S)
		Memorandum of understanding	17 June 2011 (S)
		Exchange of letters	3 April 2012
	Morocco	Agreement	27 July 1998 (S)
		Agreement	6 August 1998 (V)
	Tunisia	Police cooperation agreement linked to readmission	13 December 2003 (S)
		Administrative agreement	28 January 2009 (S)
		Memorandum of understanding	5 April 2011 (S)
	Turkey	Police cooperation agreement linked to readmission	9 February 2001 (V)
MT	Libya	Police cooperation agreement linked to readmission	1984*

Note: (S) date of signature; (V) date of entry into force; * specific date of signature or entry into force is not available.

Source: European University Institute, Return Migration and Development Platform (RDP), 2013

and signed a technical memorandum of understanding which was not made public. Tunisia agreed to not require a fingerprint verification to readmit their own nationals, but to be satisfied if its consular staff recognised the individual, according to the Italian Ministry's press release.³²⁵ From that point, returns to Tunisia were carried out within a few days or weeks.

A lack of public scrutiny of such technical agreements that enable swifter removals has raised questions about compliance with human rights.³²⁶ The agreed upon readmission modalities are in principle only tools to implement a return decision, which should have been taken

in full respect of the safeguards established by domestic and EU law on asylum and return. Such tools, however, can create a dynamic that may drive operational realities. Procedures and practices may be designed in a way to meet the agreed upon, strict deadlines. Individuals selected for simplified returns may not go through the same process as other migrants who entered in an irregular manner and may therefore have less access to information, legal counselling and to the possibility to lodge a complaint against the return decision. The limited availability of information and legal counselling and their separation from other migrant groups may make it difficult for them to seek protection if in need. The FRA research identified the following obstacles.

First, there may be few opportunities to express the wish to seek asylum. Persons channelled into accelerated

³²⁵ Italy, Ministry of Interior (2011a).

³²⁶ Amnesty International (2012b); Italy, Tribunal, Criminal Chamber (2012); Amnesty International (2012c).

removal procedures may be returned directly from a temporary facility, such as Lampedusa or a police facility in a Spanish port, without going through an expulsion centre. In both Spain and Italy, police normally carry out only a short identification interview with individuals shortly after disembarkation. This interview is in practice the only moment when they are asked why they came into the country. It is difficult, however, to expect individuals to formulate an asylum claim at this stage when they are usually still affected by crossing ordeals and before receiving any counselling on their options. With the exception of women at risk in Spain which the Red Cross screening process may identify, migrants at this point would not have received any counselling on their legal situation. In Lampedusa, migrants typically received counselling and information the day after their arrival. Persons who may fear persecution but do not raise this concern during the first interview, appear to have limited possibilities to do so before they are removed.

Second, migrants are often separated, which limits or prevents interactions with other migrants who intend to submit an asylum application and could provide some information on asylum. North African migrants, for example, are usually separated from Sub-Saharan African migrants. In Spain, they are usually detained in different cells. In Lampedusa, according to Doctors without Borders Italy (*Medici Senza Frontiere*), in spring 2011 Tunisians were separated from Sub-Saharan Africans before leaving the pier:

"At the pier [...] people from Sub-Sahara are separated from Tunisians. It is a division based on the outer physical appearance."

(Doctors without Borders Italy staff, interviewed in Italy)

Third, individuals channelled into fast-track return procedures in Italy were kept in temporary sub-standard facilities. In 2011, three temporary expulsion centres were created for individuals who were going to be returned in an accelerated manner.³²⁷ When not directly removed from Lampedusa, Tunisians were transferred to one of these temporary expulsion centres. For this research, one of these centres was visited, Kinisia in Sicily, and found to be inadequate for hosting migrants; migrants were hosted in tents under the hot sun. The centre lacked basic services, such as proper toilets, hot water or recreational services. In order to prevent escape attempts, containers were stacked up to act as a fence, which limited air flow into the centre. For security reasons, migrants were not allowed to have lighters, shoes with laces or razor blades, and mirrors were removed from the baths. Self-harm was common. Food was served through a small opening in the fence, which forced migrants to crowd each other to receive it. Migrants reported instances of

ill-treatment and unmotivated night inspections. Many resorted to drugs against anxiety and depression. Kinisia and the other two temporary expulsion centres have since been closed.

"There are scorpions as big as this [about 4 cm]. Then there are many cockroaches, so many that three days ago I found one on my face. Sometimes the water is warm, sometimes cold, sometimes the water is not there and when we pray we sometimes have problems. I tried to escape and the police beat me. I am asthmatic."

(Tunisian man crossed to Pantelleria, Italy in 2011)

"Migrants take medicines to be safe. They all have headaches. They always ask for Rivotril."

(Tunisian man crossed to Pantelleria, Italy in 2011)

Fourth, migrants immediately channelled into return procedures may have fewer opportunities to be seen by international organisations and NGOs that provide information and legal counselling. This may in part be due to practical considerations related to capacity and in part to access issues. Such entities are also sometimes prohibited from visiting groups of north African migrants. In October 2010, for example, around 138 Egyptians were rescued and held for a day in a sport centre in Catania before most of them were repatriated without having the opportunity to meet with UNHCR representatives and the humanitarian personnel that officially asked to be allowed to assist them.³²⁸ After 5 April 2011, access to temporary expulsion centres where several Tunisians were hosted was restricted to a few international organisations and NGOs, which limited access to information and counselling.³²⁹ Similarly, in Spain, no organisation that offers independent legal counsel visits holding facilities in ports. The Red Cross, though present, is not mandated to provide individual counselling.

Another issue which emerged in Italy concerns the late notification of the migrant of a forced return measure. Migrants are not notified of a delayed rejection at the border and of expulsion decisions before the start of the removal operation, according to independent legal experts in Lampedusa and in other temporary expulsion centres. In some cases, the written measure would only be delivered to the migrant when boarding the airplane.³³⁰ This delay, which was probably motivated by public order concerns, effectively deprived migrants of the possibility to seek a review and a possible suspension of the removal. This is in contradiction to ECtHR requirements that claims under Article 3 of the ECHR must be subject to judicial review.³³¹ Civil society organisations working inside the camps in Lampedusa and Kinisia as well as migrants have confirmed these concerns.

327 Italy, Prime Ministerial Order, No. 3935 of 21 April 2011. The three centres were located in Kinisia, near Trapani; in Santa Maria Capua a Vetere, near Caserta and in Palazzo San Gervasio, near Potenza.

328 La Repubblica (2010).

329 Italy, Ministerial Circular (2011).

330 Vassallo Paleologo, F. (2011).

331 ECtHR, *Gebremedhin v. France*, No. 25389/05, 26 April 2007; ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012.

Question: "When you were put on the plane, did they give you some document, something that explained what kind of measures were implemented against you?"

Answer: "No."

(Tunisian man, crossed to Italy in 2011)

Finally, readmission agreements and cooperation with third countries may also facilitate summary expulsions. Amnesty International reported that on 4 September 2012 a group of 70 migrants reached the unpopulated Spanish islet of Isla de Tierra a few hundred metres off the Moroccan coast. The Spanish authorities returned the group to the Moroccan beach of Sfiha and from there Moroccan authorities brought them to the Algerian border.³³²

Conclusions

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.³³³

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 2010.³³⁴

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.³³⁵ 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, operational 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 is 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.

³³² Amnesty International (2012d).

³³³ See European Commission (2006), Annex 39, *Standard form for recognising a return decision for the purposes of transit by land*.

³³⁴ Council of Europe, PACE, Committee on Migration, Refugees and Population (2010). See also Council of Europe, PACE (2011b).

³³⁵ Council Directive 2005/85/EC, Asylum Procedures Directive, Art. 7, 39 (3).

PART THREE: General issues relating to the situation at sea and after arrival

9

Fundamental rights training for border guards



Revised Frontex Regulation (2007/2004/EC as amended by Regulation 1168/2011/EU)

Article 5 (Training)

[...] The Agency shall establish and further develop core curricula for the training of border guards and provide training at European level for instructors of the national border guards of Member States, including with regard to fundamental rights, access to international protection and relevant maritime law.

Member States shall integrate the common core curricula in the training of their national border guards.

Border guards must be trained to deal with the practical challenges that emerge in their daily work. This concerns all areas of their work, including fundamental rights. The revised Frontex Regulation also reflects the importance of fundamental rights training for border guards.

The UN and other international and EU bodies have paid considerable attention in recent years to human rights training. The UN General Assembly proclaimed the 10-year period from 1995-2005 to be the United Nations Decade for Human Rights Education and adopted a Plan of Action.³³⁶ In 2011, the UN General Assembly adopted the UN Declaration on Human Rights Education and Training.³³⁷ This declaration covers a variety of different target groups, including law enforcement officers. It stresses that to produce the desired impact on behaviour and professional performance, institutional policies must clearly support human rights training. Human rights training is not to be seen as a one-off training course.³³⁸

Several tools have been developed for police training. The UN Office of the High Commissioner for Human Rights (OHCHR) published in 2004 a pocket-sized book for law enforcement officials containing the relevant human rights standards to keep in mind and apply while carrying out their duties.³³⁹ In 2008, the Organization for Security and Co-operation in Europe (OSCE) issued a *Guidebook on Democratic Policing*.³⁴⁰ Earlier, in 2001, the Council of Europe developed the European Code of Police Ethics.³⁴¹ The Code states that the police organisation should contain efficient measures to ensure the integrity and proper performance of police staff, in particular to guarantee respect for individuals' fundamental rights and freedoms as enshrined, notably, in the ECHR.³⁴² At the EU level, the European Police College (CEPOL), an EU Agency created in 2005,³⁴³ developed Common Curricula, which provide recommendations about police training on specific subjects with a European dimension. Such curricula include the Common Curriculum on Police Ethics and Prevention of Corruption and the Common Curriculum on Trafficking in Human Beings.³⁴⁴

These general police training tools are only partially relevant to the work of border guards, given the specificity of their work. So far, the only specific human rights training tool developed for border guards is the 2011 UNHCR manual.³⁴⁵ It focuses, however, on one particular aspect: the rights of refugees in the context of mixed migration movements. In 2009, Frontex launched a process to develop a fundamental rights training manual involving the FRA, UNHCR and other organisations. The manual is being finalised and is expected to be issued in 2013.³⁴⁶

³³⁹ OHCHR (2004).

³⁴⁰ OSCE (2008).

³⁴¹ Council of Europe, Committee of Ministers (2001).

³⁴² *Ibid.*, Clause 20.

³⁴³ Council Decision 2005/681/JHA, OJ 2005 L 256, pp. 63-70.

³⁴⁴ European Police College (CEPOL) (2008); CEPOL (2009).

³⁴⁵ UNHCR (2011c).

³⁴⁶ Frontex (2012b), p. 54.

³³⁶ UN, General Assembly (1996).

³³⁷ UN, General Assembly (2012).

³³⁸ *Ibid.*, Section II. D. 2. (a).

This chapter first illustrates EU efforts to harmonise border guard training through the adoption of a Common Core Curriculum and then provides a brief overview of existing national training structures for border guards.

9.1. The Common Core Curriculum

In 2002, the Council of the European Union decided that a Common Core Curriculum (CCC) should be developed for border guards in the EU.³⁴⁷ The objective of the CCC is to approximate the basic training that front-line staff employed as border guards in an EU Member State receive before they take up their positions. The CCC was developed in 2003 and updated in 2007 and 2012. The 2012 update responded primarily to a need to enhance its fundamental rights aspects and to adapt to changed legislation.

The CCC contains a common set of standards for national border guard training institutions. With the revised Frontex Regulation, EU Member States are obliged to incorporate the content of the CCC in their national training (Article 5a). In essence, the CCC lists the knowledge and skills that a future border guard should have before he or she is deployed. The CCC concerns basic training and does not

cover refresher courses. It is directed at front-line staff. Other tools are being developed for the approximation of training for mid-level and upper-level management. Overall, the CCC aims at fostering a common understanding among border guards across EU Member States.

The CCC is composed of a general part and specific modules for air, land and sea borders. Several parts of the CCC contain references to fundamental rights. Such references are generally of a practical nature, focusing on what a border guard needs to know and to do in a particular situation. The specific module on the sea border covers the applicable law of the sea framework, search and rescue procedures, the special regime for seafarers and the particular characteristics of maritime operations. Table 13 reproduces some of the fundamental rights-related skills and knowledge the CCC contains in its general part and with which all border guards in Europe should be equipped.

Most of these fundamental rights references were added in the 2012 CCC revision to which the FRA and UNHCR contributed extensively. As national curricula had already been adopted by the time the revised CCC was issued, the changes could not be implemented for the 2012–2013 training year. They should, however, be reflected in the 2013–2014 academic year.

Table 14: Examples of fundamental rights contained in the general part of the CCC

Subject	Knowledge	Skill
1.3.3. Identification of psychologically vulnerable persons	Border guard (BG)* is able to identify behavioural patterns which indicate that a person could be a victim of trafficking suffering trauma.	BG is able to channel appropriate care for psychologically vulnerable persons.
1.4.1 Principles of interviewing	BG is able to list and explain the guiding principles and national procedures for interviewing in border-related situations. BG is able to prove the need to have an adequate knowledge of fundamental rights standards and national legislation when meeting and interviewing people in border-related situations.	BG is able to apply adequately their knowledge of fundamental rights standards and national legislation when interviewing in a border-related situation.
1.4.2. Working with an interpreter	BG is able to describe when to call on the services of an interpreter and explain the procedures to follow.	BG is able to communicate effectively with a foreigner by using an appropriate interpreter, with due consideration concerning gender and cultural sensitivities.
1.5.1. Cultural diversity	BG is able to explain the basics of cultural diversity and how to deal with it in a border guard-related situation. BG is able to acknowledge and understand cultural diversity.	BG is able to deal with people from different cultures and with different values in a professional manner.
1.5.4. Prejudices, racism, racial discrimination, xenophobia, Islamophobia, homophobia, and other related intolerances	BG is able to explain ways of preventing prejudice, racism, racial discrimination, xenophobia, Islamophobia, homophobia, and other related intolerances and is able to identify the impact of such on the relationship with the customer.	BG is able to serve the public in a professional and sensitive way without any influence of prejudice, racism, racial discrimination, xenophobia, Islamophobia, homophobia, and other related intolerances.

³⁴⁷ European Council (2002), p. 11.

Subject	Knowledge	Skill
1.5.6. Different background: other diversities	BG is able to explain applicable national instructions and guidelines when dealing with people of different backgrounds (age, sex, sexual orientation, gender identity, persons with disabilities and other diversities).	BG is able to handle situations with people from different backgrounds (age, sex, sexual orientation, gender identity, persons with disabilities and other diversities) with respect and sensitivity.
1.7.3. European Convention on Human Rights	BG is able to explain that no one shall be subject to torture or to inhuman or degrading treatment or punishment. BG is able to explain basic procedural guarantees relating to deprivation of liberty. BG is able to explain the role of the European Court of Human Rights and its jurisprudence related to BG work.	BG is able to identify acceptable and non-acceptable behaviour under the European Convention on Human Rights relating to torture or to inhuman or degrading treatment or punishment as well as deprivation of liberty.
1.7.7. Persons seeking asylum	BG is able to define the principle of <i>non-refoulement</i> and the right to remain in the Member State pending examination of the application.	BG is able to demonstrate where to refer persons in need of protection and assistance and the procedure to follow.
1.7.8. Identification and Referral of Victims of Trafficking	BG is able to identify potential victims of human trafficking including children [and to] recognise the needs of the victims [...].	BG is able to, according to international and national standards and legislation: apply, as appropriate, child- and gender-sensitive techniques and ethical principles in conducting victim-centred interviews; refer (potential) victims to specialised service providers; [...].
1.7.9. Protection of children	BG is able to list specific protection needs of children as well as key rights, such as the protection of the family and specifically from separation from parents, the best interests of the child and the presumption against detention of children.	BG is able to apply appropriate measures, including referral to appropriate structures for the following groups of children in need of protection: unaccompanied and separated children, asylum-seeking children, potential victims of trafficking [...], missing children and children abducted by a family member.
1.8.7. Asylum and international protection procedures (relating to English language training)	BG is able to list and name terms related to asylum [...].	BG is able to identify a request for asylum/international protection regardless of how this is presented.
2.3.5. Dealing with a victim of crime	BG identifies the rights and specific needs of victims of crime [...]. BG understands that victims may suffer from trauma and that this may affect the way they react. [...]	BG is able to deal with the victim in a respectful and professional manner. BG is able to interview victims of crime paying attention to their rights and needs, in particular in cases where the person is traumatised. BG is able to advise the victim of assistance and legal remedies open to the victim.
2.3.11. Investigative interviewing: interviewing techniques		BG is able to carry out an interview by utilising basic interview techniques which are in conformity with human rights law in order to obtain reconnaissance results.
3.1.2. General principles of using coercive measures		BG is able to control his or her emotions at every stage and to continuously evaluate the risk of the given situation and to act only on legal and tactical considerations by respecting fundamental rights.
3.5.8. First aid in special cases		BG is able to apply on a mannequin: [...] the drowning protocol.

Note: *BG stands for border guard.

Source: Frontex, Common Core Curriculum (2012d)

Frontex organised two teacher workshops in 2012 to present the revised CCC to translators and trainers in EU Member States and Schengen-associated countries. Of the five Mediterranean countries, Cyprus and Spain participated in these workshops, according to Frontex. Greece, Italy and Malta requested the revised CCC for national implementation but did not take part in the Frontex workshop.

All five EU Member States are taking steps to amend the national curricula to incorporate the revised CCC in border guard training. However, not all national institutions involved in border management implement the CCC. Police academies in Cyprus, Greece, Italy, Malta and Spain are using the CCC to define the content of their national training, but this is not always the case for other institutions involved in maritime surveillance. Table 14 provides an overview on the implementation of the CCC.

Table 15: Implementation of the CCC at national level, five EU Member States

EU Member States	Institution	Undertook to implement the CCC
CY	National Police	Yes
EL	Hellenic Police	Yes
	Hellenic Coast Guards	Yes
ES	National Police	Yes
	<i>Guardia Civil</i>	Yes
	Spanish Navy	No
IT	National Police	Yes
	<i>Guardia di Finanza</i>	Yes
	Italian Navy	No
	Italian Coast Guards	No
MT	National Police	Yes
	Armed Forces of Malta	No

Note: EU Member State country codes: CY: Cyprus; EL: Greece; ES: Spain; IT: Italy; MT: Malta.

Source: Frontex National Training Coordinators, 2012

9.2. National training for border guards

In Cyprus, Greece, Italy, Malta and Spain, border guards are part of the police, although, as described in Section 3.2, there are other institutions, in part of a military nature, which are involved in maritime surveillance activities. Border guards who are part of the police undergo the same basic training as other police officers. Authorities involved in border surveillance, however, have their own training structures.

National police academies provide basic training of varying length to police officers, which in many cases include those who will be deployed to carry out border control functions. In principle, the shorter the overall training, the fewer the hours that can be devoted

to human rights issues. The most important national training institutions are briefly described in the following paragraphs.

In Cyprus, Greece³⁴⁸ and Malta there is a national police academy which provides education and further training to the police, including border guards. Separate training structures exist for the Armed Forces in Malta as well as for the Hellenic Coast Guards, two other organisations that primarily deal with maritime border surveillance in these EU Member States.

A variety of training institutions exist in Italy and Spain. In Italy, there are five national police forces, two of which are primarily involved in border management issues: the National Police (*Polizia di Stato*) under the Ministry of Interior and the tax and financial police (*Guardia di Finanza*) under the Ministry of Finance. Each police force arranges training for its own staff autonomously, in separate law enforcement academies or training centres. For instance, the National Police has training centres for trainee police constables (*scuole allievi agenti*) in Alessandria and Peschiera (northern Italy) and in Vibo Valentia (southern Italy). The Rome-based National Police College of Higher Education (*Scuola Superiore di Polizia*) provides training for management-level police officers, whereas the Cesena training centre delivers specialist training and professional qualification courses on topics including border control. The Institute for the Aero-Naval Cooperation of the *Guardia di Finanza* Corps in Gaeta plans and organises training and post-training activities, including military exercises. Additionally, the Interagency Law Enforcement College of Advanced Studies (*Scuola di Perfezionamento per le Forze di polizia*) organises interagency training courses of varying duration for senior officers from the different police forces. The main directions of police training are set forth in the 1981 Police Reform Act.³⁴⁹

In Spain, two national police forces are responsible for dealing with irregular migration: the National Police Force, (*Cuerpo Nacional de Policía*), and the *Guardia Civil*, or *Cuerpo de la Guardia Civil*, both operating under the control of the Spanish Ministry of Interior. Some ports also have specialised Port Police, cooperating on security issues around the border crossing areas.³⁵⁰ The staff of the different forces are trained by their own independent training structures; the *Guardia Civil* Training Centre in Baeza and Valdemoro and the Officers Academy in Aranjuez and El Escorial (Madrid) and the National Police schools are united under the umbrella of

348 In Greece, all Hellenic Police staff are trained at the Hellenic Academy of Police located in Acharnai, on the outskirts of Athens. The organisation and functioning of the Hellenic Academy of Police is laid down by Greece, Law 2226/1994, Gazette 122 A of 21 July 1994.

349 Italy, Law 1981/121 of April 1981, No. 121, *Gazzetta Ufficiale*, 10 April 1981, No. 100.

350 Centre for the Study of Democracy (2011).

the Training and Improvement Division of the National Police Corps.³⁵¹

In Cyprus, Greece and Malta, front-line border guards can, in principle, be deployed to border control duties immediately after completing general police training, without first having to undergo specialised border management training. Participation in specialised courses, such as the one-month course the police academy in Cyprus offers annually on air borders and illegal migration, is encouraged but not compulsory. The Cyprus Police Academy is currently preparing a pilot training programme for policemen and women working on sea borders. The programme is based on the CCC Sea Border Module and its General Part, and is to be offered in the second half of 2013. No particular specialised course for border management appears to exist in Greece or Malta, although various subjects of the general police training include elements relating to migration and border surveillance. Officers may also attend re-fresher courses or seminars, which include border management issues offered by national training institutions.

In Italy and Spain, police must complete a specialised border management course before they are deployed to border security tasks. In Spain, the specialisation centre in Madrid provides the course. In Italy, the course lasts 2-1/2 months and incorporates significant fundamental rights and migration law components. Approximately 8 % of this programme deals with the subject of fundamental rights, though with a strong focus on non-discrimination, according to the Italian police.³⁵² Courses providing a specialist qualification in border management are only open to fully fledged police officers who have received, at the very least, induction training for initial entry to officer grade.

National curricula incorporate fundamental rights to varying degrees in basic training. Border guard training in all five EU Member States includes some theoretical lessons on key international and European human rights instruments, although the degree to which these are complemented by practical exercises varies as does their content. Malta's basic human rights training focuses on regular police tasks rather than on specific issues related to the rights of migrants. Law professors typically deliver the training which appears to be practically oriented. The Cyprus Police Academy includes fundamental rights training in the majority of the programmes it offers. Budgets were cut across most programmes for 2012, but

this had no influence upon training provisions concerning fundamental rights. In Spain, thematic units on human rights for police constables and inspectors include practical activities to stimulate discussion, reflection and assimilation of knowledge. Such activities include: the viewing of videos, the study of press reports, the study of disciplinary records, and the analysis of specific actions. Human rights training courses for higher-level police officers also include practical activities. Italy uses textbooks for human rights training that give a full account of the various rights and duties arising from European and international instruments. They also relate them to real-life situations that the officers are likely to face.³⁵³ Training focuses, however, on general fundamental rights, and could be enhanced as regards specific migration-related topics, such as the principle of *non-refoulement*.

Promising practice

Making human rights training materials publicly available

The United Kingdom has established an online repository of human rights training materials. Specialised manuals discuss different fields, issues and themes. Human rights are not dealt with as a stand-alone theme but are instead incorporated into the individual training units, with particular attention paid to keeping the training relevant to on-the-ground situations.

See: www.ukba.homeoffice.gov.uk/policyandlaw/guidance/

Training, including on fundamental rights, is usually provided by specialised police teaching staff, although in all five Member States there is some external participation – albeit to different degrees – by university professors, judges, prosecutors, NGOs or international organisations. In Spain, for example, Amnesty International notes active external participation by NGOs and other entities. For *Guardia Civil* training the Institute for Women contributes to gender-related training and the Red Cross provides input to the course on international humanitarian law for senior officers, but external participation appears less developed as for the police training.³⁵⁴

³⁵¹ Spain, Royal Decree 614/1995 establishes the rules for police training, whereas *Guardia Civil* training is governed by Royal Decree 313/2006 (for lower-ranking officers) and 1563/1995 (for higher-ranking officers) which is integrated by various orders, such as Order PRE/1478/2006; Order PRE/1476/2006; Order PRE/1477/2006; PRE/1479/2006; PRE/1480/2006.

³⁵² Email correspondence and telephone interview with the European University Institute, 7 January 2012 and 3 February 2012.

³⁵³ Examples of textbooks: Di Maio, L., et. al. (2000), *Manual of legislation on foreign nationals (Manuale di legislazione sugli stranieri)*, Roma, Laurus Robuffo; Iadecola (2011), *Italian and European Constitutional Law (Diritto costituzionale italiano ed europeo)*; Trimarchi, M. and Papeschi, L.L., *Human Rights and Italian Police Forces (I diritti Umani e le forze di Polizia)*; On the Road (2002), *Prostitution and Human Beings Trafficking (Prostituzione e Tratta, Manuale d'intervento sociale)*, Milano, Franco Angeli.

³⁵⁴ Amnesty International (2010), p. 29; the information on the Red Cross lectures was provided to the FRA by the National Police in November 2012.

In addition to general training, most of these institutions also provide specialised or refresher courses on specific matters, including those relating to border management. These may incorporate a fundamental rights component or be primarily or fully devoted to fundamental rights topics, such as training offered by UNHCR or the Council of Europe.

All countries cooperate to a certain degree with the European Police College (CEPOL) on police training and with Frontex on border guard training. In 2012, for example, all five EU Member States covered in this report sent staff to at least one of the training events CEPOL organised on trafficking in human beings. CEPOL organised one course on dealing with victims of trafficking in line with human rights in collaboration with Spain, for example; 26 participants from 18 countries including Greece, Italy and Malta attended. Similarly, Frontex offers training on a number of different issues, including, for example: language training for border guards, detection of stolen vehicles, use of dogs by border guards, Schengen evaluations, training for return escort leaders and many other topics. Most of these training activities are offered on a regular basis. Fundamental rights are incorporated in such training events to different degrees. The FRA, UNHCR and other organisations have provided input to some of them. The participation of national border guards in joint European training activities helps in the medium term to foster a common understanding among EU border guards of fundamental rights issues relating to a particular subject.

Typically, in all EU Member States participation in specialist courses in the field of fundamental rights depends on what is on offer locally and/or on the initiative of the individual officer. It is therefore difficult to assess whether relevant officers take the appropriate courses, and at what point in their careers they attend such courses.

FRA was able to collect only limited information regarding the evaluation of human rights components of basic and specialised training in the five EU Member States reviewed. In Spain, Amnesty International evaluated the system of human rights training for police in 2001 and in 2009. Their general conclusion was that training at both the National Police and the *Guardia Civil* had improved slightly.³⁵⁵ The National Police, in particular, enhanced the participation of external actors in its fundamental rights training. Amnesty International also highlighted the increased use of practical exercises aimed at the internalisation of human rights values. The *Guardia Civil* started using surveys to assess the quality of its training programmes. The surveys cover all issues included in the training – including the ethical aspects of duties and rights – although without extensively focusing on human rights. In order to evaluate and monitor

the effectiveness of the overall curriculum, the *Guardia Civil* Officers Academy conducts surveys of students, teachers and recent graduates with a view to identifying gaps in training.

Conclusions

To approximate national training of border guards, Frontex has developed a Common Core Curriculum. Such 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, 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.

³⁵⁵ *Ibid.*, pp. 41–42.

10

EU solidarity and Frontex: fundamental rights challenges



Revised Frontex Regulation (2007/2004/EC as amended by Regulation 1168/2011/EU)

Article 1 (Establishment of the Agency)

2. [...] The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union [...]; the relevant international law, including the Convention relating to the Status of Refugees [...]; obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights [...].

Article 26 a (Fundamental Rights Strategy)

The Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.

The majority of irregular arrivals by sea to the EU occur in the Mediterranean. Although the phenomenon is not widespread throughout the EU, it affects the EU as a whole. This chapter reviews the solidarity measures the EU has established to support those countries most affected by irregular arrivals by sea. It will focus on the fundamental rights challenges raised by such measures but will not discuss whether these measures are sufficient and adequate for genuinely sharing the costs associated with the arrivals. This chapter will also touch upon EU funding instruments and intra-EU relocation from Malta and more thoroughly describe the operational cooperation with Frontex.

The UN Smuggling Protocol recognises that effective action to combat the smuggling of migrants requires

international cooperation, and therefore the Protocol includes a clear duty for State Parties to co-operate in order to prevent and suppress migrant smuggling by sea (Article 7). The 2011 UNODC International Framework for Action to Implement the Smuggling Protocol encourages State Parties to consider strengthening cooperation, joint border patrol teams and training as well as information exchange on best practices.³⁵⁶ Article 19 of the Protocol requires that actions taken to implement the Protocol be carried out in accordance with international human rights and refugee law.

Primary EU law also stresses the need for solidarity in the field of border checks, asylum and immigration. According to Article 80 of the TFEU: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."

10.1. EU funding instruments and intra-EU relocation

For 2014–2020, the European Commission has proposed an overall home affairs budget of €10.9 billion.³⁵⁷ This represents an increase of almost 40 % compared to the total budget for the previous period of 2007–2013. The proposal suggests that the number of home affairs funds and programmes be reduced from six³⁵⁸ to two: the Asylum and Migration Fund (€3.87 billion for 2014–2020) and the Internal Security Fund

³⁵⁶ UNODC (2011c), p. 113 ff.

³⁵⁷ European Commission (2011k), section 2.1. This figure includes also the budget for home affairs agencies and existing large-scale IT systems.

³⁵⁸ For more information on the six funds, see http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/index_en.htm.

(€4.65 million for 2014–2020).³⁵⁹ The Internal Security Fund will include two instruments, one on external borders and visa (€1.13 million) and one on police cooperation (€3.52 million).³⁶⁰ The Asylum and Migration Fund and the Internal Security Fund will make funding available under national programmes implemented at the national level, as well as EU actions implemented at the EU level.³⁶¹ EU actions are transnational actions or actions of particular interest to the EU.³⁶²

In the European Commission proposals, emergency assistance can be made available to address urgent and specific needs. Such needs can be characterised as either large and disproportionate inflows of third-country nationals who cross or are expected to cross the external border of one or more Member States (Article 14 of the Internal Security Fund instrument on external borders and visa), or as migrant flows that are expected to place significant and urgent demands on Member States' reception and detention facilities, asylum systems and procedures (Article 22 on the Asylum and Migration Fund).³⁶³ In case of emergencies, additional resources can be made available under the proposed Emergency Aid Reserve.³⁶⁴ Emergency actions and 'EU actions' will be implemented by a range of actors, such as international organisations and civil society organisations, or by entrusting specific tasks to Frontex, Europol and the EASO.³⁶⁵ All actions should be implemented in full respect of the EU Charter for Fundamental Rights in accordance with Recital 13 of the Internal Security Fund instrument on external borders and visa and Recital 24 of the Asylum and Migration Fund.

The Asylum and Migration Fund shall, among others, contribute to strengthening the Common European Asylum System including its external dimension, and enhancing fair and effective return strategies in EU Member States, with emphasis on effective readmission to the countries of origin (Article 3). Possible actions that may be supported include the provision of material aid, social assistance, legal aid and language assistance and actions for persons with specific needs (Article 5).

The Internal Security Fund instrument on external borders and visa shall, on the one hand, contribute to a high level of protection of external borders and, on the other, contribute to the smooth crossing of these in conformity with the Schengen *acquis* (Article 3). The instrument shall also support the establishment of an integrated

management system for external borders by funding border crossing infrastructures, buildings, operating equipment, means of transport and surveillance and communication and information technology systems (Article 3), including Eurosur (Article 9). It shall promote uniform application of the Schengen *acquis* (Article 3). The language of the draft Regulations is security oriented. As regards borders, the operational objectives and eligible actions in the European Commission proposal are void of fundamental rights language, with the exception of mentions in Recital 13. In the draft regulation or the explanatory memorandum, there is no other express reference to the respect of core fundamental rights relevant in the border context,³⁶⁶ such as the principle of *non-refoulement*, the prohibition of unlawful or arbitrary detention and the need for special protection of children, suspected victims of human trafficking or survivors of torture. Nor is there any reference to rescue at sea. UNHCR recommends that the Internal Security Fund objectives be amended to include a reference to ensure that people seeking international protection will be referred to asylum procedures.³⁶⁷

The objectives' achievements shall be measured against indicators. Since the border-related objectives in the Internal Security Fund instrument on borders and visa do not address fundamental rights aspects, the subsequent indicators proposed in Article 3 also do not address fundamental rights. The allocation of funds also appears to be security focused. They will be based on threat levels determined through consultation with Frontex.

In a spirit of EU-wide solidarity, the Asylum and Migration fund will support the relocation of applicants and beneficiaries of international protection from one EU Member State to another (Article 7).³⁶⁸ In this context, turning to existing funding, the European Refugee Fund has already taken a specific solidarity action by establishing the EU Pilot Project on Intra-EU relocation from Malta (Eurema). This is a voluntary intra-EU resettlement scheme for beneficiaries of international protection in Malta. As Table 15 shows, however, the number of persons resettled to EU states has been consistently smaller than those resettled from Malta to the United States of America (USA).

³⁵⁹ European Commission (2011k), section 2.1.

³⁶⁰ European Commission (2011f).

³⁶¹ European Commission (2011i), Art. 20–21; European Commission (2011f), Art. 9, 13.

³⁶² European Commission (2011i), Art. 21; European Commission (2011f), Art. 13.

³⁶³ European Commission (2011i), Art. 8–9.

³⁶⁴ European Commission (2011j).

³⁶⁵ European Commission (2011k), Section 3.1.2.

³⁶⁶ In the visa context, there is a reference to "equal treatment of third-country nationals".

³⁶⁷ UNHCR (2012d), pp. 16–17. ECRE (2012a), pp. 4, 17–18.

³⁶⁸ European Commission (2011i).

Table 16: Resettlement from Malta (departures), 2008–2012

	Departures to EU Member States and Schengen associated countries	Departures to the USA	Departures to other countries	Total number of departures
2008	-	175	-	175
2009	106	188	-	294
2010	221	244	-	450
2011	164	176	4	344
2012	105	307	8	420
Total last five years	596	1,090	12	1,698

Source: UNHCR Malta, 2013

10.2. Operational support through Frontex

EU Regulation 2007/2004 established Frontex, or the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, to assist EU Member States with effectively implementing the operational aspects of managing external EU borders.³⁶⁹ Frontex is tasked with carrying out risk analysis through collecting and analysing intelligence, assisting Member States with training, participating in research development and coordinating operational cooperation. Such coordinated joint operations can take place at different types of external borders (air, land and/or sea), but also encompass joint return operations.

Joint operations are carried out under the command of the host state. Other EU and Schengen-associated countries provide human and material resources, which they deploy to the operational area. Officers deployed to a joint operation are under the authority of the host state, except with regards to disciplinary measures, which remain with the sending state. Officers must respect the laws of both the host and sending state, such as laws on use of force or restraint measures. During deployment, EU law also requires officers to fully respect fundamental rights, the principle of non-discrimination and to use their powers in a manner proportionate to the aim to be achieved.³⁷⁰ As of 2011, officers deployed in a joint operation must be part of the European Border Guard Teams, which are comprised of national border guards.³⁷¹

The role of Frontex in joint operations has a strategic, organisational and quality-assuring nature.

Based on an analysis of risks at the external border, Frontex suggests where to carry out joint operations as well as proposes timing and scope. Coordination mechanisms with EU Member States have been created to make full use of their intelligence and ensure a certain degree of predictability. During the operation itself, Frontex collects and analyses relevant data, including data on incidents reported from the operational area. These are shared with the host Member State to assist it in steering the operation. At the end of a joint operation, Frontex is tasked with preparing an evaluation report that is presented to its Management Board.³⁷²

Once Frontex and the EU Member States agree upon implementing a joint operation, Frontex is charged with all the organisational work related to facilitating the deployment of the necessary human and technical resources to the operational area. Frontex drafts the operational plan, which is agreed on by all participating parties and contains binding instructions for the operation. Depending on the type of operation, coordination centres are established at a central and/or local level. Frontex covers deployment costs, while the sending state continues to pay the salaries of its staff and provides equipment for use in the joint operation.

Frontex has developed a number of tools and general and operation-specific guidance documents on a range of issues, from the use of dogs by border guards to trafficking in human beings. These are made available to staff deployed in an operation. While these tools are not standard setting, they do help border guards from different countries foster a common understanding of how to approach a particular issue that may emerge on a joint operation. Frontex is also under an obligation to ensure that, before being deployed, members of European Border Guards Teams “have received training in relevant Union and international law, including fundamental rights and access to international protection and guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities”.³⁷³

³⁶⁹ References to ‘Frontex Regulation’ in this publication refer to the consolidated text following the 2011 amendments: The Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union has been amended in 2011 by Regulation 1168/2011/EU, 25 October 2011.

³⁷⁰ Frontex Regulation, Art. 3 b (4).

³⁷¹ *Ibid.*, Art. 1 a(a)-2 (1) (ea).

³⁷² *Ibid.*, Art. 3 (4).

³⁷³ *Ibid.*, Art. 5.

While command and control of officers and equipment deployed to a joint operation formally remains with the host state(s), the role of Frontex in shaping a joint operation is nevertheless substantial. This has raised questions about accountability for any human rights violations during an operation. The Parliamentary Assembly of the Council of Europe, for example, adopted a resolution on 21 June 2011 expressing concerns about these joint operations, identifying a lack of clarity regarding EU Member States and Frontex responsibilities and the absence of adequate guarantees for the respect of fundamental rights and international standards. The Assembly is currently preparing a report on this issue.³⁷⁴ In 2011, during negotiations on a new Frontex mandate, the Green faction of the European Parliament commissioned a study on Frontex's compatibility with human rights.³⁷⁵ The European Ombudsman has also initiated an inquiry concerning Frontex's respect of fundamental rights.³⁷⁶

Given that Frontex's operational activities can substantially affect EU Member States' law enforcement actions at external borders, and thus impact fundamental rights, the EU legislator has made efforts to ensure that Frontex, as an EU agency, respects fundamental rights. At the institutional level, these efforts include creating a Fundamental Rights Officer position within Frontex; establishing a Consultative Forum through which external partners can assist Frontex on fundamental rights questions; developing a Fundamental Rights Strategy, which was endorsed by Frontex's Management Board on 31 March 2011;³⁷⁷ and developing a Code of Conduct.³⁷⁸ Furthermore, Frontex must put in place an effective mechanism to monitor respect for fundamental rights in all its activities.³⁷⁹ There is an express duty that Frontex activities respect the principle of *non-refoulement* (Article 2 (1) b) and also address the special needs of vulnerable persons, including children, victims of trafficking, persons in need of medical assistance and persons in need of international protection.

At a more operational level, fundamental rights must be incorporated in training activities which Frontex develops or coordinates.³⁸⁰ Operational plans need to contain detailed provisions on how to report incidents.³⁸¹ In case of serious violations of fundamental rights, Frontex can take a decision on a possible suspension or termination of an operation.³⁸² Frontex's role is to promote, coordinate and develop European border management in line with fundamental rights, according to its website. In sum,

Frontex staff are expected to not only respect but also to promote fundamental rights.³⁸³

10.3. Frontex operations at sea

An important part of Frontex operations are those carried out at sea. With the exception of Minerva, Focal Points Sea and Poseidon Sea that also cover checks at border crossing points, the focus of these operations is essentially on border surveillance. Joint sea operations have primarily taken place in the Mediterranean and in the eastern Atlantic off the west African coast. Since Frontex became operational on 3 October 2005, it has coordinated almost 50 large joint operations at sea.

Since 2009, nearly all maritime operations have been organised under the European Patrols Network (EPN) programme, which supports the coordination of national surveillance measures such as patrols for the EU's southern maritime borders and their integration into joint European activities. The joint operation Poseidon Sea in Greece is an exception as it is part of the Poseidon Regional Programme, which also covers the land border with Turkey and activities relating to return (Attica project).

The origins of EPN, a permanent regional border security concept, date back to the Presidency Conclusions of 15-16 December 2006 when the Council of the European Union called upon Frontex to launch a feasibility study on reinforcing monitoring and surveillance of the EU's southern maritime border, and on a Mediterranean Coastal Patrols Network involving EU Member States and north African countries. The Council also asked for an exploration of the technical feasibility of establishing a surveillance system for the EU's southern maritime borders.³⁸⁴ In a follow-up to the conclusions, Frontex prepared a study in July 2006³⁸⁵ that suggests ways for EU Member States to exchange information to better coordinate operational activities. A second study, the BORTEC study,³⁸⁶ deals with a surveillance system covering the southern maritime borders of the EU as well as the open sea. The studies, neither of which is publicly available, served as a starting point for establishing the EPN.

Together with Frontex, EPN identifies the priorities for joint operations. The EPN meets on a regular basis and all EU Member States and Schengen-associated countries are invited. Table 16 provides a list of the maritime operations Frontex has implemented so far either under the EPN or not.

374 Council of Europe, PACE (2011a).

375 Keller, S. et. al. (2011).

376 European Ombudsman (2012).

377 Frontex (2011b).

378 Frontex Regulation, Art. 26a.

379 *Ibid.*, Art. 26a.

380 *Ibid.*, Art. 5.

381 *Ibid.*, Art. 8 (1) (h).

382 *Ibid.*, Art. 3 (1) (a).

383 Answer by the Frontex Executive Director, Ilkka Laitinen, to the European Ombudsman's enquiry related to the integration of respect of fundamental rights into the performance of its tasks, 22 May 2012.

384 Council of the European Union (2007), p. 10.

385 Frontex (2006), 'MEDSEA feasibility study of 14 July 2006 on the Mediterranean Coastal Patrols Network', EU Restricted.

386 Frontex (2007).

Table 17: Frontex-coordinated joint maritime operations, 2006–2012

	Operation	Host EU Member State(s)	Operational area	No. of contributing states	Date
2006	Hera I	Spain	Canary Islands, Senegal, Mauritania	6 EU MS + 1 SAC	July–October
	Hera II	Spain	Canary Islands, Senegal, Mauritania	3 EU MS	August–December
	Nautilus	Italy, Malta	Central Mediterranean Sea, (Malta, Lampedusa)	5 EU MS	October
	Gate of Africa	Spain	Tarifa, Algeciras, Almería, Alicante	5 EU MS	July–September
	Agios	Spain	Senegal, Morocco	5 EU MS	July–September
	Poseidon	Greece	Eastern Mediterranean	5 EU MS	June–July
2007	Poseidon	Greece	Eastern Mediterranean	12 EU MS	May–October
	Hermes	Italy, Spain	Central Mediterranean	8 EU MS	September–October
	Zeus	Germany	EU sea and air borders and specifically regarding seamen in transit.	13 EU MS	October
	Hera III	Spain	Canary Islands, Senegal, Mauritania	6 EU MS	February–April
	Hera	Spain	Canary Islands, Senegal, Mauritania	8 EU MS	April–December
	Nautilus	Italy, Malta	Central Mediterranean	7 EU MS	June–October
	Indalo	Spain	Western Mediterranean	7 EU MS	October–November
	Minerva*	Spain	Southern Spain	11 EU MS	August–September
2008	Nautilus	Italy, Malta	Central Mediterranean	10 EU MS	May–October
	Hera	Spain	Canary Islands, Senegal, Mauritania	6 EU MS	February–December
	Poseidon (sea part)	Bulgaria, Greece	Eastern Mediterranean	16 EU MS	May–December
	Minerva*	Spain	Southern Spain	9 EU MS	August–September
	EPN Indalo	Spain	Western Mediterranean	6 EUMS	October–November
2009	Poseidon	Greece	Eastern Mediterranean	21 EU MS	March–December
	EPN Zeus	Germany	To enhance the cooperation with the Baltic Sea Region Border Control Cooperation	16 EU MS + 1 SAC	April–May
	EPN Nautilus	Italy, Malta	Central Mediterranean	11 EU MS	April–October
	EPN Hera	Spain	Canary Islands, Senegal, Mauritania	6 EU MS	March–December
	EPN Hermes	Italy	Central Mediterranean	6 EU MS + 1 SAC	April–October
	EPN Indalo	Spain	Western Mediterranean	6 EU MS	September–October
	EPN Minerva	Spain	Southern Spain	10 EU MS	August–September
	EPN Focal Points Sea*	Bulgaria Cyprus France Portugal Romania Spain	Border crossing points at the sea ports of the Host Member States	6 EU MS	September–December
2010	Poseidon 2009 (extension)	Greece	Eastern Mediterranean	3 EU MS	January–March
	Poseidon Sea	Greece	Eastern Mediterranean	21 EU MS + 2 SAC	April–December
	EPN Hera 2009 (extension)	Spain	Canary Islands, Senegal, Mauritania	1 EUMS	January–March
	EPN Hera	Spain	Canary Islands, Senegal, Mauritania	6 EU MS + 1 SAC	April–December
	EPN Hermes	Italy	Central Mediterranean	7 EU MS	June–October
	EPN Indalo	Spain	Western Mediterranean	10 EU MS + 1 SAC	May–October
	EPN Minerva	Spain	Southern Spain	11 EU MS + 1 SAC	August–September

	Operation	Host EU Member State(s)	Operational area	No. of contributing states	Date
2011	EPN Hera	Spain	Canary Islands, Senegal, Mauritania	3 EU MS + 1 SAC	April–December
	EPN Aeneas	Italy	Central Mediterranean	12 EU MS + 1 SAC	April–December
	EPN Hermes	Italy	Central Mediterranean	14 EUMS + 1 SAC	February–December
	EPN Minerva*	Spain	Southern Spain	14 EUMS + 2 SAC	July–September
	EPN Indalo	Spain	Western Mediterranean	10 EU MS + 1 SAC	May–December
	Poseidon Sea	Greece	Eastern Mediterranean	18 EU MS + 2 SAC	April–December
	Focal Points Sea*	Lithuania, Romania	Border crossing points at the sea ports of the Host Member States	4 EU MS	August–September
2012	EPN Minerva*	Spain	Southern Spain	19 EU MS	July–September
	EPN Indalo	Spain	Western Mediterranean	8 EU MS	May–October
	Poseidon Sea	Greece	Eastern Mediterranean	18 EU MS + 2 SAC	April–ongoing
	Focal Points Sea*	Bulgaria, Lithuania, Romania, Spain	Border crossing points at the sea ports of the Host Member States	7 EU MS	May–ongoing
	EPN Hera	Spain	Canary Islands, Senegal, Mauritania	2 EU MS	July–ongoing
	EPN Aeneas	Italy	Central Mediterranean	11 EU MS + 1 SAC	July–ongoing
	EPN Hermes	Italy	Central Mediterranean	11 EU MS + 1 SAC	July–ongoing

Note: Operations marked with *primarily focus on border checks at border crossing points in ports, not on border surveillance. EU MS stands for EU Member State(s), SAC stands for Schengen-associated country/ies and EPN for European Patrol Network.

Source: Frontex, 2012

Four EU Member States in southern Europe have primarily hosted these operations. All EU Member States except Ireland have contributed to Frontex sea operations in the past, according to information provided by Frontex.

As Figure 13 illustrates, Frontex-coordinated operations at sea consume an important share of the overall Frontex budget for operations. In 2011, for example, 59 % of the total budget spent on joint operations went to sea borders, which corresponds to 28 % of the overall Frontex budget.³⁸⁷ These costs are primarily a result of deploying expensive aerial and naval surveillance equipment.

Guest officers deployed to Frontex maritime surveillance operations have to deal with migrants arriving at sea,

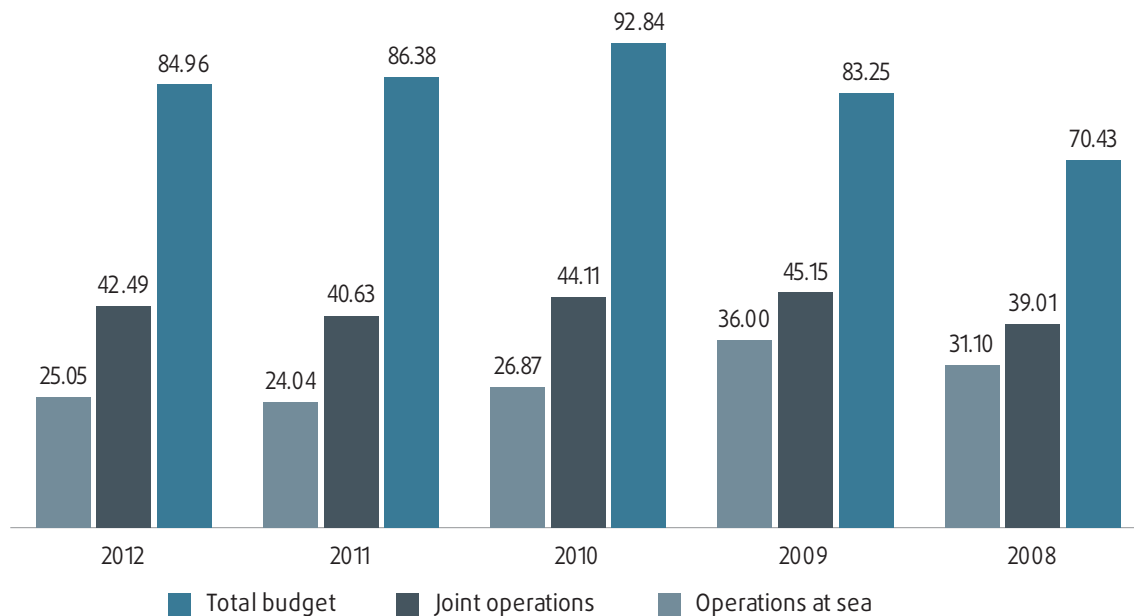
a significant number of whom come to Europe to seek protection. Depending on host state policies and practices relating to maritime surveillance, Frontex-deployed assets or staff may be involved in sensitive interception operations. These can give rise to allegations of human rights violations. Human Rights Watch reported that in June 2009 the Italian Coast Guard, with support from a German helicopter operating as part of Operation Nautilus, intercepted a boat off Lampedusa carrying 75 migrants and handed the migrants over to a Libyan naval patrol.³⁸⁸ In another case, German media reported allegations of Frontex denying drinking water to rescued persons.³⁸⁹ Regardless of whether these allegations are correct, they illustrate the risks of Frontex becoming involved in activities that are in breach of the principle of *non-refoulement* or do not respect human

³⁸⁷ Frontex (2011c).

³⁸⁸ HRW (2009b), p. 98.

³⁸⁹ Keller, S. et. al. (2009).

Figure 13: Share of sea operations within Frontex budget, 2008–2012



Source: Frontex budgets: Frontex (2012c); Frontex (2011c); Frontex (2010); Frontex (2009); Frontex (2008)

dignity. Considering the impact of Frontex operations in the field, in 2007, UNHCR appointed a liaison officer to Frontex, and in May 2010, Frontex signed a cooperation arrangement with the FRA.³⁹⁰ In September 2012, Frontex concluded a working arrangement with EASO, which among other things, covers operational cooperation and therefore the reception of migrants at the EU external borders and the identification of those in need of international protection.

Guidelines for Frontex sea operations

Civil society and international organisations have criticised Frontex operations and raised open questions regarding search and rescue situations during them. In response, the Council of the European Union adopted Decision 2010/252/EU to provide guidance on the surveillance of sea borders in the context of joint Frontex operations.³⁹¹ This decision, which supplemented the Schengen Borders Code, contained binding rules for sea border operations (Annex 1) and non-binding guidelines for search and rescue situations and for disembarkation of rescued or intercepted persons (Annex 2). According to the binding rules, surveillance operations must be conducted in accordance with fundamental rights and need to respect the principle of *non-refoulement*.³⁹²

The non-binding guidelines touch upon the thorny issue of disembarking rescued migrants, the specific dispositions of which must be spelled out in the operational plan “in accordance with international law and any applicable bilateral agreements”. The guidelines also stated that “priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons.” The coordination centre should receive information on the presence of the rescued migrants and “should convey that information to the relevant authorities of the host Member States”.

Malta objected to these guidelines as it disagreed that intercepted or rescued migrants should be disembarked in the state hosting the operation rather than taken to the nearest safe port. As a result, Malta has since declined to host Frontex sea operations.³⁹³

390 Cooperation agreement between FRA and Frontex, 26 May 2010.

391 Council Decision 2010/252/EU, OJ 2010 L 111/20.

392 Council Decision 2010/252/EU, OJ 2010 L 111/20, Annex, part 1, para. 1.2.

393 CJEU, C-355/10, Opinion of Mr Advocate General Mengozzi, *European Parliament v. Council of the European Union*, 17 April 2012, para. 82; The Ministry of Justice and Home Affairs informed the FRA in November 2012 that Malta’s objections remain in force until the guidelines are applied.

The European Parliament called on the CJEU to pronounce itself on the legality of Council Decision 2010/252/EU.³⁹⁴ The decision was adopted under the so-called comitology procedure regulated in Decision 1999/468/EC (Article 5a), in other words without full parliamentary involvement. The CJEU annulled the contested decision in its entirety, although it said that the guidelines should remain in force until replaced. It pointed out that the adopted rules contained essential elements of external maritime border surveillance, thus entailing political choices that must be reached through the ordinary legislative procedure with the Parliament as co-legislator. The CJEU also noted that the new measures contained in the contested decision were likely to affect individuals' personal freedoms and fundamental rights and therefore again required the ordinary procedure. Although the provisions contained in Part II to the Annex were referred to as 'guidelines' and were declared 'non-binding' in Article 1, that did not affect their classification as essential rules, the CJEU said.

Frontex operational plans

Joint operations at sea are implemented on the basis of an operational plan, as is the case with any other Frontex-coordinated joint operation. The revised Frontex Regulation requires that operational plans for sea operations specifically include "references to international and Union law regarding interception, rescue at sea and disembarkation" (Article 8e). The recently annulled Council Decision 2010/252/EU also required the operational plan to specify the modalities for the disembarkation of persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements (2.1).³⁹⁵ To implement these requirements, Frontex has provided more guidance on search and rescue as well as included references to UN Conventions in more recent operation plans, such as

the UN Conventions on the Law of the Sea, the SAR and SOLAS Conventions, the 1951 Refugee Convention and the International Convention on Transnational Organised Crimes and its Protocols.

The revised Frontex Regulation contains provisions relating to fundamental rights that are specific to maritime operations. First, it clarifies that according to international and EU law, no person "shall be disembarked in, or otherwise handed over to the authorities of a country in contravention to the principle of *non-refoulement*". Second, it tasks Frontex to assist states in situations that may involve humanitarian emergencies and rescue at sea (Article 2(1)da), thus codifying what is already a reality in practice. Provided by Frontex, Table 17 illustrates that the proportion of search and rescue events in Frontex coordinated joint operations in 2011 was rather substantial.

The increased attention to fundamental rights in Frontex operations is mirrored in operational plans governing operations. The first operational plans did not contain any specific language regarding fundamental rights. As of 2010, the operational plans include a general statement on fundamental rights during the operation. These provisions were strengthened in subsequent years as shown in Table 18, which compares extracts from the three latest operational plans for the Poseidon Sea operation in Greece.

Table 18: Proportion of search and rescue events during Frontex operations, 2011

Joint operations in 2011	Total number of incidents	Total number of migrants	Total number of search and rescue cases	Total number of migrants rescued
Poseidon Sea	91	1,077	7	492
EPN Aeneas	101	5,078	12	651
EPN Hermes	505	51,205	144	20,012
EPN Indalo	140	2,782	78	2,037
EPN Hera	48	470	6	62
Total	885	60,612	247	23,254

Source: Frontex, 2012

³⁹⁴ CJEU, C-355/10 [2012], *European Parliament v. Council of the European Union*, 5 September 2012, paras. 63-85.

³⁹⁵ Council Decision 2010/252/EU, OJ 2010 L 111/20.

Table 19: Excerpts from the Poseidon Sea operational plans, 2010–2012

Operational plan Poseidon Sea, April 2010
"Border control must be carried out in a way that fully respects human dignity. Law enforcement personnel, including border guards, maintain the highest standards of ethical conduct, professionalism and respect to fundamental human rights. They act responsibly and proportionately to the objectives pursued. While carrying out border control, border guards must not discriminate persons on grounds of sex, racial or ethnic origin, religion or belief, age or sexual orientation. Border guards are expected to treat every person with courtesy, respect and due consideration for the nature of any legitimate activity in which they are engaged."
Operational plan Poseidon Sea, 2011
"Border control must be carried out in a way that fully respects human dignity in compliance with international protection obligations. No person shall be handed over to the authorities of a country in contravention of the principle of <i>non-refoulement</i>, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of minors, victims of trafficking, persons in need of urgent medical assistance and other persons in a particularly vulnerable situation shall be considered." <i>Ethics</i> "All people involved in Frontex operational activities maintain the highest standards of ethical conduct, professionalism and respect for fundamental rights. They are expected to meet obligations imposed upon them by the provisions stated in the Operational Plan, the Code of Conduct (Annex B1) and shall comply with the rules of their mandates. While taking part in Frontex operational activities personnel shall respect the International law, the European law and the national law of the Member State. They shall maintain the highest standards of integrity and conduct. They are to act responsibly and proportionately to current objectives. While performing their duties they not discriminate persons on grounds of sex, race or ethnic origin, religion, belief, age or sexual orientation. Personnel are expected to treat every person with courtesy, respect and due consideration for the nature of any legitimate activity in which they are engaged."
Operational plan Poseidon Sea, 2012
Fundamental rights in Frontex activities <i>- Obligations of Frontex</i> "Frontex is obliged to fulfil its tasks in full compliance with the relevant EU law, including the Charter of Fundamental Rights; the relevant international law, including the Convention relating to the Status of Refugees, obligations related to access to international protection, in particular the principle of <i>non-refoulement</i>, and fundamental rights." "The Frontex Regulation requires Frontex to put in place an effective mechanism to monitor the respect for fundamental rights in all its activities. One of the steps to fulfil this task was to develop a Frontex Code of Conduct applicable to all Frontex activities (attached to the present Operational Plan). The Frontex Code of Conduct lays down procedures intended to guarantee the principles of the rule of law and the respect for fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as on persons seeking international protection, and it is applicable to all persons participating in the activities of Frontex. As regards training activities, Frontex is obliged to take the necessary initiatives to ensure that all border guards and other personnel of the Member States who participate in the European Border Guard Teams, as well as Frontex staff members, have received, prior to their participation in operational activities, a training in relevant EU and international law, including fundamental rights and access to international protection and guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities. Furthermore and pursuant to the provisions of the Frontex Regulation, Frontex has an obligation to suspend or terminate its operational activity in a case of serious or persistent violations of fundamental rights or international protection obligations." <i>- Obligations of all persons involved in Frontex activities</i> "All persons involved in Frontex activities are obliged to maintain the highest standards of integrity, ethical conduct, professionalism and respect for fundamental rights. They are expected to meet obligations imposed upon them by the provisions stated in the present Operational Plan and are obliged to comply with the rules of their mandates. While taking part in Frontex activities they are obliged to comply with the European law, international law, fundamental rights and national law of the host Member State. Furthermore, the home Member State of each border guard shall provide for appropriate disciplinary or other measures in accordance with its national law in case of violations of fundamental rights or international protection obligations in the course of an operational activity." "All persons involved in Frontex activities are to act responsibly and proportionately to the current objectives. While performing their duties they shall not discriminate persons on grounds of sex, race or ethnic origin, religion, belief, age or sexual orientation. They are expected to treat every person with courtesy, respect and due consideration for the nature of any legitimate activity in which they are engaged. They are obliged to report all observations regarding violations of fundamental rights via the appropriate chain of command. Prior to their deployment they have an obligation to participate in the training activities including fundamental rights issues."

Source: Frontex, 2012

As a first step, the general paragraph on fundamental rights and ethical conduct was complemented by a reference to the Frontex Code of Conduct adopted by the Frontex Management Board on 22 March 2011 and annexed to all operational plans. It makes express reference to the principle of *non-refoulement* and to the specific needs of minors, victims of trafficking, persons in need of urgent medical care and other persons in a vulnerable situation.

In 2012, following the adoption of the revised Frontex Regulation, further changes were introduced to the general parts of operational plans. These included references to the possibility of suspending or terminating an operation in case of serious or persistent fundamental rights violations. Host Member States are under an obligation to provide for "appropriate disciplinary or other measures" in case of violations of fundamental rights or international protection obligations. The obligations of Frontex and all persons involved in Frontex activities were more explicitly set out. The operational plan contains a clear duty to report "all observations regarding violations of fundamental rights via the appropriate chain of command". A standardised form to use and procedure to follow to report incidents is included in one of the annexes to the operational plan. Such annex explicitly mentions fundamental rights incidents, although only limited explanation is given to clarify what this would cover.

Evaluation reports

For each operation, Frontex is required to undertake an evaluation report, which is presented to the Management Board. With the amended Frontex Regulation, the evaluation report should be accompanied by the observations of the Fundamental Rights Officer (Article 3(4)). In practice, this means fundamental rights aspects of the operation will also be evaluated. This may be challenging, however, since the evaluation forms distributed to participating officers at the end of a mission do not include any specific questions on fundamental rights.

The FRA was given the opportunity to read the full evaluation reports of four maritime operations. Three of them concerned operations carried out in 2011, EPN Indalo, EPN Hermes, Poseidon sea, and one related to an evaluation of a 2009 operation, EPN Indalo. The FRA read these four reports through a fundamental rights lens. All three evaluations from 2011 contained a reference to the FRA project at the external EU borders, the same project on which this publication is based.

Evaluation reports examine the extent to which the objectives set forth in the operational plans have been achieved. In broad terms, the operational plans of the evaluations reviewed focus on fighting irregular entry and cross-border crime. Therefore fundamental rights

considerations may only indirectly emerge in the evaluation reports. All in all, the evaluation reports the FRA reviewed give little attention to the fundamental rights challenges of an operation, with the possible exception of EPN Indalo, which discusses trafficking in human beings.

While each of the four reports contain a reference to all operation activities being carried out in conformity with applicable national, EU and international law and safeguarding individuals' fundamental rights, the reports are generally missing a discussion of the core fundamental rights issues which are part of the operational environment. As an illustration, the Poseidon Sea operation report notes the gaps and difficulties regarding the return and removal process in Greece, but it does not mention the well-known fact that access difficulties and delays also exist with the Greek asylum system. The EPN Indalo 2009 report recommends further strengthening collaboration with Morocco and Algeria but does not examine the question on how this could be done without violating the principle of *non-refoulement*. The three 2011 evaluation reports reviewed thoroughly describe the backgrounds and profiles of the newly arrived migrants. The reports stress whether migrants have documents, indicate which migrants tend to present false nationality information and mentions that certain groups reported having left the country for economic reasons. The reports, however, do not note which profiles are likely to have left as a result of risk of persecution or serious harm.

Fundamental rights issues are not totally absent from the evaluation reports. The EPN Indalo 2011 report, for example, describes in detail the abuse and exploitation women and girls are subjected to in Morocco, confirming the findings described in Section 1.4. It also notes that two suspected victims of human trafficking were identified during the operation. Similarly, the Hermes 2011 report describes trafficking patterns of Nigerian and Niger women and their sexual exploitation for prostitution purposes also after arrival in the EU. The Indalo 2011 operation concludes that victims of trafficking in human beings are rarely identified. The report suggests distributing the Frontex 2011 Handbook on Risk Profiles on Trafficking in Human Beings and offer training to deployed officers, as well as tailoring the reporting template to collect information on trafficking victims. On another subject, the Hermes 2011 report stresses that pre-deployment briefings provided knowledge on Frontex Code of Conduct and fundamental rights.

The 2010 Council Decision on Frontex operations at sea appears to have had a positive impact on the respect of the principle of *non-refoulement* in Frontex sea operations. The 2011 evaluation reports reviewed do not contain information that may lead to the conclusion



that push backs or returns to persecution or serious harm may have occurred as part of the joint operations. In the case of boats detected in third-country search and rescue areas, the national authorities of the third country receive this information with the request to start a rescue operation. In some cases, but not always, the third country initiates a rescue operation; according to the three 2011 evaluation reports relating respectively to Hermes, Indalo, and Poseidon sea, this was reported to be the case for 16 boats rescued by Tunisia (a total of 1,029 persons), four boats rescued by Algeria (70 persons) and five boats rescued by Moroccan authorities (167 persons). In one instance, it was reported that 52 migrants were rescued by Moroccan authorities in their territorial waters, when the rubber boat they were using had partially sunk. Where a third country does not launch a rescue operation, migrants are rescued and brought to Europe.

Observation of Frontex patrols

In late August 2011, FRA was allowed to observe maritime patrols carried out in Greece and Spain in the context of two joint Frontex operations, Poseidon Sea and EPN Indalo. A third mission to Italy was cancelled as Italian authorities did not give FRA access to patrol boats. In Greece and Spain, Frontex staff accompanied FRA. In addition, the researchers contracted by FRA to collect data also observed a national patrol by the Hellenic Coast Guards. The following paragraphs are based on the observation of these two missions. FRA presence was announced in advance, as host and sending EU Member States had to give FRA permission to board the vessels. The decision on which vessel to board and when to do so was taken on the spot.

During its visit to Lesvos in Greece and Almería/Motril in Spain, the FRA was given access to all facilities and equipment. In Greece, FRA observed night patrols carried out by Finnish and Romanian vessels in the eastern Aegean, and held discussions with the Hellenic Coast Guards and Hellenic police. In Spain, FRA observed patrols by the *Guardia Civil*, visited a Portuguese patrol vessel and observed the disembarkation of about 40 migrants rescued by *Salvamento Marítimo* in Motril. FRA also met with Frontex debriefing staff, the Spanish Red Cross and visited the SIVE operational centre. In Greece, no migrants arrived by sea during the FRA visit, whereas in Spain one boat with approximately 40 Sub-Saharan migrants was rescued. During the two visits, FRA focused on procedures applied in implementing the joint operations.

Except for persons in charge of coordination, in broad terms, staff deployed to joint maritime surveillance operations are either deployed to perform surveillance tasks, to patrol the sea or are used to interview newly arrived migrants. The sending state usually

deploys the guest officers involved in surveillance and patrolling with naval equipment such as offshore and coastal patrol vessels, aerial patrolling equipment such as helicopters and fixed wing aircrafts or mobile surveillance units on land. The sending state maintains command over the vessel, but a host state officer on board the vessel carries out any law enforcement actions required. In cases where operations are carried out near third-country coasts, as in the Hera operation, third-country officers, such as those from Mauritania in the Hera operation, are taken on board for these law enforcement purposes.

Debriefing teams are tasked with interviewing newly arrived migrants, primarily to collect information on migratory patterns and other details concerning smugglers' *modus operandi*. The information collected remains anonymous. It serves to enhance surveillance activities as well as to improve intelligence to fight organised crime. To do this police officers are usually deployed. Their interview is separate from the one national police conduct in order to take a decision on what to do with an individual. Not every migrant is interviewed by officers deployed under Frontex coordination. Children are not interviewed. The collected information is shared with Frontex headquarters that use it for risk analysis purposes. The interview findings also flow into the final evaluation of the operation. In addition to debriefing officers, screening officers are deployed in some operations, primarily to assist the host state with identifying the nationality of newly arrived migrants.

Although its presence on the ground was limited in time as well as geographically, the FRA noted that procedures were clear and generally well known by all deployed staff to whom it spoke. The operational plans of the two operations incorporated the guidelines for Frontex operations at sea set forth in Council Decision 2010/252/EU. Neither in Greece nor in Spain did the FRA find any hints of pushback efforts or intentions, although the Spanish operation, EPN Indalo, had prevention of irregular entry as one of its core objectives. When a boat in distress at sea is identified within their search and rescue zone, *Salvamento Marítimo* normally forwards a request to Moroccan or Algerian authorities for rescue at sea interventions, which often, however, do not take action. The EPN Indalo evaluation report confirms the limited number of rescue operations undertaken by Algeria (four) and Morocco (five) during the operation. In most cases, the Spanish authorities launch a rescue operation when the boat is within the Spanish rescue zone, unless search and rescue obligations require otherwise.

Staff deployed from host and sending states to whom the FRA spoke were aware of key fundamental rights relevant to their work, although there was not

necessarily always a common understanding of the meaning of fundamental rights in practice. Operational pre-deployment briefings only marginally cover fundamental rights and are too short to bridge differences in handling particular situations. Moreover, given that not all persons are deployed at the beginning of the operation, but may travel to the operational area at a later stage, these briefings do not reach all deployed staff, and there is only a limited opportunity, if any at all, to cover fundamental rights issues during on the spot briefings provided upon arrival.

An illustration of such different understandings is the debriefing officers' different attitudes on how to deal with asylum-relevant information that emerges during Frontex interviews with migrants. The debriefing interviews serve to collect intelligence and are not intended to deal with the migrant's individual situation, as the national police or immigration authorities of the host country handle this issue. The migrant may, however, directly or indirectly express the wish to seek asylum by making it clear that he or she would fear serious harm if returned. In the absence of operational plan guidance on how to deal with this situation, in practice it is up to the debriefing officer, or, if consulted, the team leader, to decide whether to forward this information to the national police or immigration authorities. During the interview with Frontex officers after disembarkation, requests for asylum may be made, but neither the operational plan itself nor the annexed guidelines for debriefing officers contain a clear duty to pass this information on to the competent national authorities. In the FRA view, covering this issue in operational briefings is insufficient.

Another point is that patrol missions can easily result in a rescue operation. It is therefore essential that deployed officers have experience in rescuing migrants at sea, or have received adequate training in handling dangerous rescue operations in a manner that keeps the risks of fatalities as low as possible. Section 2.3 describes the risks as well as good practices in rescue operations involving migrants in overloaded boats. Overloaded boats present different challenges than rescue operations in other contexts, such as fishing or tourist vessels in distress. At the beginning of each deployment, the national rescue service should give the crews a specific briefing on how to approach a concrete situation. This is particularly important if deployed crews do not have past experience in rescue operations with overcrowded and unseaworthy migrant boats. Frontex should encourage operation-specific trainings, and the operational plans could make it compulsory to provide training to each new crew member that is deployed to the operational area.

A last point concerns the patrol vessels' equipment for addressing the immediate needs of rescued migrants

who are taken on board. Patrol vessels sent to the area of operation are equipped with first aid kits and other emergency relief items according to the sending Member State's national rules and practices. Medical kits are not standardised; their content depends on the sending country. Equipment may not necessarily correspond to what is actually needed in the area of operation. For example, FRA observed that one patrol vessel had no blankets on board although the vessel was operating in an area likely to experience rescue operations (see Sections 5.4 and 5.7). While the issue was easily resolved with the help of the Spanish Red Cross, it would be advisable to address this in a more systematic way, possibly involving humanitarian organisations with whom the host Member State cooperates.

10.4. Frontex cooperation with third countries

In the implementation of its mandate, Frontex may cooperate with third-country authorities in charge of border management (Article 14 (2) of the Frontex Regulation). For this purpose, Frontex can conclude operational working arrangements. The European Commission needs to provide an opinion prior to its conclusion and the European Parliament should be informed as soon as possible (Article 14 (8)). Some observers have noted that given the possible practical impact on fundamental rights of such operational agreements, they should be subject to more scrutiny.³⁹⁶

As of the end of 2012, Frontex has concluded 18 working arrangements with third countries or regional organisations.³⁹⁷ Under Article 14 (1) of the revised Frontex Regulation, a standard clause on fundamental rights has been included in arrangements concluded in 2012, which notes that: "In the implementation of the cooperation arrangement, Frontex and [...] shall afford full respect for human rights." The Regulation namely requires that the cooperation with third countries serves "to promote European border management standards, also covering respect for fundamental rights and human dignity" (Article 14 (1)).

³⁹⁶ Keller, S. *et. al.* (2011) pp. 31–32; European Parliament (2010), para. 36.

³⁹⁷ Frontex has concluded working arrangements with the following third countries: Albania, Azerbaijan (text endorsed by Frontex Management Board at the end of 2012 but not yet signed), Armenia, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, Croatia, the Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Ukraine, and the United States, as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the western Balkans. Finally, cooperation exists also with EU Missions, for example, EULEX in Kosovo, supporting law enforcement authorities in their efforts towards effective border management.

The existence of a written working arrangement is not a pre-condition for Frontex to initiate cooperation with third countries. Observers from third countries may be invited to participate in joint operations, provided the host Member State agrees (Article 14 (6)). Such was the case for example in 2009 when, according to the Indalo 2009 evaluation report, a Moroccan officer visited the Indalo coordination centre in 2009. Cooperation with west African countries also takes place in the context of the Hera operation, which includes patrolling third-country territorial waters.

Among the countries with boat departures, Frontex has only concluded a cooperation arrangement with Turkey containing very general statements.³⁹⁸ No agreement has been signed with north or west African countries. The Council of the European Union and the European Parliament have, nevertheless, tasked Frontex with improving cooperation with transit countries.³⁹⁹ It can therefore be expected that Frontex will make efforts to increase cooperation with north and west African transit countries. As described in Section 3.5, most of these countries do not have adequate mechanisms to deal with asylum seekers in accordance with international refugee law. Conditions in immigration detention facilities may be inhuman, and in several of these countries, instances of *refoulement* have been recorded.

The Frontex Regulation requires that when cooperation takes place in a third country, the “Agency and the Member States shall comply with the norms and standards at least equivalent to those set by the EU legislation” (Article 14 (1)). This requires, for example, that training or other capacity building activities not only focus on enforcement measures, but also deal with the relevant human rights issues, providing third-country officials with adequate guidance on how to act. The third-country authorities bear primary responsibility for any human rights violation resulting from their activities.

The situation is, however, more complex in cases of operational cooperation where both Frontex assets and staff as well as third-country resources are used in the same operation. In this case, it may not always be possible to clearly attribute an action to a particular officer or team. It is necessary to ensure that third-country officers respect not only the third country’s human rights obligations but also operate in accordance with those duties that deployed EU officers have under EU law and the ECHR. Otherwise, EU staff deployed in third countries may find themselves associated with fundamental rights violations.

Conclusions

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 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. Nevertheless, there are still aspects that remain to be addressed.

³⁹⁸ ECRE (2012b).

³⁹⁹ Council of the European Union (2010), measure 4; European Parliament (2008), para. 4.

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.



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Methodological annex

The report is based on a combination of desk and fieldwork research. It results from the first phase of the study 'Treatment of third-country nationals at the EU borders', which the FRA undertook between 2010 and 2012 in collaboration with a consortium led by the International Centre for Migration Policy Development (ICMPD). The report covers the EU's southern maritime borders in the Mediterranean and, in the case of the Canary Islands, the Atlantic Ocean. The fieldwork was carried out in five EU Member States: Cyprus, Greece, Malta, Italy and Spain (Canary Islands and Andalusia). At the time the research was undertaken, Cyprus had not recently experienced irregular maritime arrivals, and therefore only authorities were interviewed there. The research also included three non-EU Member States from which migrant boats depart, namely, Morocco, Tunisia and Turkey. In the course of the primary data collection, a total of 281 interviews were conducted. Interviewees included third-country nationals, public authorities, fishermen, shipmasters and other stakeholders.

The research consortium undertaking the background and empirical research for the individual case studies included the following institutions and researchers: the International Centre for Migration Policy Development (ICMPD), responsible for overall coordination as well as the Tunisian case study, and involving Albert Kraler, Maegan Hendow and Mustapha Djemali; the Hellenic Foundation for Foreign and European Policy (ELIAMEP), involving Thanos Maroukis, Angeliki Dimitriadi and Kleopatra Yousef, and responsible for the case study research in Greece and Cyprus; the *Forum Internazionale ed Europeo di Ricerche sull'Immigrazione* (FIERI), involving Ferruccio Pastore, Valeria Ferraris, Lorenzo Coslovi and Paola Monzini, and responsible for the case study research in Italy; the *Observatorio de la Inmigración de Tenerife* (OBITen), involving Dirk Godenau, María Asunción Asín Cabrera, Nassara Cabrera Abu, Juan Salvador León Santana, Paloma López-Reillo, Julio Ramallo Rodríguez and Vicente Manuel Zapara Hernández, and responsible for the case study research in the Canary Islands. The European University Institute (EUI), involving Martin Scheinin and Ciaran Burke was responsible for the background research on the international law framework and for background information regarding the training of border guards.

In addition, the consortium included a number of experts in their individual capacity, including Derek Lutterbeck (University of Malta) and Ćetta Mainwaring (University of Oxford), responsible for the case study research in Malta; Mohammed Aderghal, Lahoucine Amzil and Mohammed Berriane (University Mohammed V), responsible for the case study research in Morocco; individual research experts Sandra Gil Araujo, Tania

González and Virginia Montañés Sánchez, responsible for the research in Andalusia; and Ahmet Icduygu and Aysem Biriz Karacay (Koç University), responsible for the research in Turkey.

Desk research

The FRA and the consortium carried out the desk research which involved a combination of legal and social research.

As a whole, the social research focused on fundamental rights issues arising during the main stages of migrants' journeys to EU countries after they board boats for a crossing. These stages included: migrants' situation at sea; rescue and interception; and disembarkation and initial screening and referral. The report covers post-embarkation matters such as detention, return and reception in specific facilities, to a more limited extent. The research also analyses overall patterns of irregular maritime arrivals and reviews public debates around irregular arrivals. The research gathered information through a review of publicly available material such as research studies, government reports, media sources, as well as through relevant information obtained from public authorities in charge of border control, rescue coordination centres and other actors, such as fishermen and NGOs.

The legal research component involved mapping institutional structures, including different authorities' responsibilities regarding border management and rescue at sea, screening, referral and further processing of new arrivals. A major focus of the legal research was the analysis of national legal frameworks, including the ratification of relevant instruments under international law. In addition, the report looks at Member States' cooperation with third countries on matters of maritime border control, surveillance and re-admission. Finally, the legal research investigates administrative practices as expressed in, amongst others, standard operating procedures and guidelines, to the extent that such information is publicly available or could be obtained from relevant authorities upon request. The relevant EU, Council of Europe and international legal frameworks covering both fundamental rights dimensions and the law of the sea complemented the legal research at the national level.

Fieldwork

The information obtained through empirical qualitative fieldwork conducted in five EU and three non-EU countries was this report's main source of information. The fieldwork consisted of five main strands. These were:

- (1) semi-structured interviews with third-country nationals;
- (2) semi-structured interviews with relevant authorities;
- (3) semi-structured interviews with fishermen and shipmasters;
- (4) non-participant observation, including at points of arrival and accommodation of newly arrived migrants and on board patrol boats;
- (5) focus group and/or semi-structured interviews with other relevant stakeholders.

Methodological issues in the implementation of the fieldwork

In preparing the fieldwork, the FRA put together a fieldwork manual, which included specifications on the research objectives, the overall research methodology, the sampling design, including definitions of the target groups of the research, as well as guidelines on ethical and practical issues for researcher to observe when implementing the fieldwork. In addition, the FRA prepared detailed interview topic guides for all strands of the research. For non-participant observation, the main topics highlighted in the various topic guides were to be observed. The topic guides also included instructions regarding interview strategies, recording socio-anagraphic data and anonymising interviews. Whilst having the same set of core questions, the interview questions differed somewhat between EU and non-EU countries reflecting the different role played by sending/transit and receiving countries.

Draft interview topic guides prepared by ICMPD and Elia-mep were extensively reviewed by the research team and the FRA and subsequently translated into relevant languages by case study teams. Excerpts from the interview topic guides can be found at the end of this annex.

Interviews were ideally to be recorded and subsequently transcribed. In practice, recording was not possible in most of the interview situations as the interviewee refused consent. Interviews were hence typically captured through field notes.

Main strands of research

In the following, the objectives, content and implementation of the main five strands of research are described in more detail.

a) Non participant observation

Non-participant observation included direct observation, informal interviews and collective discussions conducted during patrols and on the shore in points of arrival. This included FRA observations made during two Frontex-coordinated sea operations. The purpose was to observe the daily practice of the parties in charge of rescuing and intercepting migrants trying to cross to the EU by sea border. The FRA also visited the Spanish surveillance system SIVE and Frontex gave it a demonstration of the functioning and operation of Eurosur.

b) Qualitative interviews with third-country nationals

A total of 143 face-to-face semi-structured interviews with third-country nationals were conducted. Figures A1-A3 provide a breakdown of the migrants interviewed. The interviews were held on both sides of the sea. Migrants interviewed in the countries of departure included persons trying to reach Europe, persons who were stopped while crossing or were returned after having arrived in Europe. Migrants interviewed in the four EU Member States included persons staying in initial reception facilities as well as persons who were hosted in reception facilities and pre-removal detention centres but also individuals who were living in the community.

The research did not include qualitative interviews with third-country nationals in Cyprus, due to the lack of irregular maritime arrivals at the time of the research. In principle, the main target group involved recent and new arrivals, that is, migrants who arrived in an EU Member State in 2010 or 2011 or attempted to do so. However, migrants who had arrived to the EU before that date were also included, notably when interviewed in non-EU countries after their return as well as Greece and Spain.

The aim of these interviews was to explore in-depth the experiences and perspectives of third-country nationals who have been subject to rescue or interception operations at sea or otherwise arrived by sea in an irregular manner. These interviews covered information about the journey, such as the type of boat, condition, composition of the groups, resources available on the boat, treatment by the organisers of the transfer as well as experiences during interception or rescue operations, including treatment by officials, first aid, and responses to persons with specific needs. It also covered experiences during transport back to a third country or to a safe port in an EU Member State; disembarkation procedures, including persons present, questions asked, information and instructions given; experiences during the first interview with authorities, including provision of information, language used,

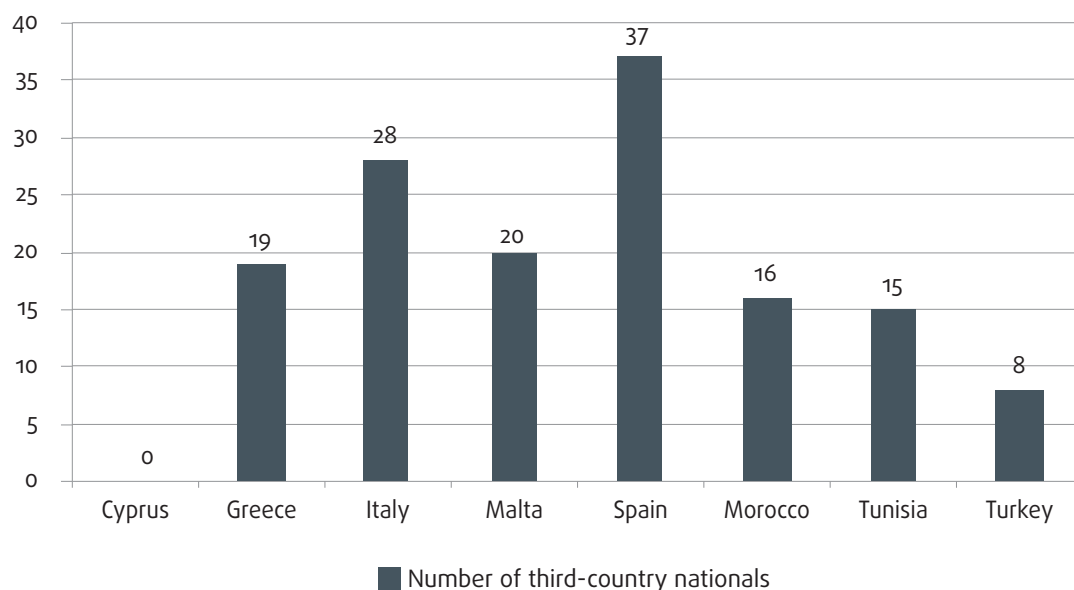


presence of an interpreter and access to a legal counsellor. For migrants accommodated in facilities on EU territory the FRA was interested in their experiences in the first days after arrival and, for migrants who claim ill-treatment, their possibility to access and use complaint procedures. While the migrants interviewed came from many different

countries, the largest three national groups came from Tunisia, Morocco and the Ivory Coast (see Figure A2).

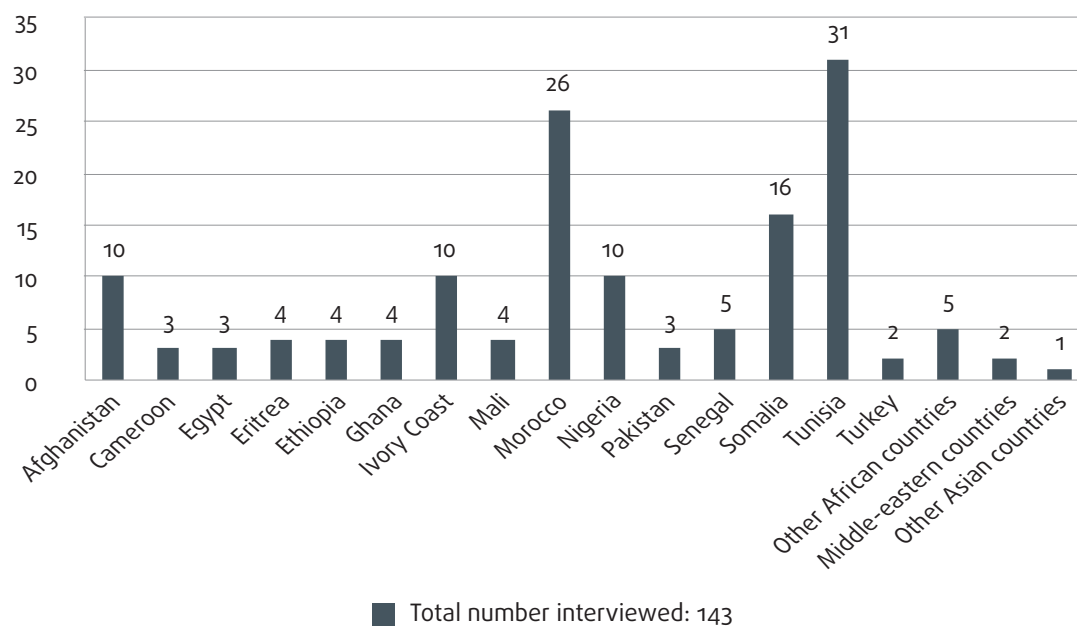
With 122 men and 21 women interviewed, women represented approximately 20 % of the overall sample.

Figure A1: Number of third-country nationals interviewed, by country of interview



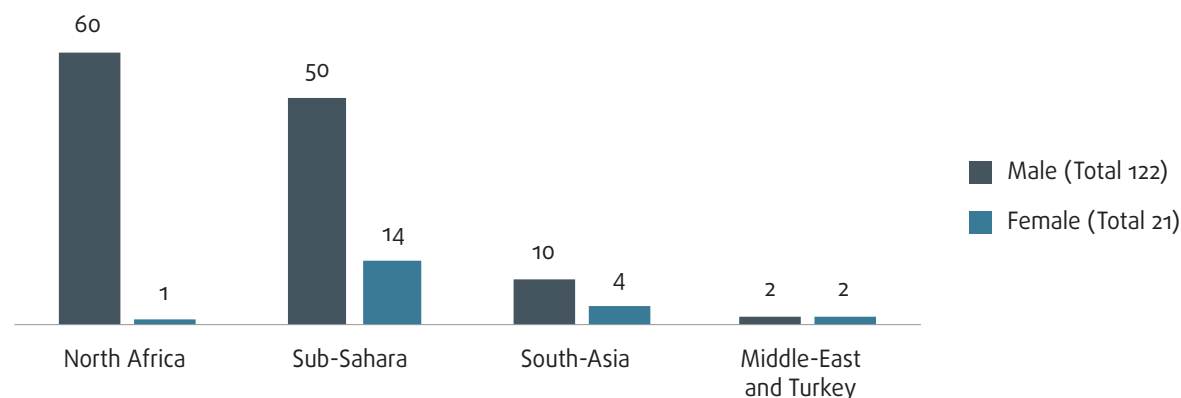
Source: FRA, 2012

Figure A2: Number of third-country nationals interviewed, by country of origin



Source: FRA, 2012

Figure A3: Number of third-country nationals interviewed, by sex



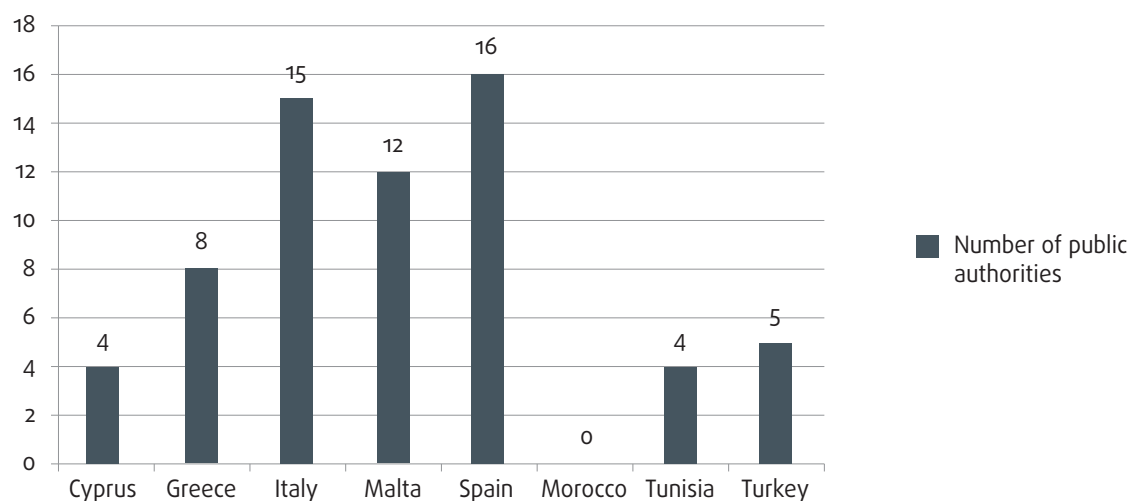
Source: FRA, 2012

c) Semi-structured interviews with relevant authorities:

These interviews aimed to examine how public authorities address maritime arrivals (as well as departures and returns, in the case of non-EU countries), both in terms of policy developments and practical application. Sixty four interviews were held with public authorities,

aimed at public officers responsible for border management, rescue at sea, interception and initial reception of migrants. They covered public authorities working at different hierarchical levels in each country. Figure A4 provides the breakdown of representatives interviewed by country.

Figure A4: Number of public authorities interviewed, by country



Source: FRA, 2012

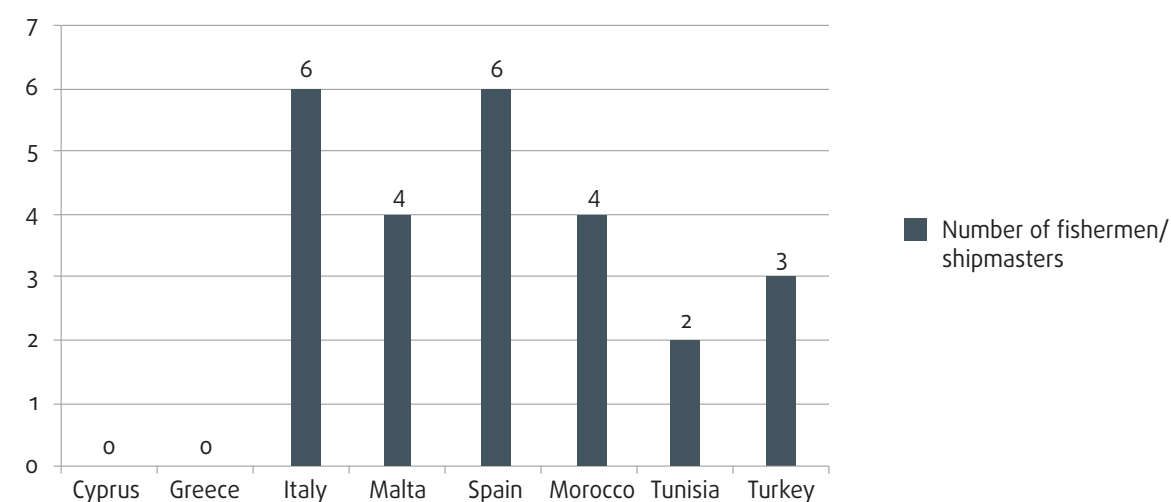
d) Semi-structured interviews with fishermen and shipmasters:

As the report showed, fishing vessels often sight migrants' boats before public authorities, and may be asked to support the authorities if the migrants are in situations of distress. These interviews explored in-depth the views, experiences, and perspectives of persons who regularly visit the areas at sea where interception or rescue operations take place, and who may take part in either a rescue operation or in informing the authorities. A total of 25 interviews were held, as illustrated in Figure A5.

e) Semi-structured interviews with other stakeholders:

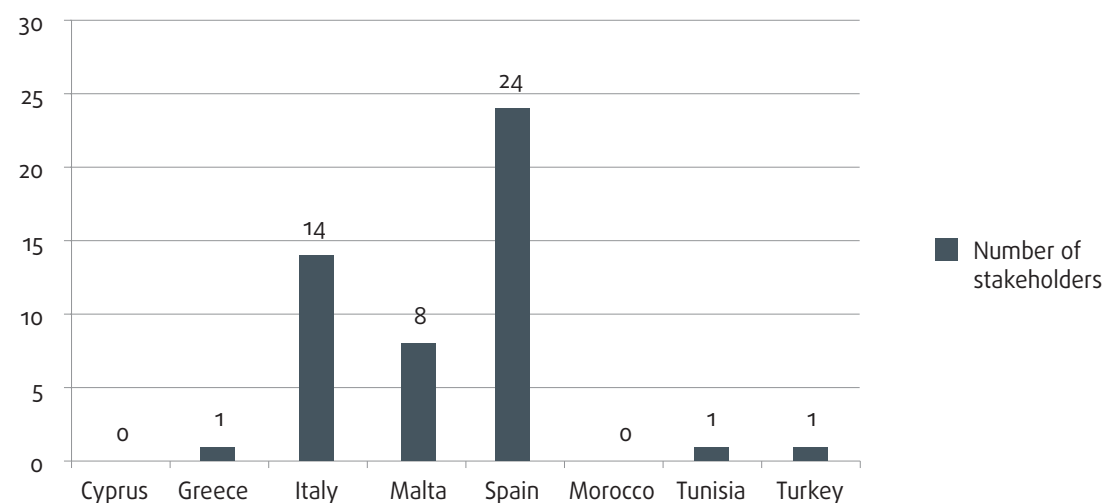
A total of 49 stakeholders were interviewed. The identification of the interviewees was based on a comprehensive mapping, undertaken by the field researchers, of all local actors with activities relating to the rescue and interception, disembarkation, screening and referral or detention and return of maritime arrivals, in order to obtain a non-governmental perspective.

Figure A5: Number of fishermen/shipmasters interviewed, by country



Source: FRA, 2012

Figure A6: Number of other stakeholders' interviewed, by country



Source: FRA, 2012

Research challenges

The implementation of the fieldwork faced a number of challenges.

First, support had to be obtained from relevant authorities to conduct interviews with public authority representatives as well as interviews with migrants in EU countries who were in detention or other reception facilities at the time of the research. All EU Member States authorities provided such support, with the FRA facilitating researchers' access to relevant facilities. Certain constraints remained in regard to participation on patrol as well as rescue and interception missions, largely due to concerns regarding the security of researchers who would have participated in such missions. No official support could be obtained from public authorities in Morocco and Turkey. This had an impact on the scope of research with public authorities, particularly in Morocco.

Second, research with migrants in EU Member States largely took place in situations where migrants were under stress, sometimes severe stress, notably if conducted in detention centres, other closed facilities or police stations, or if arrival was recent and the experiences of the journey traumatic. Conducting research in detention or reception facilities limited the possibility of selecting interviewees and made it more challenging to create the necessary atmosphere of trust for conducting the interview.

Third, the number of recent maritime arrivals impacted on the availability of interview respondents. Cyprus, as noted earlier, had no recent experience with maritime arrivals, and thus public authority interviews were the only ones conducted. In Greece and Spain (Canary Islands) challenges arose because of the decline in number of maritime arrivals at the time of the research and related challenges to identify a sufficient number of respondents for the research. Similar challenges arose in Morocco and Turkey as the main countries of departure for migrants heading to Spain or Greece, respectively. Amongst others, these challenges necessitated an extension of the fieldwork period in some of these countries while it also required flexibility on the part of the researchers to respond to new arrivals. To some extent, challenges in identifying a sufficient number of interviewees also concerned older arrivals.

Analysis

The material collected in the course of the fieldwork was analysed in a decentralised way by each of the research teams separately. To ensure comparability, a coding system was developed ('thematic coding'). The code system involved three main axes: (1) grouping interviews by groups of interviewees (adult migrants, minor migrants, public authorities, fishermen and other witnesses of interception/rescue operations, stakeholder/interest groups), (2) coding interviews by code families reflecting different stages of the migration trajectory (situation at sea, interception, disembarkation, detention, return) and (3) coding interviews by 34 specific thematic codes ('coding blocks'), which in turn were grouped into four overarching topics (fundamental rights, management of the process, experiences during the process and 'other'). The coding system was defined in such a way that it could be implemented manually or by using different types of text analysis software such as Atlas.Ti or Maxqda.

Based on the analysis of empirical data gathered in the research as well as the background research in preparation of the fieldwork, case study teams prepared extensive case study reports. The FRA drafted the comparative report.

Discussion of preliminary results with stakeholders

The preliminary findings of the research were discussed in stakeholders' meetings held in Greece, Italy, Malta and Spain in November and December 2011. Selected representatives of public authorities, international organisations, EU agencies and NGOs who play an important role in arrivals at sea participated. Comments made during and after these meetings were included in the preliminary results of the research.

The draft report was also shared for comments to public authorities in the EU Member States covered by the study. All five Member States provided the FRA with feedback and comments as did Frontex, the EASO, the European Commission, the Council of Europe, UNHCR and UNODC.



Interview topic guides with third-country nationals

Interview schedule

Start with a brief explanation of the research on the treatment of third-country nationals at the EU's maritime borders in simple language and explain the objectives and rationale of the research, who else will be interviewed and what the outcome of the research will be. Use your judgment if you can clarify basic issues (see cover page) at the beginning. Avoid asking potentially sensitive questions in the beginning and start with a conversational warm-up question.

Project description: You may wish to explain the purpose of the research on the basis of the following project description.

The study is part of the wider project on the 'Treatment of Third-Country Nationals at the EU's External Borders' conducted by the European Union Agency for Fundamental Rights (FRA). The project examines the treatment of nationals from non-EU countries intercepted or rescued at the EU's external maritime borders from a fundamental rights perspective. The study involves empirical research with public authorities, migrants and other stakeholders in five EU Member States sharing maritime borders with non-EU countries (Cyprus, Greece, Italy, Malta and Spain) as well as in three non-EU countries (Morocco, Tunisia and Turkey). The study focuses on policies and practices in relevant EU countries regarding maritime border control and interception and rescue at sea, including cooperation between the EU and relevant third countries. In doing so, the report will examine the challenges faced by those in charge of border control and surveillance in addressing human rights issues. The purpose of the research is to gather information on views and relevant experiences of authorities, migrants and other stakeholders regarding human rights issues at the border.

The research project, commissioned by the European Union Agency for Fundamental Rights (FRA), will be conducted by an international research consortium led by the International Centre for Migration Policy Development (ICMPD).

Note: In the following, introduce each topic (indicated by a header) with a conversational question. You should thus be able to solicit a narrative from the respondents. The issues/check boxes in small print indicate information that ideally should be covered – but you need not cover each and every detail. The respondent will usually cover some of these points during the interview without being prompted, but you may need to prompt the respondent for some of the details. Formulate any prompts in conversational terms, to avoid suggesting answers to the respondents – if there are check boxes both questions and answers can obviously be broader than what the check box will record – the latter is only meant to help record some key information in a standardised way. Be aware that not all respondents were equally aware of what was going on at a particular point of their trajectory.

Nature of the guidelines:

The guidelines should be seen as flexible interview guidelines, not as questionnaires. Adapt the guidelines as appropriate and necessary in the interview situation and leave out questions that are irrelevant in a particular context or in regard to particular groups of respondents (e.g. if talking to minors).

1. Contextual information on the journey

1.1. Can you tell me a little bit about the journey on the vessel you came here/ attempted to get to [country xy, Europe]?

1.1.1. - Place of departure, destination (e.g. Izmir, Turkey).

1.1.2. - Type of boat (speedboat, rubber dinghy, fishing boat, etc.)

1.1.3. - Time spent on boat (day/night)

1.1.4. - high seas ☐ yes ☐ no
- Number of people on board

1.1.5. - Type of persons present

☐ women/pregnant women

☐ minors

☐ unaccompanied minors

☐ persons with obvious health problems

☐ other vulnerable groups [specify]

1.1.6. - Nationalities

1.1.7. - Languages spoken on board

1.1.8. - Smuggler/transporter on board yes ☐
no ☐ fellow migrant in charge

1.1.9. - Traveling with....

☐ alone/ in the company of strangers
☐ children ☐ spouse ☐ parents ☐ people met on the way ☐ in the company of friends

1.1.10. - Communication facilities on board
- ☐ mobile phones ☐ radio ☐ GPS ☐ other
☐ none

1.1.11. - Phone numbers of persons/institutions to contact (e.g coastguard, UNHCR office, an individual working in any of these institutions, e.g.), who communicated? ☐ smuggler/transporter ☐ fellow migrant

1.2. How would you describe the situation of the passengers on board?

1.2.1. - Provision with water and food, blankets, life vests

1.2.2. - Health condition of fellow passengers (hunger, dehydration, stress, illness, injury)

1.2.3. - Were there conflicts during the journey? Who started them? Do you know what the motives were? How were the conflicts solved?

1.2.4. - Physical abuse experienced on board and while boarding. Did you see any differences in behaviour with women or girls present?

1.3. During the journey on the boat, did your vessel encounter any difficult situations (e.g. distress at sea)?

Add

1.3.1. - Death of fellow passengers

1.3.2. - Water coming in/half-sinking vessel, engine/motor breaking down.

1.3.3. - Reaction of the 'crew'/pilot

1.3.4. - S.O.S. transmission

NOTE TO INTERVIEWER: If the boat was not intercepted and the vessel reached the shore without being detected we should ask:

1.4. Did you surrender yourself to the police, or did the police find you?

Then go directly to section 4.2

2. Experience during interception or rescue operations

2.1. Can you tell me how your vessel got stopped [intercepted] at sea/how other boats came to your vessel's rescue?

2.1.1. - Prior communication (e.g. SOS, phone call, making signs/waving hands to helicopters or airplanes...)?

2.1.2. - Time lapsed between first contact (mobile phone/radio contact/visual contact) with interception/rescue vessel or with another boat or plane which informed the rescue vessel and actual interception/rescue

2.1.3. - In case of visual contact: attempts to avoid interception?

2.1.4. - Who stopped you?/came to your rescue? Did you know at the time who it was?

- 2.1.5. - Presence of other boats? Under which flags did these boats travel? Did you see boats turning away?
- 2.1.6. - Communication with interception/rescue vessel when in sight: Was there any attempt to communicate with passengers/ the pilot of the boat before attempts to stop the boat/ come to your rescue?/ Language of communication/ who was talking with whom?
- 2.1.7. - Content of communication
- 2.1.8. - Were women and/or children visible to the authorities?
- 2.2. Were there any particular incidents when your boat was stopped/when you were rescued?
- 2.2.1. - Pushed back by EU authorities/handed over to authorities of a third country?
- 2.2.2. - Did the boat sink or capsize? How did it happen?
- 2.2.3. - Did fellow passengers fall in the sea or drown during interception?
- 2.2.4. - Did the rescue operation start immediately? If not, how long did you wait? How long did you stay in the water for? Were life vests given/ thrown to you? How were you rescued?
- 3. Experience on the vessel en route to a safe port in an EU Member State or en route back to a third country**
- 3.1. Please tell me about your onward journey to the [EU country xyz]/ your return to [non-EU country xyz] after you were stopped/authorities or others came to your rescue
- 3.1.1. - Which boat were you taken on board? Did you know it was a rescue vessel from country xyz? How did you know? Was it an official and specific vessel for rescues or another type of boat? How did you know?
- Type of boat
- ☐ was taken on board of coastguard/ other authority vessel ☐ was taken on board of a fisher boat ☐ was taken on board of another private boat [which...] ☐ smuggling vessel escorted to the port
- 3.1.2. - What kind of instructions did they give you when you were taken on board? Describe what happened during the journey to the port.
- 3.1.3. - Were there women among the staff on the vessel? How many? What was their role?
- 3.1.4. - Did you or any of your fellow passengers ask where they were taking you? Did you get a response?
- 3.1.5. - What kind of people do you think were on board the vessel? Who talked to you? ☐ journalists/researchers, ☐ NGO members, government officials, ☐ lawyers ☐ other
- 3.1.6. - Did you, or other passengers in need of treatment that you know of, receive any medical help? From whom?
- 3.1.7. - Were food, water and blankets available to all of you once you were on board?
- 3.1.8. - When you were taken on board, which language did they use to talk to you? Were there any interpreters? Did any of your fellow travellers speak their language? Did they tell you who they were and that you were on a rescue vessel from country xyz?
- 3.1.9. - Who interpreted? ☐ fellow smuggled migrant ☐ doctor ☐ coastguard officer ☐ lawyer ☐ other
- 3.2. [for interviews in EU country and concerning migrants on board of government vessels only] I would now like to ask you a few question regarding the issue of 'asylum'.
- 3.2.1. - Do you know what the right to asylum is?
- 3.2.2. - Did you know that you could apply for asylum on board?
- 3.2.3. - Did you receive any information about asylum on board? By whom and how (e.g. leaflets, in which language?)
- 3.2.4. - Did you or your fellow passengers ask for asylum?
- 3.3. How would you describe your/your fellow passengers' treatment while en route to [country xyz]?
- incidents of beating up and intimidation by the authorities? Was this kind of behaviour different in the case of women/ girls?

NOTE TO INTERVIEWER: If the migrant was returned to a third country immediately after interception/rescue without detention occurring in EU soil, go directly to section 6.

4. Experiences upon arrival in EU countries

- 4.1. Can you tell me about your arrival in [country xyz]? Please describe a little about where you were disembarked and what happened at the point of disembarkation.
- 4.1.1. - Where were you disembarked (in case it is known to the migrant)? (e.g. Lampedusa, Mytilene), please describe the place
- 4.1.2. - What time of day were you disembarked?
- 4.1.3. - Who was there? ☐ nurses, ☐ interpreters, ☐ legal counsellors, ☐ immigration officers, ☐ police, ☐ other?
- 4.1.4. - Were you or your fellow passengers offered medical aid, food, water, blankets or dry/clean clothes when disembarked? ☐ yes, everyone ☐ no one ☐ only some [specify who]
- 4.1.5. - How long did you stay there?
- 4.1.6. - Were you, or others in the group, separated from the rest of the group and why?
- 4.2. Can you describe what the authorities did with you and other passengers after your disembarkation?
- 4.2.1. - Did authorities talk to you at the point of disembarkation? Were you taken anywhere? Who interviewed you? What kind of information did they ask you (nationality, age, journey details)?
- 4.2.2. - Was an interpreter present?
- 4.2.3. - Did you get information on the next steps (that you were to be interviewed, fingerprinted, etc.)? From whom?
- 4.2.4. - Did you ask for asylum?
- 4.2.5. - Did you witness what happened to others in your group, and in particular to children, women, families, people who were injured or sick?
- 4.2.6. - What happened to you? (Multiple answers)

Taken to: ☐ closed centre ☐ taken to an open centre ☐ taken to another location away from point of disembarkation (e.g. mainland, etc.) [specify.....] ☐ released with [specify document] ☐ returned to third country [specify]

5. Experience in reception facility

NOTE TO INTERVIEWER: in case the interview is with a minor go through both questions 5.1.-5.5. and the specific set of questions for minors in special facilities for minors (5.6.).

- 5.1. Now tell me a little about the place or places you were taken to and the conditions there were in the place you were taken
- 5.1.1. - Population of the centre- overcrowding (how many beds and how many people were there in your ward)?
- 5.1.2. - Detainee population composition: were families, women, female and male, unaccompanied minors and adult males (and smugglers) separated from one another and detained in different wards? Did this occur at the beginning of the detention period? Were split families (if that was the case) allowed to communicate to each other?
- 5.1.3. - Did anybody explain the regulations in the centre and tell you what you were supposed to do? Were these regulations written in your language?
- 5.1.4. - Any different treatment of asylum seekers, minors, women?
- 5.1.5. - Were there female guards in charge of the women/girls who arrived?

NOTE TO INTERVIEWER: Section 5.2 serves as contextual information on detention conditions in case the migrant was detained for over two weeks (waiting for screening and referral to take place). If the migrant was released after a few days then section 5.2 can be skipped. In any case, do not explore the issues under 5.2. in detail if time does not allow.

- 5.2. What were the main health-related problems while in detention?
- 5.2.1. - Were you examined by medical staff upon arrival in the detention centre? If not, were you taken to a hospital? Was there permanent medical staff in the centre?

- 5.2.2. - Were you or fellow inmates referred to GPs/psychologists/nurses regularly, when you asked for it, or not at all?
- 5.2.3. - Were you or your fellow inmates distributed (without charge) drugs (under/without doctor's permission), painkillers, mosquito repellents, toilet paper, soap, nappies? How regularly (on demand)?
- 5.2.4. - Types of health problems of inmates (stress, sleep deprivation, skin problems, diseases, other) [this is to be crosschecked from interviews with doctors or interpreters at the facilities, if any]
- 5.2.5. - Frequent access to outdoor spaces?
- 5.2.6. - Regular access to food and water?
- 5.2.7. - How many times per day did you and the other inmates eat? Was there a separate dining ward?
- 5.2.8. - How many toilets and showers per ward? What was their condition? Did you have free access to them at any time of the day or night?
- 5.2.9. - Dormitories clearly separated from toilet/shower room? Did you have access to a lavatory?
- 5.2.10. - Access to hot water in shower/toilet (how regularly?)
- 5.2.11. - How often were the wards, toilets and showers cleaned, by whom and with what equipment?
- 5.3. Please describe what happened to you in the reception facility.
- 5.3.1. - [in case of a closed facility] Were you informed of the reasons why you were/are held?
- In writing?
- In what language?
- Did you understand it?
- Did you understand whether you could appeal the decision to detain you and how?
- 5.3.2. - Were you interviewed, how often, by whom, who was present, what was the content of the interview?
- 5.3.3. - [for minors]: Did authorities assess your age (x-ray bone test, other)? How was it done? Did anybody explain what they were doing? Who took you there? How much time did it take to arrive at this place? Did they inform you about the results? Did you understand what was happening?
- 5.3.4. - Did you have access to telephone and how? If you had a mobile phone, were you allowed to use it to communicate outside the facility? Did they take it away from you? Did they facilitate communication with your family?
- 5.3.5. - Are there people you trust providing you legal counselling? Could you tell them about your problems? Did they help to find solutions? Were you able to complain?
- 5.3.6. - Were you informed about your rights and obligations (fingerprinting, asylum seeking, detention length, return to country of origin procedure)? By whom?
- 5.3.7. - Were you able to ask for asylum at that point or make an appeal to your return? If no, why not?
- 5.3.8. - Were there interpreters at the detention centres? Were they fellow inmates, NGO missions' staff, doctors/nurses, police officials (Frontex)? How many hours per day was the interpreter available?
- 5.4. Do you remember any particular incidents and things that happened while you were there?
- Riots, physical and psychological abuse between inmates or between inmates and authorities, hunger strikes
- 5.5. Overall, how long did you stay in this centre and what happened afterwards?
- 5.5.1. - How long were you detained for?
- 5.5.2. - Were personal belongings confiscated? Did you get them back upon release or readmission to a third country?
- 5.6. Specific set of questions for minors in special facilities for minors

NOTE TO INTERVIEWERS: this is relevant only for minors in special facilities, otherwise skip!

- 5.6.1. - Did they tell you, in your language, that they would take you to a centre for minor migrants? Did they tell where it was located? Did they mention what it was like and how much time you were going to stay there?
- 5.6.2. - Please describe how you arrived, your initial impression of the centre. Who was there to welcome you? Were there other minors? How many approximately? Did they talk to you? What did they say? How did you feel?
- 5.6.3. - Did anybody explain to you, in your language, what your legal situation was and inform you about your rights as a minor? Who did so?
- 5.6.4. - Who was responsible for you in the centre in lieu of parents (legal guardian)? Did you understand his or her role (legal guardianship)? What matters would he or she be involved in (e.g. informing you about rights, duties, etc.)?
- 5.6.5. - Did they inform you about the internal regulations in the centre? Were there different regulations for girls and boys? Were these regulations available in writing and in your language? How did you learn about the rules? Did anybody help you to get acquainted with these rules? Who?
- 5.6.6. - Was there any person you could talk to when you faced problems or wanted to complain? Were these problems solved? Was it possible to present formal complaints? To whom? How?
- 5.6.7. - Did they give you specific instructions about how to behave and what to say during visits or interviews?
- 5.6.8. - Were you able to call your family regularly? Were these possibilities used as a sanction or threat in order to influence your behaviour? Did you receive regular payments for your own expenditures and were these used as a sanction device? For what purposes did you use this money?
- 5.6.9. - What kind of sanctions were applied? Please describe them. What do you think about them? What were the main motives for applying sanctions?

5.6.10. - Were you able to leave the centre freely? Did you feel detained? If so, why?

5.6.11. - Did life in the centre differ for boys and girls and, if so, how?

Questions for minors who turned 18

5.7. What happened when you turned 18? Where do you live now?

5.8. Did you get permission to stay in the country? What kind of permission?

Experience of transport back to a third country (transit country and/or country of origin)

6.1. Were you returned to a third country after detention on EU soil or right after interception/rescue operation?

6.2. Were you informed about your return in writing?

What document did you receive?

In what language?

Did you understand it?

6.3. Were you informed of any appeal procedures so that you could object to the return decision? If yes, by whom? What were your options?

6.4. How did the return take place?

How were you brought to the border?

Were you escorted?

Do you know which location at the border you were brought to?

6.5. What happened after your return to the third country?

6.5.1. - Were you released shortly after being handed over to third country authorities?

6.5.2. - If yes, with what kind of document?

6.6. - Would you attempt to come again? Why? By which means?



Interview topic guides for public authorities (EU)

Organisation of maritime border control

- Could you briefly explain the overall organisation and practices of (maritime) border control in your country and your institutions/your field office's responsibilities? What is your institution's official mandate?
- What are the routines in border control (proactive patrolling vs. passive responses to alerts, joint patrols with Frontex/ EU countries/ third countries?)
- What are your own responsibilities and fields of work?
- Who are other relevant actors in regard to interception and rescue at sea besides your own institution?
- What formal and informal coordination mechanism exists? How effective are they?

General patterns of arrivals

- How would you describe the current situation and the development of maritime arrivals in general terms?
- Could you describe to me how smuggling via the sea is organised, who the smugglers are, and who is responsible on a boat and who those responsible are?
- What have been the repercussions of the events in North African countries on maritime arrivals in your country/at your location?
- What changes have you observed in the arrival patterns in recent years? What do you think are the reasons for these shifts?

Standard Operations at maritime borders

- Can you describe to me a typical interception operation, from the interception of a boat/migrants at sea to the point of disembarkation and first screening? Please describe the different stages of the procedures: which authorities and other actors are typically involved in such an operation?
- How would a rescue operation differ from a 'simple' interception operation, where a boat is not in distress at sea?
- Are there any standard operation procedures or guidelines for interception and/or rescue at sea, and, if yes, what do they entail with regard to

identification of person in need, family unity, use of force, healthcare, food, water and other fundamental rights issues ?

- How are these instructions communicated?
- Other procedural questions, such as:
 - How do you deal with minors, and in particular unaccompanied minors?
 - Is there a different treatment for men and women? Do you separate women and children from the rest? When? How do you deal with pregnant women or those with babies?
 - What do you do in case migrants ask for asylum?
 - What would you do in case there are injured/ sick persons that need treatment on board intercepted vessels?
 - How do you deal with alleged facilitators?
 - In which circumstances would use of force be permitted?
 - What sorts of problems do you personally/your institution typically encounter in such operations at sea? Provide examples of particularly challenging incidents. What risks are there involved?
 - What would you consider a successful interception operation? Can you give an example?

Cooperation in interception and rescue operations

- In search and rescue operations, is there often a need to cooperate with other countries?
- Can you explain how you cooperate with other EU countries in regard to border surveillance as well as interception/rescue at sea operations?
- How do you cooperate with third-country authorities?
- How is cooperation between different countries involved organised procedurally and legally?
- How do you cooperate with Frontex? Are fundamental rights issues discussed in the context of your cooperation with Frontex?

Situation of migrants at sea

- What can you tell me about the state migrants typically find on board a vessel?
- Apart from the overall state migrants arrive in, what other problematic issues have you encountered when intercepting vessels at sea?
- Have you encountered that vessels have capsized leading to loss of life or injury of passengers? What

are typical reasons? In your view, have slow responses by EU Member States' authorities or conflicts over who is responsible contributed to problematic situations at sea?

Procedures after disembarkation

- What happens after migrants' arrive on land?
- At which stage are migrants who are in need of protection or otherwise vulnerable identified? Who is in charge of initial screening of migrants? Are there different actors involved?
- How long does a typical initial screening procedure take? How long does it take in the current context? Does the initial screening procedure vary by sex or are the same people in charge? And in the case of minors, how and who is responsible for carrying out the initial screening and the test to determine their age?
- What training on fundamental rights have persons in charge of initial screening received?

Information and legal advice

- Do intercepted migrants have access to independent legal advice/legal representation and under what conditions? Who would provide such legal advice?
- What kind of information is provided to migrants after disembarkation and who provides it?
- Which reception facilities do you have for intercepted/ rescued migrants? What are the main challenges of your country's reception facilities/at your location?

Return and cooperation with third countries after initial screening

- In the case of those intercepted migrants channelled into return procedures after initial screening: What happens? Please describe a typical procedure, including any fundamental rights issues that have to be observed by case workers.
- If your country has a readmission agreement with major countries of departure: how does the implementation work in practice in regard to immediate return? What are the problems?
- Are you aware of what happens to intercepted migrants who are returned to the country of departure?
- What are the obstacles to return, and what happens in terms of their reception if migrants cannot be returned, or return procedures are delayed?

Resources to deal with fundamental rights

- How would you describe the main fundamental rights challenges in the context of managing maritime borders? What do you think are the main causes of these challenges? Do you think the situation has changed in recent years regarding fundamental rights?
- Does your team have the necessary resources, in terms of equipment, training and skills to deal with such challenges
- Are these covered in internal written instructions?
- Where do you see a need to further strengthen resources, training etc. in order to cope with the fundamental rights challenges that emerge in the context of management of sea borders?
- Has EU funding been made available to your country for maritime border control/your institution?

Interview topic guides with fishermen/shipmasters

Work at sea

- How long have you been working as a fisherman?
- Where is the boat usually docked? Where do you usually fish?
- Who owns the boat? Are there co-owners? How many people belong to the crew?
- Could you describe to me a standard working day?
- Where do you usually sell the fish? Could you describe to me how this works?
- What are the main difficulties and risks in your activity?

Rescue operations

- During your work, have you ever met boats in need of rescue, a shipwreck, some shipwrecked, dead bodies, etc. and when and where? Try to distinguish between fishermen who rescued a boat in distress and fishermen who witnessed an interception/ rescue operation.
- How many times did this happen to you?
- What would you normally do/what would normally happen when you rescue a boat (or passengers overboard)?

- Can the authorities of your own/third country ask/order you to rescue a boat? If so, what is the procedure?
- During rescue operations more than one boat or authority can be involved. Have you ever seen this? Could you describe to me exactly what happened?
- Have you ever met a patrol boat from a third country? Did you notice whether any EU officials were on the boat?
- Can another boat ask your help during rescue operations? If so, what is the procedure?
- Does this happen frequently? More or less than a few years ago? Has this ever happened to you? How many times? Could you describe to me what happened precisely?

Problems and difficulties

- Which problems can typically arise before, during and after rescue operations (e.g. dangers for your boat and your crew; technical difficulties; crew under strains; etc.)?
- As you are aware, there are laws nationally and internationally on seafarers' obligations in regard to rescue at sea. Can you tell me what you know about these legal obligations? Do you think there are problems to understand the Law of the sea? Do you think different authorities could interpret rules in a different way? Could different points of view put in danger your boat, your crew or the people shipwrecked? Has this ever happened to you? Could you tell me what happened?
- Have you ever received any pressure to do or not do something before or during a rescue operation? In particular, were you ever asked to perform acts beyond or against your legal obligations? From whom did you receive pressure? How did you behave in these circumstances?
- Have you ever had problems in dealing with authorities? Were there any risks for your boat, your crew and the migrants? How did you solve them?
- Did you change your way of working because of the migrants?
- Would you say that there are any negative material consequences for you/ the crew/ the owner of the boat?
- What are your and other fishermen's perceptions, ideas and needs in respect to how conduct rescue

operations? If there are differences, are these due to background, nationality or something else? Do you think everybody would agree on a common "code of conduct"?

Information and training

- What do you know about the organisation of sea journeys? Who is managing the crossings and making money? Over the years, what changes have you noticed? What do you think of irregular maritime crossings?
- How do you perceive your role between authorities and migrants? Do you have any kind of in/formal contacts with the authorities to discuss problems connected with smuggling and migrants from sea? Have authorities asked you for information?
- Do you exchange opinions on rescue operations with other people/organisations? Does this happen regularly?
- How do you see the role of Immigration and Asylum Laws for rescue operations? Do you have a rough knowledge of Immigration and Asylum laws? Have you received specific training on them? If not, do you think such training would be useful?
- Speaking about Immigration and Asylum laws, do you think some members of your crew (or in general) are more trained than others? Why? Are some nationalities better trained than others?
- Do you think Italian authorities adhere to the law?
- Have Italian authorities ever asked you to send back migrants/potential asylum seekers? If so, can you tell me your experience?
- Have you ever witnessed Italian/third country authorities returning a vessel that was stopped or rescued/its passengers to the non-EU country it came from?
- Do you remember some high-profile cases which involved fishermen? Can you briefly give me some information? What do you think of them? Do you believe this is the general opinion of people like you?

Final remarks and suggestions

- According to your knowledge, could you suggest other people to interview?
- According to your knowledge, at what other places should I interview people?

- How could your situation during rescue operations be improved?

Interview topic guides with other stakeholders

Other stakeholders include migrant associations; ombudsmen and public complaint bodies; NGOs working with migrants; UNHCR and other international organisations; journalists and independent experts; professionals involved in the reception system.

Questions were raised regarding protection of the following rights:

The right to life

- Has the duty to save the lives of those in peril, to the interviewee's knowledge, universally observed?
- Are you aware of deaths resulting from delays in rescue operations or because there was no rescue operation at all?
- Are you aware of deaths or severe injuries during interception/rescue? What were the reasons?
- Are you aware of instances when migrants were returned to countries where they may face risks to their lives, particularly from state authorities?
- Are you aware of instances when migrants were returned to countries where they might be subject to capital punishment, including through trials potentially resulting in the death penalty?
- Are you aware of instances where migrants died during the period of initial screening and/or detention? If so, how did this happen, and what was the cause?

Non-refoulement

- Are you aware of instances when migrants were returned to countries where they may face risks to their lives?
- Are you aware of instances when migrants were returned to countries where they might face religious, racial, ethnic, political or other similar persecution?
- Are you aware of instances when migrants were returned to countries where they might face physical abuse or degrading treatment, particularly from state authorities?
- Do you know of the existence of specific procedures to prevent the return of migrants to countries

where their life, physical integrity or freedom might be at risk?

- Are you aware of instances of 'pushing back' migrant boats?
- Are you aware of instances where migrants were returned to countries without proper inquiries as to whether their life, physical integrity or freedom was at risk?
- Do you believe that those who deal with irregular migrants are also fully aware of the meaning of *non-refoulement*?
- To what extent are migrants themselves aware of their rights or what information is provided to them and by whom to inform them about their rights in respect to *non-refoulement*?

Access to proceedings

- Is it normal procedure to allow temporary disembarkation for the purpose of access to proceedings in order to verify refugee status?
- Have there been attempts to verify refugee status on board vessels?
- Has disembarkation to temporary transit zones or processing centres in North African or other non-EU states been allowed, in lieu of disembarkation to the EU mainland?
- Has disembarkation to 'safe' third countries for the purposes of processing been practiced?
- Which other procedures for particularly vulnerable groups are in place? Does initial screening always consider vulnerability of intercepted/rescued migrants?
- How long does the processing of an irregular migrant typically take? Where are migrants usually placed during initial screening, considering also different categories of migrants?

Access to effective legal remedies

- Is the determination on refugee status open to appeal?
- Does such an appeal have the effect of suspending deportation?
- Are migrants always informed of their rights? By whom, when and where? Where do you see problems in regard to informing migrants about rights?

Is access to legal advisors possible for those who are disembarked?

- Is the determination on refugee status reached by a legal officer or by someone else?

Access to food and water

- Is it usual practice to provide food and water to those who are rescued or intercepted at sea? Are there any exceptions to this practice?
- Is it usual practice to provide food and water to those who are detained post-disembarkation? Are there any exceptions to this practice?
- Are the food and water provided adequate for the purpose and of a similar standard to that consumed by the local population?

Access to emergency healthcare

- Is access to emergency medical care, to the interviewee's best knowledge, routinely available on board vessels which intercept migrant boats at sea?
- Is there a systematic screening of intercepted/rescued migrants' health needs on board vessels intercepting or rescuing migrants?
- Is access to emergency medical care, to the interviewee's best knowledge, routinely available at processing centres and at points of disembarkation?
- Is there a systematic screening of migrants' health needs available at disembarkation?
- Is access to emergency medical care, to the interviewee's best knowledge, routinely available throughout detention to migrants while their cases are being processed?
- Is the level of emergency medical care provided, to the interviewee's best knowledge, of a substantially similar standard to that which is enjoyed by local residents?

Torture, inhuman, and degrading treatment

- Do you know of the use of physical force or degrading treatment during the interception process?
- Do you know of the use of physical force or degrading treatment in the reception context?
- Are you aware of instances when migrants were returned to countries where they may face physical abuse or degrading treatment, particularly from state authorities?

Vulnerable groups

- Are families separated from single, particularly male, migrants and accommodated in special facilities within reception centres?
- Is there a practice of separation of the sexes in detention/processing centres? Are there special facilities or services for women with special needs?
- Are there specific detention/reception facilities for children?
- Are there specific procedures to identify minors and award them special protection? What do these entail? Is special protection provided for children throughout the process?
- Are there specific services/facilities for traumatised individuals? Are authorities dealing with migrants intercepted or rescued at sea sensitive to the potential traumatising of migrants?

Access to information

- Are migrants informed, upon rescue/interception, of their rights under the law of the flag state, EU law and international law?
- Are migrants informed, upon disembarkation, of their rights under the law of the coastal state, EU law and international law?
- Are migrants informed, during detention/processing, of their rights under the law of the detaining state, EU law and international law?
- Are information leaflets available to migrants detailing their rights? In what language(s) is(are) the literature printed? How else are migrants informed about their rights?

Personal liberty

- Does the interviewee have knowledge of how migrants are housed aboard rescue/interception ships? Does this accommodation amount to detention?
- Once disembarked, what are the procedures for housing migrants?
- Do holding and detention facilities for migrants used while processing asylum applications (if any) bear the hallmarks of prison accommodation?
- Do irregular migrants have the ability to move freely in the receiving country while their cases are under determination?

Other questions regarding

- Patterns of arrival
- Control practices and prevention of access to the territory
- Cooperation with third (EU) countries in migration control
- Cooperation with Frontex and other EU institutions
- Trajectories of migrants
- Relevant actors
- Human rights awareness and training needs
- Desired/actual role of non-state actors

Concluding sections

- Where would you see the main challenges in regard to human rights in the context of interception and rescue at sea and initial screening of intercepted/rescued migrants?
- Are there any particular incidents or cases that you think are good examples for the challenges existing in this area?
- Is there anything else that you wish to share?



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

Each year, hundreds of men, women and children board overcrowded and ill-equipped boats in an attempt to reach Europe, a phenomenon that started in the late 1980s after European countries tightened immigration policies and made it more difficult to enter such countries in a regular way. 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 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.



Publications Office

FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 158030-699
fra.europa.eu – info@fra.europa.eu
facebook.com/fundamentalrights
linkedin.com/company/eu-fundamental-rights-agency
twitter.com/EURightsAgency

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