

# Access to Protection: Bridges not Walls



# Access to Protection: **Bridges not Walls**

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## ACRONYMS

AIDA	Asylum Information Database
AMIF	Asylum Migration and Integration Fund
ANAFE	Association Nationale d'Assistance aux Frontières pour les étrangers
APDHA	Asociación Pro Derechos Humanos de Andalucía
ASGI	Associazione per gli Studi Giuridici sull'Immigrazione (Immigration Law Studies Association)
CARA	Centri di Accoglienza Richiedenti Asilo (Reception centres for asylum seekers)
CCC	Common Core Curriculum
CEAR	Comisión Española de Ayuda al Refugiado
CEAS	Common European Asylum System
CIE	Centri di Identificazione ed Espulsione
CIR	Consiglio Italiano per i Rifugiati (Italian Council for Refugees)
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
CPSA	Centri di Primo Soccorso ed Accoglienza (Centres for first aid and reception)
CPT	Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
DCP	Direct Contact Point
EASO	European Asylum Support Office
EBF	European Border Fund
EC	European Commission
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EP	European Parliament
EPIM	European Programme for Integration and Migration
EU	European Union
EUBAM	EU Border Assistance Mission
EURA	European Readmission Agreements
EUROSUR	European External Border Surveillance System
FOO	Frontex Operational Office
FRA	European Union Agency for Fundamental Rights
FRC	First Reception Centre
FRO	Fundamental Rights Officer

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FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GCR	Greek Council for Refugees
HHC	Hungarian Helsinki Committee
ICC	International Coordination Centre
ICCPR	International Covenant on Civil and Political Rights
ILO	Immigration Liaison Officer
IOM	International Organization for Migration
ISF	Internal Security Funds
JLD	Judge of Freedom and Detention
JRO	Joint Return Operations
NGO	Non-Governmental Organization
OFPRA	Office for the Protection of Refugees and Stateless Person
PACE	Council of Europe's Parliamentary Assembly
PCF	The People for Change Foundation
PCR	Portuguese Council for Refugees
PEP	Protected Entry Procedure
RABIT	Rapid Border Intervention Teams
SPRAR	Sistema di Protezione per i Richiedenti Asilo e Rifugiati (Protection System for Asylum Seekers and Refugees )
TFEU	Treaty on the Functioning of European Union
UDHC	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VLTV	Visa with Limited Territorial Validity

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## RECOMMENDATIONS

### TO THE EU AND MEMBER STATES

- ▶ The EU should ensure effective access to the territory and to individualised relevant procedures in accordance with the principle of non-refoulement and the right to asylum as enshrined in the EU Charter of Fundamental Rights.
- ▶ The EU should intervene with Member States to halt the unlawful collective expulsions and collective rejections at borders carried out in some parts of the Mediterranean.
- ▶ The EU should use its prerogatives provided under EU law to start infringement procedures against those Member States that persist in conducting unlawful collective expulsions and in removing individual migrants and asylum seekers to third-countries where they may face persecution or serious harm or from where they are at risk of being deported to their country of origin.
- ▶ The EU should request and monitor that Member States conduct prompt and independent investigations into all allegations of collective expulsions and of ill-treatment at borders received from the Council of Europe, international organisations, NGOs and media.
- ▶ The EU should promote an independent monitoring system together with an effective complaint mechanism for migrants and asylum seekers subjected to any non admission and removal measures. The monitoring system should ensure that EU funds are not used to support activities that contravene the obligations of States related to the respect of the principle of non-refoulement.
- ▶ The EU should ensure that its own agencies, in particular FRONTEX, do not engage in actions in violation of the principle of non- refoulement. Frontex could be held responsible for the manner in which joint operations are carried out in practice, at least when they are initiated by the Agency.
- ▶ The Executive Director of Frontex should suspend all Frontex operations when there are serious allegations of collective expulsions and ill-treatment carried out by the authorities of Member States. In such cases, Frontex should monitor that the allegations are promptly, effectively and independently investigated by the authorities of the Member States concerned.

- ▶ Protocols on individual complaint mechanism should be set up to ensure transparency and effective respect of fundamental rights.
- ▶ In its annual report, Frontex should include information on the actions it takes after receiving allegations on human rights violation.
- ▶ Frontex should reinforce its reporting mechanisms and its follow up activity on human rights violations reported from Frontex operations or carried out in operational areas where Frontex-led operations are conducted.
- ▶ In order to avoid misleading interpretations of the 2014 External Sea Border Surveillance Regulation it should be clarified how procedural guarantees will be applied in practice in Frontex sea operations.
- ▶ Systematic and effective monitoring of Frontex-coordinated operations regarding interception and search and rescue should be ensured.
- ▶ Frontex should not engage in any operational cooperation with those third-countries for which independent reports indicate that they do not respect the fundamental rights of migrants, asylum seekers and refugees.
- ▶ The expertise of EASO should be systematically integrated into the planning and implementation of Frontex border control and surveillance activities.
- ▶ The role of the Frontex Fundamental Rights Officer should be strengthened, its independence as well as the necessary means and resources to effectively monitor all Frontex activities guaranteed.
- ▶ The EU, its Agencies and Member States must ensure that respect for human rights is inserted in all cooperation agreements, readmission agreements and in any other technical cooperation agreements with police authorities and that they are respected during implementation. Detailed substantive and procedural safeguards aiming at the full respect of the principle of *non-refoulement* and fundamental human rights should be expressly indicated in such agreements.
- ▶ The EU and Member States should ensure full transparency when negotiating such agreements making them public. The European Commission should develop monitoring mechanisms allowing for public scrutiny.
- ▶ Bilateral readmission agreements should be adopted with Parliamentary scrutiny.
- ▶ The EU and Member States must suspend the implementation of readmission procedure in case of violation, persistent and serious risk of violation of human rights of a readmitted person. As recommended by the Commission in its 2011

## RECOMMENDATIONS

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evaluation of the EU readmission agreements, suspension clauses should be included in such agreements.

- ▶ Control mechanisms and adequate guarantees should be adopted in readmission agreements to ensure that the human rights of returnees are fully respected at all times.
- ▶ International organisations and NGOs should be invited to the Joint Readmission Committees charged with the monitoring of the implementation of EU readmission agreements considering the growing importance that such agreements have in the return process and their interrelation with human rights and international protection standards.
- ▶ The EU should promote and encourage the development of solidarity arrangements between Member States for a more equitable system based on effectively shared responsibilities in a real spirit of solidarity between them and those third-countries currently being under impressive migratory pressure.
- ▶ The EU should promote and support the adoption of lawful avenues to access the EU territory in favour of persons otherwise deprived of any protection, as complementary tools to the processing of asylum applications lodged on the territory of the EU Member States.
- ▶ The EU should continue to advocate for increasing numbers of resettlement places.
- ▶ The EU should prepare guidelines on the conditions under which humanitarian visas should be issued and promote widespread use of this instrument, also by providing financial incentives with a similar mechanism to those already applied for resettlement.

### **TO MEMBER STATES**

- ▶ Member States should ensure that all intercepted migrants and asylum seekers are individually identified and profiled before being channelled to the relevant procedures. A common standard interview format could be used to ensure proper treatment of individual cases by border guards.
  - ▶ State authorities should include in their legislations the duty for border guards to provide sufficient, correct and friendly information to each migrant and asylum seeker in a language that the persons concerned understand. Every
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third-country national should be informed on the reasons of border checks and on his/her rights and obligations, and on the relevant procedures and related services provided by law.

- ▶ “Information desks” should be set up at border crossing points to ensure information, interpretation services, legal counselling.
- ▶ Interpretation services should be always ensured to allow communication between the third-country national and the border guards who have the task to assess the personal circumstances and the situation of the country where the concerned person risks to be returned to. On line Country of Origin information should be assessable to border guards to allow them to take the correct decision.
- ▶ National Guidelines should be issued to avoid divergent approaches and conducts in how recognising and dealing with asylum applicants. In this respect the Guidelines developed by EASO are considered an important tool to ensure the application of common rules.
- ▶ Member States should ensure that all intercepted migrants and asylum seekers have access to free legal counselling and assistance before a refusal of entry and removal or return decision is adopted. The law should guarantee effective means to challenge a removal order through an effective remedy by providing suspensive effect to appeals.
- ▶ Border guards and other officials of navy, customs, army and coast guards conducting border and surveillance operations should be properly trained on fundamental rights, the principle of non - refoulement asylum procedures, special needs of vulnerable groups. Following good practices in some countries, UNHCR as well as qualified NGOs should participate in training exercises.
- ▶ Member States should resort to detention at borders only under strict observance of the relevant jurisprudence of the Strasbourg Court and in any case search in each individual case for alternative and less restrictive means. Unaccompanied minors should under no circumstances be placed in administrative detention.

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## INTRODUCTION

DR. CHRISTOPHER HEIN

Director of CIR

In the very moment of writing this introductory note to our publication, the tragedy of 3 October 2013, where 368 people died - early in the morning - a few hundred meters off the coast of Lampedusa, is widely commemorated by media, politicians and civil society organisations. Today articles in the press remind us that in the Mediterranean during the first 9 months of 2014 an estimated number of 3072 refugees and migrants have disappeared in the waters on their way to Europe. The mass murder of approximately 500 persons committed by traffickers on 14 September 2014, somewhere between Crete and Malta, showed an even greater number of victims than “3 October” but had far less public attention due to the different circumstances – and, maybe, also due to a “tragedy fatigue” in the public opinion bombarded during the summer of 2014 with almost daily news on shipwrecks. From January to September 2014, some 130.000 people have arrived by boat in Southern Italy from North Africa. Half of them belong to only 2 nationalities : Syrians and Eritreans. And less than half of the total of these “boat people” remain, as asylum seekers, in Italy. The others move forward to other destinations in Europe, mainly to the North. They arrive at the Southern shores of Europe in an irregular way, without passports and entry visas, with the costly assistance of smugglers. There is no other way to access the European territories, to access protection, as a result of the “Schengen System”. And tens of thousands move from Italy, Greece or Bulgaria further North, again in an irregular way, often by paying again the services of smugglers. There is no other way to reach European destinations different from the country of first arrival, as a result of the “Dublin System”. The combined effect of the Schengen and the Dublin Systems is that the movement of refugees towards and within Europe is illegal in the vast majority of cases. The right to asylum, enshrined in the Universal Declaration of Human Rights, in the Lisbon Treaty and in the Constitutions of 5 member States of the European Union, is in practice in Europe embedded in a frame of illegality and of organised criminality. Making use of the right to ask asylum carries, in 2014 in Europe, the risk to die beforehand. However, people continue to undergo this risk, they continue to pay smugglers, they continue to suffer days and nights of fear on the high seas, fear for their lives and of their relatives and friends’ and also fear to be pushed back where they departed from. They have no alternative since there are no other means to access protection.

When we planned, in 2012, the project “Access to protection- a Human Right”, we started from our experience with the push back of more than 1000 persons to Libya, in 2009, exercised on the high seas of the Canal of Sicily by the Italian

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military under clear political instructions from the highest level of the Government. We had, as Italian Council for Refugees, thanks to our presence in Libya and to our access to a number of detention centres for refugees and migrants in the Libyan territory, contributed to the preparation of the “Hirsi Jaama and others” case for the submission to the European Court for Human Rights in Strasbourg. Our sister organisations in Greece, Hungary, Spain had made similar experiences of mass rejection at their sea and land borders. In other words, the study on access to protection was initially limited to situations of explicit, even violent refusal of access to protection by State authorities. And this is reflected in the starting question of the Hirsi Judgement of February 2012 : did Italy expose the claimants to torture or inhuman treatment, in Libya and/or in their home countries Eritrea and Somalia, by refusing them access to its territory and, thus, to protection ? However, this question implies a number of more principled considerations regarding jurisdiction, extraterritorial effects of Human Rights obligations, State responsibilities for persons under the direct control of State agents, and, not at least, regarding the relationship between the prohibition of *refoulement* and the prohibition of torture and inhuman treatment in the sense of Article 3 of the European Human Rights Convention. The Strasbourg Court reaches conclusions the significance of which go far beyond the concrete case to which the Decision refers. In evolution of its previous jurisprudence, developed over more than a decade, these conclusions and principles reflect a dynamic application and interpretation of Human Rights law vis-à-vis more recent tendencies of States to externalize the barriers against irregular migratory movements to areas outside the physical territories of the States or of the whole of the European Union.

The traditional concept of *non-refoulement* imposes on States, under certain conditions and circumstances, the obligation to admit citizens of other countries or stateless persons at least temporarily, in derogation from their ordinary entry and border control rules and mechanisms. The Hirsi judgement elaborates on the scope and the application of this concept to situations where rejection is carried out prior to the arrival of the foreigner at the physical State border and even prior to arrival in territorial waters. By doing so, the Court provides for a list of safeguards that must be ensured by States in all cases of rejection and physical removal of foreigners in order to avoid the risk that such acts could result in *refoulement* and in exposure of the person to inhuman treatment.

The principles and safeguards established by the Court are to be observed irrespective of a request for international protection. They derive from general Human Rights law, not from the more specific international or European refugee protection regime on which the European Human Rights Convention remains silent.

Starting point for our project has been the question to which extent these safeguards are actually ensured and respected in practice at borders or entry zones by some Member States as well as by legislation and policies of the European Union

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and by practices of agencies of the Union like the external border agency Frontex. At the level of Member States, this includes very concrete and operational aspects like the availability of interpretation services and the provision of information in a language the person is able to understand; the access to UNHCR and other independent protection actors; the right to an effective remedy against a deportation order and the actual possibility to lodge an appeal; the training of border police. Of utmost importance appears the principle established by the court that the authorities must ascertain whether measures like rejection, removal or deportation would possibly entail the risk of severe Human Rights violations in the territory where the person is sent. Our study includes countries with extended sea borders, Greece, Italy, Malta, Portugal and Spain as well as a country with an important external land border, Hungary, and a country without external land and relevant sea borders where in turn a particular procedure for asylum seekers arriving by air is practiced, Germany. In all these Member States of the Union we have found elements of concern regarding the full respect of the principles established by the European Human Right law as interpreted by the Strasbourg Court.

But the question of access to protection includes policy dimensions that go beyond the treatment of persons at entry points or border areas. First of all – how does a foreigner reach the border of a State belonging to the “Schengen area”? The Schengen visa regime requires the possession of an entry visa by citizens from nearly all countries in the world, where asylum seekers and refugees are originated from. The absence of a valid entry visa - of course jointly with a valid travel document - makes the journey illegal. But for protection seekers visas are very rarely issued. The presentation of a protection request at the border should normally lead to temporary admission of the person even in absence of the normal entry requirements. However, some States like Germany use the fiction of non-admission of asylum seekers arriving at airports for the period of the processing of the asylum request even when such procedure is actually carried out on the State territory.

But the most far reaching problem is produced by the fact that the presentation of a protection application requires the physical presence of the applicant at the border or at least in the territorial waters of the requested State. The whole Common European Asylum System is exclusively addressed to persons already present in the Member States. Access to protection is dependent on the access to the territory of a State which is in the position and willing to provide protection.

In the title of our project we affirm that access to protection is a Human Right. The question is whether the access to the territory is equally a Human Right. The Hirsi judgement seems to provide a positive reply to this question, at least for those circumstances when the person is under the control of the State authorities and the refusal of access to the territory would result in refusal of protection against *refoulement*. In the Hirsi Jamaa case decided by the Court, the claimants, although intercepted in international waters, had been under the effective, continuous and exclusive, *de jure* and *de facto* control of the Italian State authorities, being kept on

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a military vessel prior to be handed over to the Libyan police. In his Concurring Opinion on the Judgement, the Judge Pinto de Albuquerque goes further, affirming, *inter alia*, that also the visa policy of a Country is subject to its obligations under international human rights law and the non-issuance of an entry visa may in certain circumstances entail a breach of these obligations.

In any case, it becomes apparent that the question of access to protection requires, independently from the legal debate, a policy reply. Subsequent to the publication of the Hirsi Jamaa Judgement, in February 2012, important legislative steps regarding the right to asylum and the control of sea borders were made by the European Union. In the present publication these legislative acts are examined under the aspect of compliance with the principles set by the Strasbourg Court in the Hirsi Jamaa case and a number of recommendations are made regarding future policy developments. First of all, a true European Asylum System has to find avenues for persons in need of international protection to reach securely a "safe haven". The research work carried out under the project sponsored by EPIM and resulting in this publication is meant to contribute to this fundamental debate.

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# **I. THE PROJECT “ACCESS TO PROTECTION: A HUMAN RIGHT”**

## **I.1 The Project**

The project “Access to Protection: a Human Right,” financed by the Network of European Foundations in the framework of the European Programme for Integration and Migration (EPIM), aims to promote EU and national policies and practices in line with the obligations set out by the European instruments on Human Rights. In particular, it focuses on the principles outlined by the European Court of Human Rights (ECtHR) in the *Hirsi Jamaa and Others v. Italy* case<sup>1</sup> as far as the access to the territory and to protection is concerned. Access to protection and to asylum procedures has become increasingly difficult in European Union countries due to a combination of policies and measures that hamper regular and safe arrival of asylum seekers. In this context, the *Hirsi* case is of fundamental importance as it delineates clear standards that EU Member States must respect when conducting border controls.

The project is implemented by the Italian Council for Refugees – CIR (lead agency), the Hungarian Helsinki Committee-HHC (Hungary), Pro Asyl Foundation (Germany), The People for Change Foundation- PFC (Malta), the Greek Council for Refugees-GCR (Greece), the Spanish Commission for Refugee Aid – CEAR (Spain) and the Portuguese Council for Refugees- PCR (Portugal).

The project intends to contribute to the promotion of a “cultural shift”: from a perspective that focuses mainly on security and on fighting irregular immigration flows to an approach which balances these exigencies with respect for human rights, in particular the *non-refoulement* principle. The project promotes the effective access to rights and procedural safeguards for aliens intending to enter the territories of the Member States and/or staying at borders or border areas.

The project began in September 2012 and will terminate at the end of October 2014. Project partners have engaged in desk-research, legal analysis, field research as well as in debate with key stakeholders through interviews and roundtables carried out in all countries with the exception of Portugal.

Project partners have published their national reports that have been launched in their respective countries. National reports are available on CIR and project partners web-sites and have been collected in a DVD produced in the frame of this project, attached to the present Report:

- Epim German Country Report by the Pro Asyl Foundation “ Das asylverfahren

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<sup>1</sup> European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, n. 27765/09 of 23 February 2012.

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an deutschen flughäfen: Völkerrechtswidriges „push back“ oder model für ein asyl-schnellverfahren auf hoher see?“<sup>2</sup>.

- Epim Greek Country Report by the Greek Council for Refugees “Access to Protection: A human Right”<sup>3</sup>.
- Epim Hungarian Country Report, by the Hungarian Helsinki Committee “Menedékkérők hozzáférése a nemzetközi védelemhez”<sup>4</sup>.
- Epim Maltese Country Report by PCF “Access to Protection: A Human Right”<sup>5</sup>.
- Epim Italian Country Report by CIR “Accesso alla protezione: un diritto umano”<sup>6</sup>.
- Epim Spanish Country Report by CEAR “Acceso a la protección: un derecho humano”<sup>7</sup>.
- Epim Portuguese Country Report by PCR “O acesso à protecção: Um direito humano”<sup>8</sup>.

These national reports contain detailed information on legal framework and the practices with regard to admission at border to the territory and to asylum procedures, highlighting good practices and shortcomings, with the hope to contribute to a better understanding of their impact on migrants and asylum seekers’ fundamental rights under domestic and EU law.

In the frame of this project the Hungarian Helsinki Committee has produced the report “Border Guard Training on Human Rights. A Mapping Paper Focusing on Selected EU Member States’ Practices”. The mapping exercise includes desk-research conducted by the Hungarian Helsinki Committee in May-June 2013 which was then supplemented by the contribution of project partners. The Report summarizes the main trainings offered to border guards by institutions in the

2 Report available at: <http://www.asylumineurope.org/reports/country/germany>; [http://www.proasyl.de/en/about-us/foundation/projekte/icf/europ-network-icf/newsletter/icf-newsletter-may-2007/germany/?cHash=978fb9118bfb1fac8fcf5d12045ac933&no\\_cache=1&sword\\_list\[0\]=germany&sword\\_list\[1\]=country&sword\\_list\[2\]=report](http://www.proasyl.de/en/about-us/foundation/projekte/icf/europ-network-icf/newsletter/icf-newsletter-may-2007/germany/?cHash=978fb9118bfb1fac8fcf5d12045ac933&no_cache=1&sword_list[0]=germany&sword_list[1]=country&sword_list[2]=report).

3 Report available at: <http://www.gcr.gr/index.php/el/news/press-releases-announcements/item/354-access-to-protection-a-human-right?highlight=WjYhY2Nlc3MiLCJ0byIsInByb3RlY3Rpb24iLCJhY2Nlc3MgdG8iLCJhY2Nlc3MgdG8gcHJvdGVjdGlvbWl3InRvIHByb3RlY3Rpb24iXQ>.

4 Report available at: <http://www.asylumineurope.org/reports/country/hungary>; <http://www.refworld.org/publisher/HHC,COUNTRYREP,HUN,539164814,0.html>.

5 Report available at: <http://www.asylumineurope.org/reports/country/malta>; <http://www.pfcmalta.org/access-to-protection-a-human-right.html>; [http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi\\_report\\_final\\_1-12.pdf](http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi_report_final_1-12.pdf).

6 Report available at: <http://www.asylumineurope.org/reports/country/italy>; <http://www.cir-onlus.org/images/pdf/rapporto%20epimcon%20corr%2023-10-13.pdf>.

7 Report available at: <http://www.cear.es/wp-content/uploads/2013/05/INFORME-FINAL.pdf>.

8 Report available at: <http://www.cpr.pt/>.

countries involved in this project. The partnership has also benefitted from the valuable support of the Bureau for Europe - Division International Protection of the UNHCR, the Commission for Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe and the lawyers of the Forensic Union for the Protection of Human Rights, who filed the complain concerning the *Hirsi* case before the European Court of Human Rights.

### **I.2 The Report "Access to Protection: Bridges not Walls"**

This report, written by CIR, presents a number of development and findings at the EU level on the field of migration and asylum and provides an analysis of main EU legal instruments and practices applied in project partners countries.

The primary argument throughout the whole report is related to the relevance that the principle of *non-refoulement* has in relation to border control and surveillance activities, interception and rescue at sea operations.

Chapter II of the Report provides a short analysis of most recent migration flows in the Schengen area in terms of detection of irregular border crossing by air, land and sea as well as migrants' countries of origin and migratory routes. The second part of the chapter analyses the most recent trends with regard to applications for international protection in the EU Member States, including asylum seekers' countries of origin, top destination countries and recognition rates.

Chapter III presents the salient legal principles set out in the *Hirsi* decision, while chapter IV provides an analysis of important policy and legislative developments since the issuance of the *Hirsi* decision and the 2 tragic events occurred in October 2013 off the coast of Lampedusa. Chapter V presents a number of key findings with regard to border control and surveillance activities and illustrates some important cases and incidents occurred at the airports, at land and sea borders.

Chapter VI describes the main border control externalisation measures and the readmission agreements concluded by the EU or among Member States with third-countries or other EU countries. Chapter VII discusses some of the main obligations relating to the application of the direct and indirect *non-refoulement* principle, in particular to the right to information and interpreting services, the right to legal assistance and to an effective remedy and the duty for border guards to be adequately trained. This chapter highlights shortcoming as well as challenges migrants and asylum seekers face in practice in accessing such rights, that when denied may hamper their fundamental rights.

This report through its recommendations addressed to the EU Institutions and Member States intends to highlight the areas where improvements are needed under the policy and legal point of view to improve the overall respect of fundamental human rights by Member States and to help clarify which are the main factors that make achievement of this goal difficult.

## II. MAIN MIGRATION FLOWS AND ROUTES

During the last two years remarkable changes and developments have concerned the numbers and nationalities of third-country nationals entering the European territory as well as the migration routes to reach EU external borders.

The last two years (2013-2014) have been characterized by a significant increase in arrivals of asylum seekers and migrants.<sup>9</sup> As reported by Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union<sup>10</sup>, *“detections of illegal border crossing along the EU’s external borders sharply increased between 2012 and 2013 from 72 437 to 107 365, consisting in an annual increase of 48%”*.<sup>11</sup> However, the Agency pointed out that although the annual increase is considerable, the 2013 level is still lower compared to the total number of third-country nationals who entered the EU without valid documents during the Arab Spring in 2011, which amounted to 141 051.<sup>12</sup>

Migrants resort to different modalities to access European territory, by sea, land and air.

During the last years the number of third-country nationals arriving irregularly **by sea has steadily increased**. UNHCR estimates that the number of people who arrived in Europe by crossing the Mediterranean Sea in 2013 reached over 59,600. This represents *“a significant increase - almost three times – compared to the number of people arrived by sea in 2012, even though it is still lower than in 2011, when high numbers of people took the sea during the Arab Spring events.”*<sup>13</sup>

**This trend continues into 2014, considering that from the 1<sup>st</sup> of January till the 6<sup>th</sup> October 142,085 persons have been rescued by the Italian “Mare Nostrum” military and humanitarian operation.**<sup>14</sup>

The **Central Mediterranean route**, as highlighted by Frontex in its Annual Risk Analyses, has been interested in 2013 by the largest percentage of all detections of irregular crossings of EU external border, namely 40 304 which amounted at 38% of the total detections.<sup>15</sup> According to Frontex, in the first semester of 2014 (January-June) the number of arrivals by sea through this route has been significant

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9 FRONTEx, *Annual Risk Analysis 2014*, available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf).

10 Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, page 1).

11 FRONTEx, *Annual Risk Analysis 2014*, page 29.

12 *Ibidem*.

13 UNHCR, Syrian refugees in Europe, What Europe Can Do to Ensure Protection and Solidarity, July 2014, page 9, <http://www.refworld.org/docid/53b69f574.html>.

14 Data provided to the Italian Council for Refugees by the Italian Navy on 6<sup>th</sup> October 2014.

15 FRONTEx, *Annual Risk Analysis 2014*, page 30.

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## II. MAIN MIGRATION FLOWS AND ROUTES

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since it reached 56 446. Most boats departed from Libya and Egypt.<sup>16</sup> The main nationalities refugees and migrants entering the EU external borders through this route have been Eritrean, Syrians and Somali.<sup>17</sup>

The **Eastern Mediterranean route**, has been one of the most used path for border-crossing into the EU territory via Greece, southern Bulgaria or Cyprus crossing through Turkey. Since 2008 this route increasingly became one of the biggest migratory EU external border hot spots.<sup>18</sup>

As reported by Frontex, compared to 2011 and 2012 when most arrivals through Turkey occurred through the land border with Greece, the areas of detections considerably changed: 2013 was characterised by an increased number of migrants arriving to the Greek islands from Turkey; **detections in the Eastern Aegean Sea were the largest, amounting at 11 831.**

In terms of the nationalities of the migrants, Syrians, Afghans and Eritreans constitute the most numerous group.<sup>19</sup>

Closely related are also the arrivals by sea of migrants in the area of **Apulia and Calabria**, mostly linked to departures from the Eastern Mediterranean, amounting totally at **4994 in 2013**, while at **7751 during the period of January-June 2014.**<sup>20</sup>

With regard to the **land border**, although data are limited, it can be assessed that between 2009 and 2013, passenger flows increased more rapidly at the land border than at the air border.<sup>21</sup>

As reported by Frontex the years 2013-2014 have been characterized by a noteworthy intensification of third-country nationals entering EU territory through the **Western Balkan route**. The number of migrants, in fact, increased from 6 391 in 2012 to 19 951 in 2013<sup>22</sup>, while in the first semester of 2014 (January-June) it amounts to 5 634<sup>23</sup>. In particular, a sharp increase in detections, mostly in January-June 2014, have been registered by Hungary at its land border with Serbia.<sup>24</sup>

Years 2012, 2013 and the first six months of 2014 saw also an increasing number of migrants who entered EU by land crossing the **Spanish land borders Ceuta and Melilla.**<sup>25</sup> The migration flow through the Western Mediterranean land

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<sup>16</sup> *Ibidem*, page 8.

<sup>17</sup> *Ibidem*, page 31. See also: Frontex, Migratory Routes Map, available at: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map>.

<sup>18</sup> FRONTEX, *Annual Risk Analysis 2014*, page 8.

<sup>19</sup> *Ibidem*, pages 8 and 31.

<sup>20</sup> *Ibidem*, pages 8, 30 and 31. See also Frontex, Migratory Routes Map.

<sup>21</sup> *Ibidem*, page 6.

<sup>22</sup> *Ibidem*, pages 7, 8 and 31.

<sup>23</sup> Frontex, Migratory Routes Map.

<sup>24</sup> FRONTEX, *Annual Risk Analysis 2014*, pages 7 and 31.

<sup>25</sup> FRONTEX, Western Mediterranean Route, <http://frontex.europa.eu/trends-and-routes/western-mediterranean-route>

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route intensified of 49% between 2012 and 2013, passing from 2 839 to 4 229 third-country nationals who have crossed the land border in Ceuta and Melilla.<sup>26</sup>

By contrast, a significant decrease of migrants crossing by land has been registered between 2012 and 2013 in the Eastern Mediterranean route (Greece, Bulgaria and Cyprus): in fact, in 2012,

32 854 migrants have entered EU soil through this route, while in 2013 the number amounted to just 12 968.<sup>27</sup> Although in 2013 the figure was the lowest reported on this route since 2009, nevertheless *“the route still ranked second and accounted for nearly a quarter of all detections for illegal border-crossing to the EU”*<sup>28</sup>. Specifically, an unprecedented amount of migrants, mainly Syrian refugees, has arrived in Bulgaria from Turkey.

In terms of the **nationalities of migrants entering the EU territory**, Syrians, Eritreans, Afghans and Albanians together accounted for 52% of total detections (or 55 359). Syrians alone (25 546) represented almost a quarter of the total.<sup>29</sup> Their detections at the EU border tripled between 2012 and 2013. **Syrians were reported as the top nationality detected crossing EU external borders in most border areas.**

**Eritreans** ranked second in 2013, with 11 298 detections, or 11% of the total, representing one of the most significant increases (fourfold), as their detections in 2012 totalled 2 604.<sup>30</sup> The vast majority of Eritreans were detected on the Central Mediterranean route (9 926, or nearly 90%), after departing from Libya. Following a similar route, **Somalis** were also detected in large numbers in 2013 (5 624), which level is comparable to 2012 (5 038). As emphasized by Frontex, all together detections of Eritreans and Somalis totalled 16 922 (16% of all detections). This relatively large share shows the importance of the migration flow from the Horn of Africa to the EU, a flow that is often extremely dangerous since migrants have to cross the Sahara, transit through Libya and then cross the Mediterranean Sea.<sup>31</sup>

By contrast, detections of **Afghans** sharply decreased to about 9 500 in 2013, down from 13 169 detections in 2012 and nearly 26 000 in 2010.

In addition, detections of **Nigerians** (3 386), **Mali**ans (2 887), **Senegalese** (1 643) and **Gambians** (2 817) all quadrupled or more compared to 2012. Together they totalled 10 733 detections (10% of all), and were mostly reported from the Central Mediterranean.<sup>32</sup>

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26 FRONTEX, *Annual Risk Analysis 2014*, page 31.

27 *Ibidem*, page 35.

28 *Ibidem*, page 31.

29 *Ibidem*, pages 31-36.

30 *Ibidem*, page 30.

31 *Ibidem*.

32 *Ibidem*.

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## II. MAIN MIGRATION FLOWS AND ROUTES

With regard to **asylum applications**, in 2013 Eurostat<sup>33</sup> reported a large increase in asylum applications registered in the EU-28, which resulted in **435.000**, nearly 100.000 more compared to 2012, mostly composed by Syrian nationals.<sup>34</sup>

As for the period 2014-2020, EU funds dedicated to borders have become part of **the Internal Security Funds (ISF)**, which are divided into ISF-1 (Police cooperation) and ISF-2 (Border instruments). The budget established for the **instrument for financial support for external borders and visa** is € 2.76 billion and its legal basis lies in the EU Regulation no. 515/2014 of the European Parliament and the Council of 16 April 2014<sup>35</sup>.

Concrete actions to be funded through this instrument can include a wide range of initiatives, such as setting up and running IT systems, acquisition of operational equipment, promoting and developing training schemes and ensuring administrative and operational coordination and cooperation.

The **key objectives** that actions are required to cover with regard to **visas** are: an effective processing of Schengen visas by supporting a common visa policy which aims at facilitating legitimate travel to the EU, providing a high quality of service to visa applicants, ensuring equal treatment of non-EU nationals and tackling irregular migration.

With regard to **borders**, the objectives are: to achieve a uniform and high level of control of the external borders by supporting integrated borders management, harmonising border management measures and sharing information among the EU Member States and with **Frontex**<sup>36</sup>.

The available budget will be allocated through shared management (€ 1.55 billion) and through direct management (€ 1.06 billion).

The majority (70%) of all applicants for international protection has been registered in five EU countries, namely Germany (126,995), France (66,265), Sweden (54,365), the United Kingdom (30,110) and Italy (26,620). However, in 2012 Italy was not in the top 5 countries of destination in the EU. This shift can be at least partly explained by the important increase in arrivals by sea in Italy in 2013 reaching over 59,600 arrivals. Although such numbers represent a significant increase compared to 2012, they do not reach the peak registered in 2011, when huge numbers of people took the sea in the context of the Arab Spring events<sup>37</sup>.

33 EUROSTAT, *Asylum applicants and first instance decisions on asylum applications: 2013*, available at: [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

34 *Ibidem*.

35 Additional information is available at: [http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/overview/regulation\\_eu\\_no\\_5152014\\_of\\_the\\_european\\_parliament\\_and\\_of\\_the\\_council\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/overview/regulation_eu_no_5152014_of_the_european_parliament_and_of_the_council_en.pdf).

36 Additional information is available at: [http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-borders/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-borders/index_en.htm).

37 UNHCR, *Syrian Refugees in Europe. What Europe Can Do to Ensure Solidarity*. May 2014, page 10.

**Asylum applications have increased by 22 % in the second quarter of 2014** compared to the same period of 2013.<sup>38</sup> The overall number of persons seeking asylum in the EU-28 in the second quarter of 2014 reached 122.030, 21.860 more than in the same period of 2013. Almost 90% of the 122.030 asylum applicants were first time applicants (109 270).

In the second quarter of 2014, persons coming from 142 countries sought asylum in the EU. Syrians, Eritreans and Afghans were the top 3 citizenships of asylum seekers, lodging 21.110, 11.185 and 6.270 applications respectively<sup>39</sup>. In the context of the overall increase in asylum applications in absolute terms, asylum requests lodged by Syrian nationals have contributed the most, followed by Eritreans, Malians and Ugandans (increased by 9.710, 2.290 and 2.205 respectively).

As the conflict in **Syria** continued and worsened throughout 2013, the number of Syrians seeking international protection in the EU became the first nationality, registering an increase of 13.025, whereas it was the third nationality in 2012. Syrians mostly sought protection in Sweden, Germany and Bulgaria. Overall applications from Syrian nationals accounted for 12% of the total applications in the EU 28.<sup>40</sup>

**Germany, Sweden, France and Italy reported the largest numbers of asylum seekers in the second quarter of 2014** (37.900, 18.925, 15.375 and 14.380 respectively). These 4 Member States account for more than 70 per cent of all applicants in the EU-28.

With more than 1.960 applicants per million inhabitants Sweden was the country with the highest number of applicants relative to its population, followed by Malta, Switzerland and Norway (945, 660 and 645 respectively).<sup>41</sup>

With regard to the outcomes of asylum applications lodged in the EU Member States, 80.245 first instance decisions were made by the national authorities in the second quarter of 2014. Among those, 42 % were granting a type of protection status. The countries which issued the highest number of decisions in the second quarter of 2014 are Germany, France and Sweden (19.785, 16.850 and 9.395 respectively). The beneficiaries of such decisions have mostly been Syrian nationals (13.230), followed by Afghans (4.725), Pakistanis (4.020) and Albanians (3.915). At the EU level, Syrians have received by far the highest number of protection statuses (12.285), followed by Afghans (2.770) and Eritreans (2.030).<sup>42</sup>

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38 EUROSTAT, *Asylum quarterly report, Asylum applicants and first instance decisions on asylum applications: second quarter 2014*, available at: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Asylum\\_quarterly\\_report](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_quarterly_report).

39 *Ibidem*.

40 AIDA, *Annual report 2013/2014*, page 10.

41 EUROSTAT, *Asylum quarterly report, Asylum applicants and first instance decisions on asylum applications: second quarter 2014*, available at: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Asylum\\_quarterly\\_report](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_quarterly_report).

42 *Ibidem*.

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### III. THE PRINCIPLE OF NON-REFOULEMENT AND THE HIRSI DECISION

#### III.1 The Decision *Hirsi Jamaa and Others v. Italy*

The decision taken unanimously by the Grand Chamber of the European Court of Human Rights (ECtHR) on the case of *Hirsi Jamaa and Others v. Italy* concerned the “push-back” of 11 Somali nationals and 13 Eritrean nationals who were part of a group of about 200 migrants who had left Libya aboard three vessels with the aim of reaching the Italian coast. The “push-back” was carried out on 6 May 2009 by the Italian Custom Police and the Coastguard on the high seas, within the Maltese Search and Rescue (SAR) zone. The intercepted migrants were transferred onto Italian military ships and returned to Tripoli, where they were handed over to the Libyan authorities. They were not identified, informed about their real destination and regarding the procedure to be followed to gain access to the relevant procedures to obtain protection and/or to challenge the decision of forcibly return them to Libya. As indicated in the Court’s decision, the personnel aboard the military ships did not conduct any form of examination of individual situations. Moreover, they were not trained to conduct individual interviews and they were not assisted by interpreters or legal advisers<sup>43</sup>.

At a press conference held on 7 May 2009, the then Italian Minister of the Interior, Roberto Maroni, stated that the operation to intercept the vessels on the high seas and the push-back of migrants to Libya was conducted in the framework of the bilateral agreements concluded with Libya,<sup>44</sup> entered into force on 4 February 2009, to effectively combat illegal immigration<sup>45</sup>. In this context, in 2009, Italy conducted nine operations on the high seas to intercept irregular migrants, in conformity with the bilateral agreements concluded with Libya.

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43 European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, n. 27765/09 of 23 February 2012, para 185.

44 On 4 February 2009 Italy and Libya signed an Additional Protocol that partially amended the Agreement of 29 December 2007 to strengthen bilateral cooperation in the fight against clandestine immigration. On 29 December 2007 the two countries signed also an additional Protocol setting out the operational and technical arrangements for implementation the 2007 Agreement. On 30 August 2008 Italy and Libya signed the Treaty on Friendship, Partnership and Cooperation between Italy and Libya signed on 30 August 2008 to prevent inter alia clandestine immigration in the countries of origin of migratory flows.

45 In a speech to the Senate on 25 May 2009, the Minister stated that between 6 and 10 May 2009 more than 471 irregular migrants had been intercepted on the high seas and transferred to Libya in accordance with those bilateral agreements, in application of the principle of cooperation in fighting smuggling and trafficking, in helping saving lives at sea and in considerably reducing landings of irregular migrants along the Italian coast, which had decreased fivefold in May 2009 as compared with May 2008. See *Hirsi* decision, para 13.

With respect to the agreements signed with Libya, the Italian Government underlined that *"The bodies of the European Union had, on numerous occasions, encouraged cooperation between Mediterranean countries in controlling migration and combating crimes associated with clandestine immigration"*.<sup>46</sup>

In the Government's view, the event of 6 May 2009 had been conducted in the context of a rescue operation on the high seas in line with the norms set in international legal framework for Search and Rescue operations.<sup>47</sup>

The Italian government stated that in that context and in line with the principle of freedom of navigation, it was not necessary to identify the migrants who were provided with the necessary humanitarian assistance<sup>48</sup>. Moreover, identity checks of the applicants had been kept to a minimum since no maritime police operation on board the ships had been envisaged and because Libya was considered a safe host country.<sup>49</sup> It was also stressed that since the events had taken place on board of vessels, it had been impossible to guarantee the migrants the right of access to an Italian Court.<sup>50</sup>

Contrary to the assertions of the Italian authorities, in the *Hirsi* decision, the Strasbourg Court re-affirmed that *"whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms"* under the European Convention on Human Rights (ECHR).<sup>51</sup> According to the Court *"....Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas. In particular, the Court cannot subscribe that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time"*.<sup>52</sup> Undoubtedly, migrants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities since the events in issue occurred on the high seas, on board of military vessels flying the Italian flag<sup>53</sup> under the control of the Italian armed forces.<sup>54</sup>

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46 In this respect the Government referred to the European Parliamentary Resolution No. 2006/2250 and the European Pact on Immigration and Asylum adopted by the Council of the European Union on 24 September 2008, which affirmed the need for EU Member States to cooperate and establish partnerships with countries of origin and transit to strengthen control of the European Union's external borders and to combat illegal immigration. See *Hirsi* decision, para 94.

47 United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention on maritime Search and Rescue (1979).

48 *Hirsi* decision, para 95.

49 *Ibidem*, para 97 and 98.

50 *Ibidem*, para 191.

51 *Ibidem*, para 74.

52 *Ibidem*, para 79.

53 By virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag is flying. This principle is enshrined in Italian law in Article 4 of the Italian Navigation Code.

54 *Hirsi* decision, para. 81.

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### III. THE PRINCIPLE OF NON-REFOULEMENT AND THE HIRSI DECISION

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Furthermore, the Court found a violation of the prohibition of torture and inhuman treatment enshrined in Article 3 as well as a violation of the right to an effective remedy as set out in Article 13 in conjunction with Article 3 of the ECHR. The Court reiterated *"the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints."*<sup>55</sup> In this case, migrants were deprived of any remedy which would have enabled them to lodge their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced<sup>56</sup> in order to effectively guarantee the binding prohibition of *refoulement* also in the context of interceptions at sea.

Moreover, the Court stated that *"...the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3."*<sup>57</sup> And in any case, *"...it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which applicants would be exposed after their return..."*<sup>58</sup>

In the instant case, in fact, *"the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees"*<sup>59</sup>, exposing the migrants to arbitrary collective removal. In this respect, the Court affirmed for the first time that Article 4 of Protocol No. 4, prohibiting the collective expulsion of aliens, applies also to cases involving the removal of third-country nationals to a third State carried out extraterritorially.

Having the obligation to abide by the final judgment of the Court,<sup>60</sup> Italy, under an enhanced procedure<sup>61</sup>, had to adopt individual and general measures.<sup>62</sup>

The Court found that the transfer of the applicants to Libya exposed them to the risk of being subjected to ill-treatment in this country and of being arbitrarily

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55 *Ibidem*, para 204.

56 *Ibidem*, para 205.

57 *Ibidem*, para 133.

58 *Ibidem*, para 133.

59 *Ibidem*, para 157.

60 Article 46 of the ECHR.

61 The procedure followed by most cases for the adoption and implementation of action plans is a **standard procedure**. By contrast, for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases an **enhanced procedure** is used.

62 **Measures to be adopted** may take the form of **individual measures** to put an end to the violation and to remedy its negative consequences for the applicant (i.e. the payment of any sum awarded by the Court as just satisfaction) **and/or general measures** to prevent violations similar to those found by the Court (i.e. through amendments of legislation, changes in policies and practices, or other kinds of measures).

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repatriated to Somalia and Eritrea.<sup>63</sup> Therefore, among the individual measures identified, the Court urged the Italian Government to undertake all possible steps to obtain assurances from the Libyan authorities that the applicants would not have been subjected to any treatment incompatible with Article 3 of the ECHR.

In its Action Plan of July 2012, sent to the Committee of Ministers of the Council of Europe, responsible for supervising the execution of the judgments, Italy affirmed that contacts with the Libyan authorities were taken immediately after the ECtHR decision. However, in March 2013 the Italian authorities declared that they could not obtain the assurances required due to the objective difficulties arisen from the political developments in Libya, stressing their intention to continue anyway their contacts with the Libyan authorities on this issue. In addition, Italy was legally bound to pay the interested parties the sums awarded in just satisfaction under Article 41 (15,000 Euros each).

Italy, along with individual measures, had to adopt some general measures as requested by the Court. In this regard, the government indicated in its Action Plan that its policy of push-backs as a measure of controlling irregular migration would not be resumed. In addition, the Action Plan also referred to the *procès verbal* signed on 3 April 2012, providing the basis for a new cooperation between the two States, in order to improve the reception of migrants and refugees in Libya. The Italian authorities ensured also the respect of fundamental rights and the access to protection procedures in all circumstances, including during interception and SAR operations.

In March 2013, the Committee of Ministers of the Council of Europe requested the Italian government to draft and submit an "Action Report" with a view to assess whether Italy had adopted all necessary and adequate measures to put an end to the violation which triggered the *Hirsi* case and to remedy its negative consequences for the applicant as well as to prevent violations similar to those observed by the Court.

On 26 June 2014 the Italian authorities presented the Action Report to the Committee of Ministers illustrating all individual and general measures adopted with a view to comply with the *Hirsi* judgment.

In general terms, the Italian Government considers to have fully complied with the individual and general measures required by the Court's judgment and demands the Committee to close the case. In particular, as for the individual measures, the Italian Government affirms to have obtained by the Libyan authorities all the assurances of good treatment and *non-refoulement* of the applicants toward countries that would expose them to danger. Actually, the above mentioned assurances risk having little practical effects as none of the applicant is currently in or likely to return to Libya. On the contrary, no commitment has been taken to facilitate the applicants' return to Italy in order to have access to international protection.

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63 *Ibidem*, para 211.



With regard to the payment of the sums awarded in respect of just satisfaction to each applicant, the Italian authorities stated to have encountered some regulatory obstacles to pay the non-pecuniary damage to the representatives in trust for the applicants and, thus, to have attempted to locate and pay each applicant individually. For the time being, however, the authorities' attempts have failed, but for one applicant (Ermias Berhane). Indeed, the Italian authorities have not yet overcome the said obstacles, such as differences in the spelling of the name indicated on the identity cards and the judgment of the Court, which still prevent the many of applicants from receiving the sums awarded.

In respect of the general measures, the Italian Government emphasized to have suspended and not resumed the policy of push-backs.

In the light of the above "Action report", on 25 September 2014, at its 1208th meeting, the Deputies of the Committee of Ministers, noted with interest the efforts of the Italian authorities, invited them to provide further assurances and information by 1st December 2014 in order to, eventually, close the case. Especially with regard to the general measures, the Deputies requested clarifications as to whether *"the requirements of the Convention have been incorporated in Italian law and practice to prevent pushbacks such as those at issue in this case"*. Besides, the Deputies expressed their interest in receiving more detailed information about the practical measures of implementation undertaken *"including instructions, guidelines and training"*.

#### **III.2 The Principle of *Non-refoulement***

States have the legitimate right, as a matter of well-established international law, to control their borders and to establish the rules of entry and stay of third-country nationals and to take measures to counteract illegal immigration and cross-border crime, and to maintain a high level of security. However, this discretionary power is limited by international human rights obligations and the principle of *non-refoulement*. In this respect, as underlined in the Stockholm Programme *"the strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and especially people and groups that are in vulnerable situations."*<sup>64</sup>

Expulsion, extradition, deportation, removal, informal transfer, "rendition", rejection, refusal of admission in the territory of a State may come into conflict with the binding principle of *non refoulement*. This principle, representing one of the strongest limitations on State control prerogatives, prohibits State authorities from sending anyone, whether directly or indirectly, to a place where the person concerned would have a well-founded fear of persecution or would face a real risk of other serious violations of human rights. The principle of *non-refoulement* has

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64 European Council, The Stockholm programme – An open and secure Europe serving and protecting citizens, (2010/C 115/01), para 5.1.



its origin in international refugee law<sup>65</sup> and applies to persons seeking international protection as well as to beneficiaries of international protection (refugees and persons entitled to subsidiary protection) as reflected in the EU “Qualification Directive.”<sup>66</sup> This principle, as part of international customary law, represents an international obligation not only to the 144 States parties to the Convention but also to those that are not party to it.<sup>67</sup>

The duty to respect the principle of *non refoulement* derives also from international human rights law, as enshrined in several universal and European instruments<sup>68</sup> and applies to both nationals and third-country nationals, irrespective of their status.

As indicated above, the terms “expel” or “refouler” relate not only to the persons physically present in the State territory, but also to those who request the authorisation to enter the national territory or have already entered or attempted to enter it in an irregular manner, avoiding any border control procedure.

As it will be further developed throughout this report, States tend to conduct control and surveillance activities outside their territories, in international waters, in third-countries territories as well as in the territorial waters of these last. In this respect, the Strasbourg Court, on the basis of customary international law and treaty provisions, has recognised the extraterritorial exercise of jurisdiction by States in cases of activities conducted outside their territories when, for instance, decisions are taken from its diplomatic or consular agents abroad or on board of craft and vessels flying the flag of that State.<sup>69</sup>

In the *Hirsi* decision, in fact, the Court clarified that the obligation under the ECHR and, implicitly, under the 1951 Geneva Refugee Convention applies also with regard to activities conducted outside the territory of the State.

Recognising the increasing use of interception on the high seas and the removal of migrants to third-countries of transit or of origin as additional tools for States

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65 The principle of *non refoulement* is codified in Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees ratified by all EU Member States. The Convention has been incorporated into primary EU law through Article 78 of the Treaty on the Functioning of the European Union (TFEU).

66 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); See Recital 21: “*The recognition of refugee status is a declaratory act*”.

67 UNHCR, Executive Committee on International protection of refugees, Conclusion No. 25 (XXXIII) – 1982 (b); UNHCR, The principle of *non-refoulement* as a Norm of Customary International Law, Response to the Question posed to UNHCR by the Federal Constitutional Court of Germany, 31 January 1994.

68 Article 7 of the International Covenant on Civil and Political Rights; Article 3 of the ECHR; Article 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 19 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime (2000); Article 19 (2) of the Charter of Fundamental Rights of the European Union.

69 *Hirsi* Decision, para 75. See *Bankovic and Others*, para 73 and *Medvedyev and Others*, para 65.

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to control and combat irregular immigration, the Court firmly ruled that Italy cannot evade its responsibility by relying on its obligations arising out of bilateral agreements with third countries. *"Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States."*<sup>70</sup> Those countries that return migrants must ensure that the intermediary country offers sufficient guarantees to prevent these persons from being removed to their countries of origin without an assessment of the risks they could face, especially when the intermediary country is not a State Party to the Convention.<sup>71</sup>

The special nature of the maritime environment cannot justify an area outside the law where individuals are not covered by any legal system capable of ensuring the enjoyment of their rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.<sup>72</sup>

As stressed by the Court the expansion of extraterritorial application of Human Rights norms is nothing but a rational response to the cited changing policies adopted by States. As firmly rooted in the Court's case-law, *"the Convention is a living instrument which must be interpreted in the light of present-day conditions."*<sup>73</sup> Furthermore, *"It is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory."*<sup>74</sup>

In the light of above, before adopting any removal measure at border, expulsion or return or when conducting or handing over persons on board of vessels to a third-countries authorities, EU States must identify the personal circumstances and potential protection needs of migrants as well as the consequences of the return decision against which the persons concerned shall exercise their right to an effective appeal with suspensive effect.

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<sup>70</sup> *Ibidem*, para 129.

<sup>71</sup> *Ibidem*, para 147.

<sup>72</sup> *Ibidem*, para 178.

<sup>73</sup> *Ibidem*, para 175.

<sup>74</sup> *Ibidem*, para 175.

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## IV. EU POLICIES AND LEGISLATION HAVING AN IMPACT ON ACCESS TO PROTECTION

This chapter illustrates the relevant policies adopted at EU level with regard to border control and surveillance as well as to the access of persons already present at the EU borders to the European territory. With respect to asylum, reference will be made to additional tools that, if adopted, would ensure legal and protected entry in the EU and highly contribute to avoid that asylum seekers engage themselves in increasingly dangerous journeys through the desert and the Mediterranean sea, obliged to turn to unscrupulous and increasingly violent smugglers who remain unpunished for the serious crimes committed.

### IV.1 The EU Policies following the *Hirsi* Decision

The area of Freedom, Security and Justice has been for the last 15 years one of the most dynamic EU policy in the field of migration and asylum. The incorporation of Justice and Home Affairs issues within the EU has been a long and difficult process mainly due to the transfer of sovereignty power from Member States to the EU.

Following the entry into force of the Amsterdam Treaty, three successive multiannual programmes<sup>75</sup> have been adopted to set political directions and priorities and to identify the timeframe of actions to be taken for a period of 5 years, corresponding, more or less, to the EU policy cycle. Following the Stockholm Programme, **Strategic Guidelines for legislative and operational planning** for the coming five years in the area of Freedom, Security and Justice have been defined on 26-27 June 2014 during the European Council meeting, as enshrined in the Lisbon Treaty.<sup>76</sup>

#### IV.1.1 Strategic Guidelines for Legislative and Operational Planning

Disappointingly, the **Strategic Guidelines**, while reaffirming repeated statements about migration, asylum and border management, is silent on more ambitious political statements and initiatives in these fields. The document of the Council does not give any directions on how the EU will face the new challenges due to the growing number of conflict areas all over the world. The Council has practically ignored the recurring requests for EU solidarity by Italy currently facing unprecedented high migration pressure at its sea borders. These guidelines, in fact, do not make any proposal for a discussion on how to integrate the Italian “*Mare Nostrum*” into the EU framework. A humanitarian initiative which has highly contributed in saving thousands of lives since its launch in October 2013 in the

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75 Tampere Programme (1999- 2004), The Hague Programme (2004-2009) and the Stockholm Programme (2009-2014), adopted few days after the entry into force of the Lisbon Treaty.

76 Article 68 of the TFEU “*The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*”.

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aftermath of the Lampedusa tragedy occurred on 4 October where 368 persons lost their lives. Regrettably, these guidelines, while underlying the importance of avoiding the loss of lives of migrants, reiterate the security-oriented approach in line with the current EU immigration policy.

After one year from that tragic event, a climate of cynical indifference seems to have replaced the first emotional and solemn reaction of EU leaders who, soon after the incident, declared that such tragedies were never to happen again. In this regard, in August 2014, the Commissioner Cecilia Malmström while praising the impressive work done by the “*Mare Nostrum*” military and humanitarian operation by saving more than 100.000 among men, women and children and that this initiative could not be carried out by Italy alone, has stated that the Commission would do its utmost to push the EU and Member States to play a more active role in the management of the increasing migration pressure in the Mediterranean and that “[S]olidarity now needs to be transformed into concrete actions”.<sup>77</sup> The Commissioner and the Italian Minister, Angelino Alfano, announced that the two current Frontex operations, Hermes and Aeneas, would be merged in one upgraded operation “*Frontex Plus*” (now “*Triton*”), supposed to start in November 2014. The future operation should rely on the support of other Member States that should provide adequate human and technical resources. At the time of writing, only France, Spain and Germany have indicated their intention to participate in this future joint operation, even though it is unclear which its mandate will be and in which terms the participating Member States will contribute.

The Council Strategic Guidelines stress the need of addressing the root causes of irregular migration flows as an essential part of EU migration policy together with the prevention and the management of irregular migration aiming at limiting the loss of lives of migrants obliged to undertake dangerous journeys. To this end, reinforced cooperation with countries of origin and transit, with a view to strengthening their capacity in migration and border management, is considered a key priority by the Council.

The Guidelines, stress also that “[M]igration policies must become a much stronger integral part of the Union’s external and development policies, applying the “more for more” principle and building on the *Global Approach to Migration and Mobility*”.<sup>78</sup> Moreover, in order to ensure strong protection at EU borders, the Integrated Border Management of the common external borders should be modernised to guarantee an efficient border management with an entry-exit system and a registered travellers programme, supported by the Agency for Large Scale IT Systems (eu-LISA).

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77 Statement by Commissioner Cecilia Malmström after the meeting with Italian Interior Minister Angelino Alfano European Commission - Statement/14/259, 27 August 2014.

78 Council of the European Union, European Council (26 and 27 June 2014) – Conclusions – EUCO 79/14 CO EUR 4 CONCL 2, Brussels, 16 June 2014, Section 1.8.

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In addition, the strategic guidelines reaffirm, *inter alia*, the EU policy framework for cooperation with third countries in the area of return and readmission as well as the actions identified by the Task Force for the Mediterranean.

#### **IV.1.2 Task Force for the Mediterranean**

The Task Force for the Mediterranean,<sup>79</sup> set up in October 2013, in the aftermath of the tragic shipwreck off the coast of Lampedusa, convened only twice and identified 38 measures to be adopted in order to face the challenges posed by crossings of the Mediterranean and to reduce the loss of migrants' lives. Such measures include those aiming at reinforcing the dialogue with countries of origin and transit in line with the Global Approach to Migration and Mobility; at strengthening the fight against trafficking and smuggling of human beings and criminal networks through a better interagency cooperation and encouraging Member States to systematically provide relevant information to Europol; at reinforcing the management of EU external borders through the Eurosur Regulation and supporting those Member States facing significant pressure on their migration and asylum systems; at exploring legal avenues to safely access the EU with a focus on resettlement and regional protection programs; at ensuring speedy and sustainable return of migrants in a humane and dignified manner.<sup>80</sup>

Disappointingly, rather than making proposals on how Member States shall share their responsibilities after the arrival of migrants and asylum seekers in the EU, once again, these measures privilege the security approach aiming at countering and preventing migrants to irregularly reach the EU through a reinforced cooperation with third countries. To fight smugglers' and traffickers' networks, the Commission promotes dialogue with some selected countries of the North African and Sahel region. In particular, with the Tunisian authorities "*on measures aimed at stopping the provision of Tunisian boats to smugglers in Libya*," with the Egyptian authorities who should "*combat more effectively the activities of the traffickers of human beings in the Sinai region*" and with the Sudanese authorities to limit the migration flows from the Horn of Africa towards the Mediterranean region. Being Libya the main country of departure of migrants crossing the central Mediterranean, the Commission calls for the development of an integrated border management system<sup>81</sup> through the on-going EU Border Assistance mission (EUBAM Mission) and the Sahara-Mediterranean project. The EU shall keep "*supporting the establishment in Libya of a migration management and asylum system that fully complies with international human rights standards*."<sup>82</sup> Ambiguously, the commitment of the Commission seems

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79 COM (2013) 869 final, Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, Brussels, 4 December 2013.

80 Communication Task Force Mediterranean, page 2.

81 The ongoing EU Border Assistance mission (EUBAM Mission) and the Sahara-Mediterranean project are currently run to promote the development of an integrated border management system.

82 Communication Task Force Mediterranean, page 7.

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not to take into consideration the political and security instability as well as the lack of reliable institutional interlocutors in Libya and the dangerous and inhuman living conditions migrants and refugees are obliged to cope with. As denounced by father Mussie ZERAI, President of the Habeisha Agency for Development and Cooperation,<sup>83</sup> the EU and Member States seem to turn a blind eye on the destiny of hundreds of young Sub-Saharan refugees, trapped in Libya and forced to be exploited as “*slaves auxiliary forces*” in carrying arms and munitions of Libyan militias. Many of these young people have been killed or seriously injured, while others disappeared after being kidnapped by local militias. Those who dare to resist are seriously injured and threatened to death.

#### IV.1.3 The EUROSUR Regulation and the External Sea Border Surveillance Regulation.

The Strategic Guidelines reiterate the need to strengthen Frontex operational assistance to support Member States facing high migration pressure at their external borders and increase their immediate reactivity through the use of the European Border Surveillance System – the **EUROSUR** System. The Council, in the long-term development of Frontex, has also envisaged the possibility of setting up a European system of border guards to reinforce the activities of control and surveillance at the EU external borders.

Eurosur Regulation<sup>84</sup> has partly entered into force on 2 December 2013 and represents a multipurpose system aiming, through sophisticated technologies, at detecting and preventing at the earliest stage cross-border crime, as well as at contributing to saving migrants’ lives at the external borders of the Schengen area, through the provision of a common mechanism for near real-time exchange of information and interagency cooperation in the context of border surveillance in full compliance with international law. All national authorities responsible for border surveillance (e.g. border guard, police, coast guard, navy) are required

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83 For additional details please see: [http://www.cir-onlus.org/index.php?option=com\\_content&view=article&id=1382:libia-appello-di-don-zerai-agenzia-habeshia-per-migliaia-di-rifugiati&catid=13:news&lang=it&Itemid=143](http://www.cir-onlus.org/index.php?option=com_content&view=article&id=1382:libia-appello-di-don-zerai-agenzia-habeshia-per-migliaia-di-rifugiati&catid=13:news&lang=it&Itemid=143).

84 Regulation 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), *OJ* 2013 L 295/11. Eurosur became operational on 2 December 2013 for EU Member States at the southern and eastern external borders (Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovak Republic, Slovenia and Spain, together with the Schengen associated country Norway), while the other 11 EU countries will join EUROSUR on 1 December 2014 (Austria, Belgium, Czech Republic, Denmark, Germany, Luxembourg, Netherlands and Sweden; and the three remaining Schengen associated countries Iceland, Liechtenstein, Switzerland). With regard to Ireland and the United Kingdom, which do not take part in the Schengen cooperation and therefore also not in EUROSUR, specific provisions for a regional cooperation have been in the EUROSUR Regulation. Additional information are available at: [http://europa.eu/rapid/press-release\\_MEMO-13-1070\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1070_en.htm).

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to coordinate their respective activities via national coordination centres, and with Frontex, providing “national situation pictures”, containing information on unauthorised border crossings and on incidents relating to a risk to migrants’ lives, position and status of patrols, and analytical reports and intelligence.

According to the European Commission, Eurosur “will reinforce cooperation between Member States and Frontex, contributing to the management of the external borders and helping to save lives, especially in the Mediterranean Sea.”<sup>85</sup> In this respect it is worth mentioning that, during the consultation process among relevant stakeholders and the Commission, in view of the adoption of the Communication of the Commission of March 2014, the Director of the EU Agency for Fundamental Rights (hereafter “FRA”) has stressed that, considering that a few analyses exist on the impact of modern technologies on fundamental rights, in particular on the misuse of personal information stored in large information technology systems, new instruments, tools, and policies by EU institutions and Member States shall be developed on the basis of ethical considerations and on their impact on fundamental rights. “The fundamental rights potential of Eurosur, the EU border surveillance system, should be made visible by a clear commitment and action to use it for the protection and saving of lives of migrants at sea.”<sup>86</sup> In addition, the Director of FRA underlined that joint operations with third countries must be conditional on full respect for fundamental rights. Operational plans, other related documents guiding joint operations or patrols and 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 from the principle of non-refoulement”.<sup>87</sup>

In addition, it should be considered that Eurosur will improve not only the “situational awareness” at the UE external borders and the capacity of reaction of Member States to speedily intervene at their borders but also the so-called common pre-frontier intelligence picture, meaning the geographical area beyond the external borders,<sup>88</sup> thanks to different sources of information, including those obtained from third countries. In this respect, however, concerns were raised by ECRE on the fact that this “Regulation does not seem to set any limitation as to the geographical reach of the information gathering activities within the EUROSUR framework.”<sup>89</sup> Moreover, even though the Regulation prohibits the exchange of information concerning

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85 COM (2014) 154 final, European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, “An open and secure Europe: making it happen”, 11 March 2014, page 6.

86 See the contribution of Morten Kjaerum, Director of the European Union Agency for Fundamental Rights (FRA) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/docs/kjaereum\\_contribution\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/docs/kjaereum_contribution_en.pdf), page 18.

87 *Ibidem*, page 19.

88 See Article 3 (g) of the EUROSUR Regulation.

89 AIDA, *Annual Report 2013/2014*, page 25. Additional details are available at: [http://www.asylumineurope.org/Annual\\_Report\\_2013-2014](http://www.asylumineurope.org/Annual_Report_2013-2014).

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asylum seekers, concerns persist on whether and how this right can be guaranteed not only with regard to asylum applicants during the asylum procedure but also to migrants that could not benefit from the procedural safeguards in case they are not adopted during sea operations.

Another important development is the adoption, in May 2014, of the **External Sea Border Surveillance Regulation**,<sup>90</sup> following a fast process of negotiation. This Regulation provides the legal framework for activities of sea surveillance, in particular norms on interception in territorial waters of EU Member States as well as in the high seas, disembarkation, search and rescue operations and provisions related to the respect of fundamental human rights and the principle of *non-refoulement*, applicable extraterritorially. As it will be further illustrated in chapter V.3 of this report, these rules apply only in the context of Frontex-led operations and not when one Member State or more Member States conduct operations at sea outside the scope of the Regulation.

##### IV.1.4 CEAS: Future Steps?

With regard to asylum, the Strategic Guidelines call for the full transposition and implementation of the **Common European Asylum System (CEAS)** as a key priority. Two sets of legislation composed of Directives<sup>91</sup> and Regulations<sup>92</sup> have been adopted between 2003 and 2013, and much has to be done in view of a coherent transposition of EU asylum legal instruments into domestic legislations

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90 Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2014 L 189/93.

91 Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, L 180/96. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF>.

92 Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Regulation 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

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and of their proper implementation. The Strategic Guidelines call also for the reinforcement of the European Asylum Support Office (EASO)<sup>93</sup> that will play a key role in assisting national authorities to implement EU rules to ensure that individual asylum case is dealt with in a coherent manner by all national administrations to further reduce significant discrepancies still existing between EU Member States in relation to asylum procedures, protection recognition rates, reception conditions and procedural guarantees during the asylum procedures. In this respect, EASO will be also involved in *“monitoring the quality of asylum decisions and pooling Member States’ Country of Origin Information (COI)”*.<sup>94</sup>

The Strategic Guidelines, however, do not make reference to any additional legislative measure or instrument to be adopted in the 5 coming years to complete the CEAS and to solve the problems related to the ongoing harmonisation process. Moreover, the Council lost the opportunity to explore the possibility for mutual recognition of asylum decisions, as recurrently proposed by the then up-coming Italian Presidency of the EU. Regrettably, the proposal of mutual recognition of positive asylum decisions and the transfer of protection statutes between Member States, that would have enhanced free movement of the persons concerned within the EU, was removed during the final decisions. Although this instrument could have constituted an effective tool of solidarity toward the Member States located at external borders and facing high migratory pressures, some Member States showed no political will to adopt such a tool, mainly fearing its possible “pull effect” producing an increasing number of refugees in their territories, receiving already the vast majority of asylum applications lodged in the whole EU.

The Strategic Guidelines call for strengthening and expanding the **Regional Protection Programs**,<sup>95</sup> close to the regions of origin. In this respect, recognizing that *“the EU should seek to ensure a more orderly arrival of persons with well-founded protection needs, reducing the scope for human smuggling and human tragedies”* in

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93 Regulation 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. Established in 2010 in Malta, the EASO’s role is to assist in the development and implementation of the Common European Asylum System and to contribute to the reinforcement of all forms of practical cooperation between Member States in the area of asylum. The Agency will be increasingly involved in the collection and dissemination of reliable and objective country of origin information (COI). EASO coordinates also support actions for Member States subject to particular pressures on their asylum and reception systems. To this aim EASO may deploy “Asylum Support Teams”, like for instance in Greece in May 2011 to support the Hellenic reforms as part of the Greek Action Plan. More information is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>.

94 COM (2014) 154 final, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *“An open and secure Europe: making it happen”*, 11 March 2014, page 6.

95 Commission Communication to the European Parliament and to the Council on Regional Protection Programmes, COM (2005) 388 final of September 2005.

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line with the Stockholm Programme,<sup>96</sup> and the previous Communication of the Commission.<sup>97</sup> The Commission underlined the need to expand the scope of the existing Regional Protection Programs<sup>98</sup> and to assess the need to establish new ones.<sup>99</sup> These programmes are designated to enhance the protection capacity of the region involved and to promote durable solutions, including resettlement of refugees to third countries.

The Strategic Guidelines make also reference to the use of **resettlement**, as an important tool to face, *inter alia*, the current protracted crisis in Syria.

The Commission underlined that the EU Member States should increase their commitment to **resettlement**, considered “*as an integral element in the establishment of CEAS,*” showing more solidarity with developing countries hosting the vast majority of the world’s refugees.

In 2012, a joint European Resettlement Programme<sup>100</sup> has been adopted envisaging the transfer of pre-established quotas of refugees from the country where they have sought asylum to another that has agreed to admit them as refugees and to grant them permanent settlement there. EU Member States are not mandated to join this Programme, but may do so on a voluntary basis. In fact, it should be pointed out that resettlement is not a right-based instrument, it

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96 Stockholm Programme, Chapter 6.2.3. “*The external dimension on asylum*”.

97 Commission Communication to the European Parliament and to the Council on Regional Protection Programmes, COM (2005) 388 final of September 2005.

98 In the framework of the cooperation with Third Countries and with countries of first asylum aimed at improving the management of refugee flows and enhancing protection in regions of origin, the European Commission has developed and launched several EU Regional Protection Programmes and Resettlement Schemes. Following the Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, 1 September 2005, COM (2005) 388 final, the Commission has developed Regional Protection Programmes in close collaboration with EU States, the UNHCR, and in partnership with the countries of origin, transit and first asylum, aimed at improving the management of refugee flows and enhancing protection in regions of origin. These Programmes aim to improve refugee protection through durable solutions, such as return, local integration and resettlement, carried out thanks to EU financing. These practical actions deal with the improvement of general protection in the host country, through establishing an effective procedure for determining refugee status, facilitating capacity and training on protection issues for those working with refugees, support measures and benefiting the local community hosting refugees.

The first two Regional Protection Programmes were carried out in Europe (in particular Belarus, the Republic of Moldova and Ukraine) as a region of transit and the African Great Lakes Region (particularly Tanzania) as a region of origin. In 2010, the European Commission decided to extend the Regional Protection Programmes in Eastern Europe and in Tanzania and to apply the Regional Protection Programme scheme to two new regions: the Horn of Africa (including Kenya, Yemen and Djibouti) and eastern North Africa (Egypt, Libya and Tunisia). For more detailed information, please see at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm).

99 COM (2014) 154 final, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, “*An open and secure Europe: making it happen*”, 11 March 2014, page 7.

100 The Program was adopted on 29 March 2012 by the European Parliament and entered into force on 1 January 2013. COM (2009) 447 final of 2 September 2009 of 29 March 2012.

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depends much on discretionary and political decisions of States. Resettlement may be considered the most valid mechanism for providing durable protection,<sup>101</sup> in particular to vulnerable groups. However, the annual resettlement quotas, which are established by Member States, remain very low, considering that they do not exceed 5.000 places per year. To this end, during the consultation process between the Commission and relevant stakeholders, UNHCR has underlined the importance to increase resettlement numbers for refugees to be transferred to a wider group of Member States. *“A target of 20,000 resettled refugees to be resettled to Europe by 2020 has been put forward by civil society, including many organisations at the national level which are ready to support Member States in this endeavour.”*<sup>102</sup>

Regrettably, the Council is silent on additional legal avenues for refugees to reach EU in a legal and safe manner, not even proposing any commitment for discussion at EU level. In this regard it should be considered that even the Commission is quite cautious on this issue considering that will only *“explore further possibilities for protected entry in the EU in the context of the reflection on the future priorities in the Home Affairs area after the expiry of the Stockholm Programme,”*<sup>103</sup> even though it recognises that **Protected Entry Procedures (PEP)** *“could complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines.”*<sup>104</sup>

ECRE, during the consultation process with the European Commission in view of the issuance of its Communication of March 2014, underlined the need to develop and mainstream protection-sensitive border controls that fully respect the right to asylum and the principle of *non-refoulement* and to introduce legal avenues to protection in the EU<sup>105</sup>. *“The most straightforward option is the establishment of so-called Protected Entry Procedures,”*<sup>106</sup> a complementary legal tool to be introduced in the EU legislation that currently provides the possibility to lodge an asylum application only if asylum seekers are already present in the EU territory, at the border, in transit zones and in the territorial waters of Member States.<sup>107</sup> In this

101 See C. Hein, M de Donato, *Exploring avenues for protected entry in Europe*, Milan 2012, page 25.

102 See UNHCR, Asylum and international protection in the EU: strengthening cooperation and solidarity - UNHCR's initial inputs to strategic guidelines for future development of the area of freedom, security and justice, January 2014, page 8, available at: <http://www.unhcr.org/532bf9fd9.html>.

103 Communication Task Force Mediterranean, page 13.

104 COM (2014) 154 final, European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *“An open and secure Europe: making it happen”*”, 11 March 2014, pages 7 and 8.

105 See C. Hein, M de Donato, *Exploring avenues for protected entry in Europe*, Milan 2012.

106 See Michael Diedring, Secretary General of ECRE *An Open and Safe Europe – What Next?*, 29-30 January 2014, Brussels, Legal Routes to Access Asylum in Europe Workshop (30 January), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/docs/diedring\\_speaking\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/docs/diedring_speaking_en.pdf)

107 Article 3 (1) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

regard, it should be pointed out that no EU norms provide the possibility to present an asylum application from countries of origin or of transit. PEP is a mechanism that has been introduced in some national legislations allowing *“a non-national to approach potential host countries outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.”*<sup>108</sup> In the past, in fact, only Austria, Denmark, Spain and Switzerland had provisions regarding PEP in their national legislations, which have been, however, abolished during the first decade of the century with the argument that the administrative and economic burden on the single States, in absence of a uniform European concept, was too high<sup>109</sup>. In this regard, during the consultation process, UNHCR has stressed that further consideration for PEP and for humanitarian visas should be reconsidered as *“potential means to ensure people at risk can be identified outside the EU, and granted visas by Member States on a voluntary basis, to facilitate their travel to safety in Europe.”*<sup>110</sup>

As stressed in different fora, Member States, in an innovative spirit and political will, could establish PEP and a coordinating mechanism aiming at benefitting of local Schengen cooperation between embassies and consulates of Member States that could share, *inter alia*, administrative and financial resources.

With regard to other mechanisms to legally access the EU, the Director of the FRA Agency has highlighted that *“[T]he EU should initiate a process leading to a joint commitment by all Mediterranean coastal and other interested States to address unsafe migration by sea. Such commitment should also include a component of legal access to the EU, though, for instance, humanitarian visas, potentially focusing on those who have close family members living in the EU.”*<sup>111</sup> As it will be further illustrated, a **Visa with Limited Territorial Validity** may be issued by consular authorities for humanitarian grounds, national interest, international obligations, although the requirements for the issuing of a “Schengen visa” are not met.<sup>112</sup> It would be, however, appropriate

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108 Noll Gregor, *Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure*, 2002, page 20.

109 See C. Hein, M. de Donato, *Exploring avenues for protected entry in Europe*, Milan 2012, pages 37-60.

110 UNHCR, *Asylum and international protection in the EU: strengthening cooperation and solidarity - UNHCR's initial inputs to strategic guidelines for future development of the area of freedom, security and justice*, January 2014, page 8, available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/unhcr-initial-inputs-to-strategic-guidelines-final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/unhcr-initial-inputs-to-strategic-guidelines-final_en.pdf) ;

111 Morten Kjaerum, Director of the European Union Agency for Fundamental Rights, FRA, *What to expect after Stockholm: fundamental rights in the future of the European Union's Justice and Home Affairs*, December 2013, page 19 available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/fra-european-union-agency-for-fundamental-rights\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/fra-european-union-agency-for-fundamental-rights_en.pdf).

112 Article 25 of the Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas. See C. Hein, M. de Donato, *Exploring Avenues for Protected Entry in Europe*, Milan 2012, page 27.

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to regulate this mechanism to avoid too much discretionary power of Member States through specific guidelines issued at national and EU level.<sup>113</sup>

In addition, the Commission has indicated the need to explore **joint processing of asylum applications**<sup>114</sup> among the new forms of solidarity to be developed in the coming years. In this respect, UNHCR has stressed that the four possible models identified in the 2013 EC study on the feasibility and implications of joint processing “could contribute to more effective responsibility-sharing, mutual trust and consistent outcomes from asylum processes in the EU in some situations.”<sup>115</sup>

It is worth recalling, that the “Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU”<sup>116</sup> was based on the idea that a joint processing may be considered as a possible solidarity mechanism to help Member States cope with challenges they may be faced with in asylum matters.

Following a number of consultations with key experts, four options have been developed on how EU mechanisms for joint processing of asylum claims could be established:

**Option A** starts from the crisis management phase of the Early Warning Mechanism: in case a Member State is suffering from a massive inflow of asylum seekers, “joint processing teams” involving officials from the EASO Asylum Intervention Pool are set up on an *ad hoc* basis: Participation in support processing missions is voluntary. Such officials are in charge of preparing dossiers and drafting recommendation with regard to the individual cases on the basis of the EU *acquis*. However, the final decision as well as the appeals and returns remain under the responsibility of the Member State concerned.

**Option B** provides the same provisions as option A including two additional

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113 See C. Hein, M. de Donato, *Exploring avenues for protected entry in Europe*, Milan 2012, page 73.

114 The Commission has decided on a broad definition of the term for the purpose of this study: “An arrangement under which the processing of asylum applications is jointly conducted by two or more Member States, or by the European Asylum Support Office (EASO), with the potential participation of the UNHCR, within the territory of the EU, and which includes the definition of clear responsibilities during the asylum procedure and possibly also for dealing with the person whose application was jointly processed immediately after a decision on his/her case was taken”. For more details please see European Commission, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the Joint Processing of Asylum applications on the territory of the EU*, February 2013 available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report_final_en.pdf).

115 UNHCR, *Asylum and international protection in the EU: strengthening cooperation and solidarity* - UNHCR's initial inputs to strategic guidelines for future development of the area of freedom, security and justice, January 2014, page 11, available at: <http://www.unhcr.org/532bf9fd.html>.

116 The Study was launched in the context of the Hague Programme, the subsequent Stockholm Programme and the Commission Policy Plan on Asylum (adopted on 17 June 2008). See: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report_final_en.pdf).

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factors: a “one-way side-stepping” of the Dublin Regulation, meaning that the Member State assumes responsibility for “all asylum cases lodged in that Member States plus those that should have been lodged in that State according to the geographical determination factors of the Dublin Regulations”. Moreover, the distribution and return are established in a common EU framework.

Each Member State participating in the support processing team predetermines a quota of recognised refugees to be accepted in its territory.

**Option C** provides for the joint processing to be invoked in the preventive phase of the Early Warning Mechanism “with an objective to freeing up resources within a Member State under pressure to allow to build it up the necessary capacity to cope with the pressure and fulfil the requirements” drafted in the action plan.

**Option D** broadens the mandate of EASO in view of charging the Office with the functions of an EU asylum agency. In such proposal, EU officials will “process and decide on all asylum applications at centralised joint processing centers”. Returns are also carried out by EASO and Frontex; the territorial distribution of recognised refugees is based on a quota system facilitated by a “distribution key”.

According to the observations expressed by the interviewees, the research team distinguished the four given options in two different groups, the ones referring to a “supported processing” (A, B and C) and the one (option D) referring to a “joint processing”. Besides, the stakeholders involved in the consultations, expressed their scepticism towards a full-scale EU system for joint processing, underlining the fact that such model is unlikely to receive support at a political level “in the short or medium term”.<sup>117</sup>

On the basis of the outcome of the assessment of the four options, the research team developed a **modified version of option A** – considered as the most feasible – which includes considerably valuable elements of options B and C, such as “an

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117 European Commission, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the Joint Processing of Asylum applications on the territory of the EU*, February 2013. The survey showed how the first option has been ranked as the most positive one: however, some elements of possible good practises have been identified also in options B and C, namely the idea of joint returns and the supported processing to be started at the “crisis prevention phase”.

Concerning the final decision-making on asylum applications, it has been decided to leave the responsibility of such decisions upon the Member State, since the involvement of other Member State’s officials in such processes would create legal anomalies with regard to competence and jurisdiction. Other concerns are related to the training of the EASO experts on the national legislation and requirements for the assessment of asylum application and to the practical aspect of the translation of the relevant document in the language of the Member State concerned, other than to mutual recognition and appeal issues. Option A is also seen as the most feasible one since it does not require any specific amendments to EU legislation on asylum. Option B and options C have been seen as particularly difficult to realise since they would instead require some significant changes to the current EU asylum *acquis*, such an amendment to the Dublin Regulation and to the current proposal for an Early Warning System and to the EASO regulation. Option D stays the most ambitious one as it foresees a complete revision of the CEAS. With regard to the financial implications, option A seemed to be the most feasible one, since a faster processing of asylum applications will reduce reception and accommodation costs.

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*extended scope including the preventive phase of the Early Warning mechanisms and the potential establishments of a mechanisms for joint returns”.*

The final recommendation of the study includes an encouragement to further test the idea of supported processing of asylum applications by establishing the *“practical implications of collaboration on processing and the magnitude of the issues”* raised in the study. To this end, pilot projects could be implemented to acquire knowledge of the practical actions needed in order to establish a supported processing system, and *“how the design of an EU mechanism could and should be developed if the idea is taken further”*. In this respect, according to the Commission,<sup>118</sup> EASO should set up a first project on supported processing of asylum applications in Member States, ensuring a swifter and more efficient processing of asylum applications in full respect of national legal framework.

The Commission has also proposed to explore, among further possibilities for protected entry in the EU in the context of the reflection on the future priorities in the Home Affairs area, a feasibility study on possible **joint processing of protection claims outside the European Union** without prejudice to the existing right of access to asylum procedures in the EU.

EASO, FRA and Frontex and, where relevant, UNHCR, ILO or IOM, should be involved in the execution of these tasks.<sup>119</sup>

In this respect, however, ECRE has raised the need to clarify and define the concept of joint processing outside the EU and its real aim. This tool should be used to facilitate legal access to the EU and *“not as a way to contain refugees in regions outside the EU or as a migration management tool.”*<sup>120</sup> This concept needs to be defined clearly because of the complex legal and practical implications. The questions remain on how asylum applicants will have access to fundamental procedural safeguards in Third-countries and what will be the responsibilities of Member States in such a procedure.

#### **IV.1.5 Return Policy**

Forced return whether applied at the border crossing points may result in the refusal of access to the territory and to relevant procedures.

In March 2014, the Commission issued another important **Communication on EU Return Policy**,<sup>121</sup> stressing the importance of return as an additional key *“tool for facing the challenge of irregular migration, while fully ensuring respect for*

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118 European Commission, Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, 4.12.2013, COM (2013) 869 final, at page 20, para 5.4.

119 European Commission, Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, 4.12.2013, COM (2013) 869 final, page 20.

120 AIDA, *Annual report 2013/2014*, page 21.

121 COM (2014) 199 final, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014.

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*the fundamental rights and dignity of the individual concerned, in line with the EU Charter of Fundamental Rights, the European Convention on Human Rights and all other relevant international human rights conventions.*"<sup>122</sup> It is officially recognised that there is still a gap between the return decisions taken and the returns effectively carried out, mainly due to lack of cooperation of third countries of origin or of transit for the issuance of the necessary documents from the consular authorities and from the migrants who conceal their true identity or abscond it. Thanks to the Return Fund (2008-2013), annual programmes have been significantly developed by Member States, in particular the ones for voluntary returns. Over the last six years, approximately 148.000 migrants have been assisted for voluntary returns to their countries. In this respect, according to the data of Frontex 2013 annual risk analysis,<sup>123</sup> in the EU the ratio between voluntary departure and forced return in 2012 was about 44:56.<sup>124</sup>

As highlighted by the Commission, NGOs play an important role in assisting returnees mainly due to their experience in working with irregular migrants and in facilitating the trust between these ones and the authorities. To this end, the upcoming Asylum, Migration and Integration Fund (AMIF) will be used to financially support return programmes and, *inter alia*, social and legal counselling, assisting activities for vulnerable persons, independent forced return monitoring, improvement of reception infrastructures and detention conditions.

As indicated in the implementation report, which is part of the mentioned Communication of the Commission, since the transposition of the Return Directive into Member States national legislations, a number of shortcomings and concerns still remain with regard to the conditions of detention, the insufficient use of alternatives to it, the promotion of voluntary return and the absence of independent monitoring systems.<sup>125</sup>

As highlighted in the Communication, the Commission will give due consideration to the implementation of the Return Directive by Member States, in particular *"to the detention of returnees, safeguards and legal remedies, as well as the treatment of minors and other vulnerable persons in return procedures"*.<sup>126</sup> To this end, the new established Schengen Evaluation Mechanism, under the coordination and the supervision of the Commission, will highly contribute to assess the concrete implementation of the Return Directive conducted by Member States and whether States practices fully comply with the international human rights standards.<sup>127</sup>

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<sup>122</sup> *Ibidem*, page 2.

<sup>123</sup> Published at: <http://frontex.europa.eu/publications> ('FRAN 2013').

<sup>124</sup> COM (2014) 199 final, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, page 5.

<sup>125</sup> *Ibidem*, page 7.

<sup>126</sup> *Ibidem*.

<sup>127</sup> *Ibidem*.

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Reinforcing the monitoring of the implementation of the Return Directive to ***“promote more consistent and fundamental rights-compatible practices”*** is considered one of the top priorities for the Commission that intends also to develop a number of **guidelines and recommendations** in this respect.<sup>128</sup>

With regard to the Frontex Joint Return Operations (hereafter “JROs”), the Commission calls for an increased coordination *“in a way which ensures that common standards related to humane and dignified treatment of returnees will be met in an exemplary way, going beyond mere compliance with legal obligations”*.<sup>129</sup>

Frontex is also asked to adapt its Code of Conduct on Joint Return Operations and to clearly establish that each JRO will be subjected to independent monitoring.

## **IV.2 The EU Legislative Instruments and the Principle of *Non-refoulement***

This chapter deals with the most relevant EU legislative instruments related to migration and asylum with regard to the principle of *non-refoulement* focussing merely on border control and surveillance and on admission to the EU territory. Reference will be made to the EU Frontex agency as well as to the human rights monitoring mechanisms put in place following the amendments of legal basis for the activities of Frontex.<sup>130</sup>

As a general rule, States have the sovereign right to control the entry and the presence of non-nationals in their territory, however the EU law and the ECHR impose limits on such a power of States by prohibiting the removal at borders and expulsion from the territory in violation of the principle of *non-refoulement*. In this respect the Stockholm Programme, by setting political priorities for the EU in the period 2010-2014, has emphasised that the main challenge *“will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe. It is of paramount importance that law enforcements measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced”*.<sup>131</sup> Therefore, Member States are obliged to ensure access to their national territory, asylum and other relevant procedures when taking

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128 *Ibidem*, page 8, para. 2.

129 *Ibidem*, page 11.

130 Regulation 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

131 European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, 2010/C115/01 point 1.1. Please consider that the Stockholm Programme deals with border policies and the external dimension under three different chapters: 1) integrated management of external borders (Chapter 5.1) and visa policies (Chapter 5.2, 2) policies concerning migration and the fight against illegal immigration (6.1.3) the external dimension on asylum (6.2.2.).

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measures to fight illegal migration, cross-border crime, and to maintain a high level of security,<sup>132</sup> especially when facing significant pressure from mixed migration flows at the EU external borders, in particular in the southern ones.<sup>133</sup>

##### IV.2.1 The Visa Code

A visa is required to enter the European Union by virtue of common EU rules provided in the “Community Code on Visas”<sup>134</sup> (hereafter Visa Code) which sets out *“procedures and conditions for issuing visas for transit through or intended stay in the territory of the Member State not exceeding three months in any six-month period.”*<sup>135</sup>

Alongside the list of third countries whose citizens must be in possession of a visa when crossing the external border of the Union<sup>136</sup>, the Visa Code introduces a list of third countries whose nationals are required *“to hold an airport transit visa (ATV) when passing through the international transit areas of airports situated on the territory of the Member States”*<sup>137</sup>. The introduction of this provision may potentially hamper the access to protection of persons who flee from those countries included in the list - such as Afghanistan, Democratic Republic of Congo, Iran, Iraq, Somalia, Eritrea, Ethiopia<sup>138</sup> - because victims of persecution, torture, serious human rights violation.

Moreover, the mentioned list can be enlarged by individual Member States in *“urgent cases of mass influx of illegal immigrants”*<sup>139</sup>. In this respect, it should be pointed out that the Member State concerned is not required to substantiate or to prove the ‘urgency’ or ‘massive influx’, and its decision becomes immediately

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132 *Ibidem*, point 5.1.

133 *Ibidem*, point 1.1.

134 Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas. The Code is not applicable to UK, and Ireland, while it applies to Iceland, Lichtenstein, Norway and Switzerland, since *“it constitutes a development of provisions of the Schengen acquis.”*

135 Article 1 of the Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

136 Annex I of the Council Regulation 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

137 Article 3 and Annex IV of the Regulation 810/2009.

138 The list provided in Annex IV of the Regulation 810/2009 also encompasses Ghana, Nigeria, Bangladesh, Sri Lanka e Pakistan.

139 Article 3 (2) and Article 26 of the Regulation 810/2009 .

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applicable upon notification to the European Commission.<sup>140</sup> However, notifications by States to the Commission are annually reviewed by the Visa Committee<sup>141</sup> which is in charge of evaluating whether to insert the third country proposed in the “common” list or not, and in the latter case whether it must be withdrawn or can be maintained in the list of Member States<sup>142</sup>.

Consular authorities, before issuing a visa, have the obligation to verify whether the applicant fulfils the entry conditions and to assess if s(he) presents “*a risk of illegal immigration*”, evaluating in particular whether the person concerned “*intends to leave the territory of the Member State before the expiration of the visa applied for*” with a view to limit the so-called “*overstayers*” phenomenon.

In addition, with a view to combat irregular migration at EU external borders by October 2014, as stated by the European Commission in its fifth report, all visa holders will be obligatorily subject to fingerprinting at the crossing points of the Schengen border to perform verifications.<sup>143</sup>

Although some Member States have already been performing a number of such verifications, it is crucial that all the Member States comply with the deadline. The data available at EU-LISA show that between November 2013-January 2014, 152 262 verifications by fingerprints were carried out in the VIS at the posts located at the external border.<sup>144</sup> “*These verifications were primarily carried out by 6 Member States, the rest having had no such verifications or numbers lower than 100 cases a month. For comparison, there were 6 159 564 verifications in the VIS using the alphanumeric data (the visa sticker number) during the same period for all the Schengen area.*”<sup>145</sup>

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140 Article 3 (2) of the Regulation 810/2009. In this regard, the document on the evaluation of the implementation of the Visa Code of 1 April 2014, elaborated by the Commission staff, is critical towards the mechanism which allows individual Member States to impose the ATV requirement on nationals from other third countries in ‘urgent cases of massive influx of illegal immigrants’. In fact, it provides that “in many cases Member States have failed to substantiate the need to maintaining a third country on the national list and the Visa Code does not refer to substantiated justification when a new country is added to a national list. This, in combination with the unilateral competence to impose the airport transit visa requirement in the first place, means that the procedure is not transparent, particularly as regards proportionality.” Commission staff working document “Evaluation of the implementation of Regulation 810/2009 of the European Parliament and Council establishing a Community Code on Visas (Visa Code)” of 1 April 2014 N. SWD(2014) 101 final, which accompanies the document to the Report from the Commission to the European Parliament and the Council “A Smarter Visa Policy for Economic Growth” (COM(2014) 165 final). page. 40, available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/report\\_a\\_smarter\\_visa\\_policy\\_for\\_economic\\_growth\\_-\\_swd\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/report_a_smarter_visa_policy_for_economic_growth_-_swd_en.pdf).

141 Article 3 (3) of the Regulation 810/2009 .

142 Article 3 (4) of the Regulation 810/2009 .

143 European Commission, Fifth bi-annual report on the functioning of the Schengen area 1 November 2013 - 30 April 2014, COM (2014) 292 final, 26 May 2014, section 2, page 9, available at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0292\\_/com\\_com\(2014\)0292\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0292_/com_com(2014)0292_en.pdf)

144 *Ibidem*.

145 *Ibidem*.

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The Visa Code provides that fundamental rights must be respected<sup>146</sup> and that when an application for visa does not meet the requirements it may be considered admissible on humanitarian grounds or for reasons of national interest.<sup>147</sup> Nevertheless, it does not envisage the issuance of a “protection visa”.

However, by virtue of article 25 of the Visa Code, in exceptional circumstances a “Visa with Limited Territorial Validity” (hereafter “VLTV”) shall be issued by Consular authorities of a State when they consider it necessary on humanitarian grounds, for reasons of national interest, or of international obligations, although the requirements for the issuing of a “Schengen visa” are not met.<sup>148</sup> Since the definition of “humanitarian grounds” is not provided by law, this visa is generally issued on the grounds of tourism, mission, invitation, also to avoid migrants of being intercepted by border guards at border crossing points while leaving the third-country concerned. Accordingly, it would be appropriate to regulate this mechanism, in order to avoid, *inter alia*, a wide discretionary power of Member States. Specific guidelines should be adopted evidencing the conditions on the basis of which this visa may be issued at national and EU level.<sup>149</sup> In this respect, it should be noted that following the abolishment of Protected Entry Procedures on 29 September 2012, the Swiss authorities have issued guidelines for the issuance of visas for humanitarian purposes.<sup>150</sup> The Swiss Consular authorities may issue such visas when the life or the physical integrity of the person concerned is directly, seriously and concretely threatened in the country or origin or (residually) in a Third-country where s(he) is supposed to be under such threat. An entry visa can be issued, in fact, when a person may be threatened during serious armed conflicts or obliged to flee from imminent, personal and real threat. The VLTV visa is issued for one entry and is valid for 90 days.

In Italy, CIR has requested the Italian authorities to adopt similar guidelines for the delivery of such visas to persons at serious risk in their countries of origin or of transit, and to allow family reunification when refugees and persons benefitting from subsidiary protection cannot timely and for objective reasons meet the legal requirements. It should be noted that in the past VLTV has been already issued on humanitarian grounds, for instance, by the Italian authorities between 2007 and 2010<sup>151</sup>, and by the Maltese authorities<sup>152</sup> in 2011 to allow entry in Italy and Malta to individuals risking their lives because of the armed conflict in Libya.

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<sup>146</sup> Recital 29 of the Regulation 810/2009.

<sup>147</sup> Article 19 (4) of the Regulation 810/2009.

<sup>148</sup> Article 25 of the Regulation 810/2009. See C. Hein, M. de Donato, *Exploring Avenues for Protected Entry in Europe*, Milan 2012, page 27.

<sup>149</sup> See C. Hein, M. de Donato, *Exploring Avenues for Protected Entry in Europe*, Milan 2012, page 73.

<sup>150</sup> Additional information are available at: <https://www.bfm.admin.ch/content/dam/data/bfm/rechtsgrundlagen/weisungen/auslaender/einreise-ch/20120928-weis-visum-humanitaer-f.pdf>

<sup>151</sup> *Ibidem*, page 45.

<sup>152</sup> *Ibidem*, page 46.

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In this respect, it is worth mentioning the Concurring Opinion of Judge Pinto de Albuquerque in the *Hirsi Jamaa v. Italy* arguing that “if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State. A positive duty to protect will then arise under Article 3.”<sup>153</sup>

The Commission has also emphasized that in order to facilitate a closer cooperation between the EU and partner countries, visa “*facilitation agreements could be considered where liberalisation is not yet realistic option*” and that “*concluding readmission agreements in parallel to any visa facilitation agreement has proven useful and should be continued in the future*”.<sup>154</sup>

In this respect, aiming at reaching a full visa reciprocity with non-EU countries whose nationals are exempt from the visa requirement, a **visa reciprocity mechanism**<sup>155</sup> has been established. To this end, the EU has concluded visa facilitation agreements with 10 third-countries.<sup>156</sup>

#### IV. 2.2 The Schengen Borders Code

The Schengen *acquis* establishes a unified system for maintaining external border controls, while abolishes controls at internal borders within the Schengen area.

The legal regime concerning the access to the EU territory by third-country nationals as well as the border controls and surveillance is mainly set out in the Schengen Borders Code (hereafter “Borders Code”),<sup>157</sup> entered into force on 13 October 2006. Since its adoption, the Borders Code has already been amended and the most important changes to the text have been made in 2013.

Relevant amendments were, in fact, adopted in June 2013 introducing more protective norms concerning the obligations of Member States to act in full compliance with relevant European and international human rights law, refugee

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153 See Concurring Opinion, Judge Albuquerque, Judgement *Hirsi Jamaa and Others v. Italy*, page 51.

154 COM (2014) 154 final, European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, “*An open and secure Europe: making it happen*”, 11 March 2014, page 6.

155 Council Regulation 851/2005 of 2 June 2005 amending Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism.

156 Albania, Armenia, Bosnia and Herzegovina, FYROM, Georgia, Moldova, Montenegro, Serbia, Russia, Ukraine. For more detailed information about EU Visa Facilitation Agreements. For more details please see at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm).

157 Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

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law and the principle of *non-refoulement*.<sup>158</sup>

After two years of negotiations,<sup>159</sup> on 7 October 2013 the Council of the European Union adopted, without discussion, the Schengen governance legislative package, namely a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*<sup>160</sup> and another Regulation amending the Schengen Borders Code concerning the rules for the temporary reintroduction of border controls at internal borders in exceptional circumstances.<sup>161</sup>

The revision of the Schengen rules was strongly requested by France, with the purpose of reinforcing Member States' control of the Schengen mechanism,<sup>162</sup> following the issuance by Italian authorities of permits of residence to the Tunisians disembarked on Italian coasts in the wake of the Arab Spring, in April 2011, under national temporary protection regime with the authorisation to travel in the Schengen area.

The amendments to the Borders Code have clarified the conditions under which Member States may reintroduce controls at internal borders<sup>163</sup> and allowed the European Commission and Parliament to strengthen their role in the Schengen governance, weakening the intergovernmental approach in favor of a "*Community*

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158 Regulation 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations 1683/95 and 539/2001 and Regulations 767/2008 and 810/2009 of the European Parliament and of the Council.

159 These two Regulations have been adopted on the basis of the two legislative proposals presented by the European Commission on 16 September 2011: COM(2011)559 final and COM(2011)560.

160 Council Regulation establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, 10597/13, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010597%202013%20INIT> The evaluation mechanism and monitoring cover all aspects of the Schengen *acquis*, including the absence of border controls at internal borders as well as the application of accompanying measures in the area of visa policy, SIS, data protection, police cooperation and judicial cooperation in criminal matters. Under this mechanism, the Member State concerned will be required to submit an action plan to remedy any deficiencies, and the Commission will continuously monitor and report on this plan until it is fully implemented. Such monitoring and reporting may also include announced or unannounced follow-up visits.

161 Regulation 610/2013 of the European Parliament and of the Council amending Regulation 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, PE-CONS 30/13, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2030%202013%20INIT>.

162 Yves Pascouau, *The Schengen Governance Package: the subtle balance between Community method and intergovernmental approach*, Discussion paper, 12 Dec 2013, page 1.

163 The requirements identified are: i) the existence of a "serious threat to public policy or internal security"; ii) the temporary nature of the reintroduction; iii) and the obligation to inform other parties in cooperation.

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approach.”<sup>164</sup>

The Borders Code establishes the rules governing the control of persons crossing the external borders of the EU Member States<sup>165</sup>. Schengen countries, having an external border, hold the primary responsibility of border controls conducted in the interest of all Member States that have abolished internal borders control, with the aim to “*help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations*” of Member States.<sup>166</sup>

The Code provides that border checks should be carried out in the full respect of human dignity by professional border guards and be proportionate to the objectives pursued.<sup>167</sup> Moreover, all the rules must be interpreted and applied in compliance with the respect of fundamental rights and the principles recognised by the EU Charter of Fundamental Rights, in particular of the principle of *non-refoulement*,<sup>168</sup> without prejudice to the rights of refugees and international protection applicants.<sup>169</sup> In line with the principles of the *Hirsi* sentence, it should be noted that an important amendment has been made to the Code which now provides that the “**decisions under this Regulation shall be taken on an individual basis.**”<sup>170</sup>

#### IV.2.3 The Return Directive

The Return Directive<sup>171</sup> provides that its rules apply to third-country nationals staying illegally on the territory of a Member State while they do not apply to persons enjoying the Community right of free movement.<sup>172</sup> Among derogations, Member States may decide not to adopt the Directive to third-country nationals who are subject to a refusal of entry in accordance with the Schengen Borders Code, or who are apprehended or intercepted by border authorities in connection

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164 Yves Pascouau, *The Schengen Governance Package: the subtle balance between Community method and intergovernmental approach*, EPC Discussion paper, 12 Dec 2013, page 1.

165 Article 1 of the Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

166 Recital 6 of the Regulation 562/2006.

167 Recital 7 of the Regulation 562/2006.

168 Recital 20 of the Regulation 562/2006.

169 Article 3 of the Regulation 562/2006.

170 Article 3 (a) of the Regulation 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations 1683/95 and 539/2001 and Regulations 767/2008 and 810/2009 of the European Parliament and of the Council.

171 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

172 Article 2 (3) of the Return Directive “*This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.*”

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with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in the concerned country.<sup>173</sup> This implies that Member States apply the Directive only in case of expulsion while making use of their national legislation in cases of removal of non-nationals who entered their territories irregularly. However, in this respect, it should be noted that Member States shall ensure minimum standards of protection and the respect of the principle of *non-refoulement*.<sup>174</sup> Moreover, the Directive stresses that Member States are legitimated to return illegally staying third-country nationals, provided that fair and efficient asylum systems which fully respect the *non-refoulement* principle are in place<sup>175</sup> and that the return procedure must be “fair and transparent” in line with the general principles of EU legislation. Return decisions should be taken case-by-case and on the basis of objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.<sup>176</sup>

In addition, Member States, when implementing the Directive shall take in due account the best interest of the child, family life and the state of health of non-nationals and fully ensuring the respect of the *non-refoulement* principle.<sup>177</sup>

The Directive provides that detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and the objectives pursued and that is justified merely “to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.”<sup>178</sup> Detainees should be treated in a humane and dignified manner respecting their fundamental rights and in compliance with international and national law.<sup>179</sup>

Voluntary return should be preferred to forced return and a period for voluntary departure should be granted. Moreover, enhanced assistance and counselling should be ensured.<sup>180</sup> Derogations to the voluntary return are applied when no period for voluntary return has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period granted for voluntary departure.<sup>181</sup>

In addition, Member States, depending on the case, hold the faculty or the obligation to postpone the removal. States are, in fact, obliged to postpone the

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173 Article 2 (2) (a) of the Return Directive. Another derogation is provided by Article 2 (2) (b) Member States may not apply the Return Directive to those non-nationals who “are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.”

174 Article 4 of the Return Directive.

175 Recital 8 of the Return Directive.

176 Recital 6 of the Return Directive.

177 Article 5 of the Return Directive.

178 Recital 16 of the Return Directive.

179 Recital 17 of the Return Directive.

180 Recital 10 of the Return Directive.

181 Article 8 (1) of the Return Directive.

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removal of non-nationals when it would violate the principle of *non-refoulement* or when the authorities competent to review the removal decisions may suspend their enforcement.<sup>182</sup>

The Directive prescribes that Member States apply provisions that may be more favourable for third-country nationals laid down in the Community *acquis* relating to immigration and asylum. With regard to applicants for international protection a non national who has applied for asylum in a Member State should not be considered as staying illegally in that country “ *until a negative decision on the application or a decision ending his or her right to stay as asylum seeker has entered into force.*”<sup>183</sup>

Regrettably, since many provisions of the Return Directive leave Member States the discretionary power to adopt them or not as well as the possibility to choose among of a series of alternative solutions, the Directive is not as relevant as it should have been with regard to harmonisation.

#### IV.2.4 Frontex

The EU has adopted rules of border surveillance to prevent unauthorised border crossings, to counter cross-border criminality, to apprehend or take other measures against those people who have crossed the border in an illegal manner<sup>184</sup>.

The EU Frontex Agency ( hereafter “Frontex”) has been established to support Member States in the management of external EU borders.<sup>185</sup> Since its launch in 2005, Frontex has become a key actor in the EU border policy, by ensuring operational cooperation and assistance to EU Member States and facilitating more effective activities of EU border control and surveillance to prevent unauthorised entry of non-EU nationals and to return them to third countries.

Frontex develops and applies common integrated risk analyses for the EU external borders, coordinates pilot projects and joint operations to allow Member States to share their experience and competences. These operations are tailored on the basis of the results of the risk analysis and recommendations<sup>186</sup> made by Frontex. In addition, Frontex assists Member States in the organisation of Joint Return Operations, supports the training of national border guards and facilitates research and development in the area of border security. The budget of Frontex is constantly growing. In 2013, its budget amounted to 94 million Euros,<sup>187</sup> confirming

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182 Article 9 (1) (a) (b) of the Return Directive.

183 Recital 9 of the Return Directive.

184 Article 12 of the Regulation 562/2006.

185 Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, page 1).Recital 13 of the Council Regulation 2007/2004.

186 Additional information are available at: <http://frontex.europa.eu/operations/types-of-operations/general>.

187 Frontex, *General Report 2013*, page 47.

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that border security remains one of the top priorities for the EU and its Member States.

As it will be further developed, Frontex joint operations are conducted by land, sea and air and are performed under the authority of the host State with the participation of other Member States and Schengen Associated countries deploying their equipment and staff.

Guests officers (called also experts) deployed by sending Member States may conduct border controls and check identity documents together with Frontex agents and national staff. When conducting such activities they are under the authority of the host country

**Third-countries authorities** may participate in these activities as observers on the basis of working agreements, such as, for instance, the Memorandum of Understanding signed between Frontex and Turkey<sup>188</sup> which provides for the exchange of information, possibilities to participate in joint return operations, training on border management, research and development activities. The observers can exchange opinions, information on the *modus operandi*, migratory routes, criminal networks operating in the area concerned, but they cannot participate in any activity of border control.

The operations are coordinated by the International Coordination Centre (ICC) managed by the country hosting the operation in collaboration with Frontex. The Joint Operations are conducted in the frame of **joint operational plans** indicating the scope, the operating area, the modalities of coordination as well as the resources deployed. These operational plans and their annexes should be publicly accessible. However, they are made public only at the end of the operations concerned with the exception of the information considered relevant in relation to public interest with regard to public security, defence and military matters and international relations, in particular with the Third-Countries where Frontex operations are conducted.<sup>189</sup>

It should be pointed out that in case of urgent and exceptional emergency pressure at the border of one Member State or a State which Frontex has signed an agreement with, the Agency can deploy teams composed of Member States' border guards, the **Rapid Border Intervention Teams** (so-called "RABIT") to conduct border and surveillance operations at external borders.<sup>190</sup> This team, operating

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188 Memorandum of Understanding of 28 May 2012 between Frontex and the Turkish Ministry of Foreign Affairs. Following this agreement, Greece and Turkey are developing a more effective operational cooperation in particular in the Evros region.

189 Article 4 (1) (a) of the Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

190 Regulation 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L.199 of 31 July 2007.

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under the coordination of Frontex, is composed of about 600 border guards deployed by Member States. This mechanism has been activated for the first time late 2010 following the formal request made at the end of October 2010 by the Greek Ministry of Citizen Protection to the European Commission seeking support at its land border with Turkey in the River Evros region. To this end, during the four-month operation, 576 officers of 26 Member States and Schengen Associated Countries were deployed to tackle the exceptional and urgent irregular migration towards Greece.<sup>191</sup> As an extension of the RABIT operation, since 2011, the Poseidon regional programme was set up, becoming a permanent Joint Operation targeting Greek-Bulgarian land borders and the Greek sea borders.

On 1<sup>st</sup> October 2010, the first Frontex Operational Office (FOO), composed by Frontex agents, was set up at the Greek port of Piraeus in the framework of the Poseidon Operation, aiming at conducting operations in the central-eastern Mediterranean area. Since the end of 2013, the FOO has been transformed from a pilot project to a regional permanent structure composed by Frontex agents with the main task of coordinating the deployment of guest agents and/or the technical equipments and reinforcing the activities of identification and debriefing. In addition, Frontex coordinates the land and sea focal points in the hotspot migration areas where experts are deployed in small numbers to facilitate interrelationship with local authorities

**“Screening” officers** may be deployed in some operations (not only at sea) to assist the host State authorities with identifying the nationality of newly arrived migrants. In this respect, the UN Special Rapporteur on human rights of migrants has denounced the worrying practice by Frontex officers who tend to identify the nationalities of migrants for the aim of expelling them rather than their protection needs.<sup>192</sup>

**“Debriefing” teams** are also deployed to interview newly arrived migrants to collect information on migratory routes and patterns to obtain information on the *modus operandi* of the smugglers’. The gathered information are shared with Frontex Headquarters for risk analysis purposes to enhance surveillance activities as well as to improve intelligence to fight organized crime. Interviews, for the mentioned purpose, are made randomly and migrants may accept on voluntary basis. However, migrants, if not informed on the aim of the interviews, may not be aware on the possibility to refuse to provide information on travel routes and eventually on personal circumstances. Migrants, in fact, may not distinguish between the interviews conducted by Frontex officers and those conducted by the national police or the immigration authorities competent to handle migration and asylum matters.

191 Frontex, *RABIT Operation 2010 – Evaluation Report*, August 2011, pages 6-8. The full report is available at: [http://frontex.europa.eu/assets/Attachments\\_News/fer\\_rabit\\_2010\\_screen\\_v6.pdf](http://frontex.europa.eu/assets/Attachments_News/fer_rabit_2010_screen_v6.pdf).

192 Report of UN Special Rapporteur on human rights of migrants, Francois Crèpeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, note 13. See at: <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>.

Frontex also assists Member States in coordinating and organising **Joint Return Operations** (JROs) for individuals staying illegally in the EU.<sup>193</sup> Frontex is generally informed by the organising Member State on the planned flight and the seats available and dispatches this information to other Member States that may then manifest their wish to join the JRO.

The organising Member State, before the return takes place, may decide to meet third-country authorities to agree on the details related to the return procedure.

In practice, returnees of a given nationality, escorted by security personnel, are transported from Member States participating in the JRO to the Member State or Schengen Associated country organising the operation. Returnees are then embarked on aircrafts and returned to third countries often on the basis of specific arrangements with the organising State, such as, for example, readmission agreements.

During JROs, a Frontex project manager always travels with returnees to make sure that these operations are carried out in accordance with the Code of Conduct for JROs.<sup>194</sup>

In 2013, the Direct Contact Point (DCP) network on return issues contributed to facilitate communication and information exchange on JROs. In addition, Frontex consolidated the “rolling operational plan”, adopted by the Management Board<sup>195</sup>, aimed at improving the planning and implementation of these operations by providing Member States with the necessary operational support and assistance. In 2013, cooperation with Third-countries authorities was also reinforced to promote JROs.<sup>196</sup>

According to Eurostat, almost **250,000 people are subject to return orders every year**. The vast majority of them leave voluntarily, while others are forcibly returned by police authorities following individual return decisions adopted by a Court or a competent administrative body.”<sup>197</sup>

**Between 2006 and December 2013, FRONTEX coordinated 209 JROs, returning 10 855 people.**<sup>198</sup>

In 2013, 39 JROs were organized and 2152 persons were subjected to return procedures: 33 Member States and Schengen Associated Countries took part in

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193 Additional information are available at: <http://frontex.europa.eu/operations/return>.

194 For additional information on Joint Return Operations carried out in 2013 see Frontex, General Report 2013, page 60, available at: [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2013/General\\_Report\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf).

195 Frontex, General Report 2013, page 18, available at: [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2013/General\\_Report\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf).

196 This issue can be mentioned with regard to the consolidated cooperation between Frontex and Nigerian authorities, which led to the conclusion of an agreement named *Best Practices for the organisation of joint return operations to Nigeria*. Please see Frontex, General Report 2013, page 13.

197 For more detailed information, please see at: <http://frontex.europa.eu/operations/return>.

198 COM (2014) 199 final, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, page 5.

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these joint operations.<sup>199</sup> In 2012, the number of returnees was of 2110 persons.<sup>200</sup>

Among the JROs, it is worth mentioning the project “Attica”, implemented in 2012 and 2013, mainly aimed at supporting Greece “*in organizing national return flights,<sup>201</sup> training of escorts, the acquisition of travel documents and the establishment of a pool of trained interview experts for screening of detected irregular migrants*”.<sup>202</sup> In 2012, in fact, Greek screening experts took over the leading role in planning and conducting screening activities at the Greek-Turkish land borders<sup>203</sup>. As underlined by Frontex, following the changing routes of irregular migration flows, a similar operation was set up in Bulgaria with the aim of screening migrants at the Bulgarian-Turkish land borders.<sup>204</sup>

Concerns were raised by Human Rights<sup>205</sup> organisations on the way the JROs are conducted, since they are organised for specific national groups, raising potential concerns of racial discrimination in violation of the EU Charter of the Fundamental Rights.<sup>206</sup>

Following severe criticism, a **Code of Conduct for the return flights**<sup>207</sup> of non-EU nationals has been adopted. This Code sets out common principles and main common procedures to ensure that JROs are conducted in a humane manner and in compliance with fundamental rights and the principle of *non-refoulement*, the right to asylum, the prohibition of torture and of inhuman or degrading treatment or punishment, the rights to the protection of personal data and non discrimination.<sup>208</sup> Moreover, according to this Code, the JRO must be interrupted or terminated by States in case of serious and persistent violations of fundamental rights.<sup>209</sup> However,

199 For more detailed information, please see Frontex, General Report 2013, page 62.

200 COM (2014) 199 final, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, page 6.

201 Return operations were carried out through commercial flights, national return operations and joint return operations as well. In addition, the reinforcement of building return capacity was carried out mainly “*advising on issues related to identification interviews at third-country embassies*”. Please see Frontex, General Report 2013, page 33.

202 *Ibidem*.

203 For more detailed information, please see Frontex, General Report 2012, page 18; Frontex, General Report 2013, page 32.

204 Frontex, General Report 2013, page 33.

205 Frontex Agency: which guarantees for human rights ?A study conducted by Migreurop on the European External Borders Agency in view of the revision of its mandate, page 21. In this respect it is worth mentioning the Hydra operation concerning the forced return of Chinese immigrants and Silence operation the return of Somali immigrants, both carried out in 2007

206 Article 21 (1) (2) of the Charter of Fundamental rights of the European Union.

207 Frontex, Code of Conduct for Joint Return Operations, adopted on 7 October 2013, available at: [http://frontex.europa.eu/assets/Publications/General/Code\\_of\\_Conduct\\_for\\_Joint\\_Return\\_Operations.pdf](http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf). This Code complements the provisions of the Code of Conduct for all persons participating in Frontex activities adopted by the Decision of the Frontex Executive Director No 24/2011 of 21 March 2011.

208 Article 4 (1) and (2) of the Frontex, Code of Conduct for Joint Return Operations.

209 Article 4 (3) (b) of the Frontex, Code of Conduct for Joint Return Operations.

this decision should not be left to the discretion of State authorities. As stressed by the Parliamentary Assembly of the Council of Europe specific criteria should be developed in co-operation with the Council of Europe, UNHCR, FRA, human rights organisation and the Frontex Consultative Forum.<sup>210</sup>

The Code does not provide an effective right for the returnees to lodge a complaint on the alleged ill-treatment during JROs, since the code merely indicates that Member States “*are expected to give sufficient and clear information to the returnee*” on the possibility to lodge such a complaint, without indicating any other rule on the proceeding and the procedural guarantees to be applied in such cases.

The Code of Conduct, however, does not contain provisions indicating what type of sanctions would be applied to those breaking the Code rules and what rights and procedural guarantees are offered to the returnee victim of acts conducted in violation of the Code.

In addition, it should be considered that the Code provides a monitoring mechanism to collect information and to ensure that JROs are conducted by Member States in an humane manner and in compliance with fundamental rights as required by the “Returns” Directive.<sup>211</sup> However, “*Unless contrary to national rules and procedures*” these reports are sent to Frontex only at the end of a JRO and their observations may be included in the Final Return Operation Report to be delivered to Frontex.<sup>212</sup> In this regard it is worth stressing that not all Member States have adopted an independent monitoring system. In line with PACE position, the reporting to Frontex of the findings of the monitoring activity should be binding.<sup>213</sup>

The Code provides also that any participant in the JRO is required to report to Frontex any violation of the Code of Conduct or of fundamental rights through, for example, Frontex Serious Incident Reporting System.<sup>214</sup> If the violation is committed by a person assigned to the operation by a Member State, it is expected to inform Frontex of the results of its investigation. The returnee may request information and should be informed on the measures taken and on his/her possible right to compensation.<sup>215</sup> However, considering the discretionary power left to Member States in the implementation of this provision, the introduction of an effective complaint mechanism for returnees should be put in place to ensure transparency.

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210 PACE Resolution 1932 (2013), Frontex, *Human rights responsibilities*, point 7.4, page 2.

211 Article 8 (6) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

212 Article 14 of the Frontex Code of Conduct for Joint Return Operations.

213 PACE Resolution 1932 (2013) Frontex. *Human rights responsibilities*, para 7.2, page 2.

214 Article 16 of the Frontex Code of Conduct for Joint Return Operations.

215 Article 17 of the Frontex Code of Conduct for Joint Return Operations.

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As underlined in the Communication of the Commission, despite the obligation for Member States to introduce, as from 2010, a return monitoring system at national level,<sup>216</sup> only half of all JROs have been subjected to such monitoring by independent monitors physically present during the whole return phases. *“To date, these monitors have not reported any violation of returnees’ fundamental rights.”*<sup>217</sup>

Although not expressly required by the current legislation, the Commission has considered the revision of the Code of Conduct as a priority providing that *“given the visibility and sensitivity of such operations an independent monitor should be present in each JRO,(...)”*<sup>218</sup> In this regard, it is worth mentioning the EU-financed project run by the International Centre for Migration Policy Development (ICMPD) aiming at harmonising different State monitoring approaches and developing *“objective, transparent criteria and common rules for monitoring”*, and providing *“a pool of independent monitors to Member States which may also be used in JROs.”*<sup>219</sup>

With regard to **training**, since 2007 Frontex has provided standardised training for return officers focusing on safeguarding returnees’ fundamental rights and dignity during forced return operations. In this respect, Frontex should keep supporting Member States by offering them a specific training on return, in particular on fundamental rights of returnees during the whole procedure.<sup>220</sup>

It should be considered that, being Frontex a legal entity, it is also allowed to enter into practical and operational **cooperation with the authorities of Third-countries**. Frontex has already concluded working arrangements with 17 countries<sup>221</sup> and negotiations are currently ongoing with seven third countries.<sup>222</sup>

Frontex, in fact, has already launched and financed projects of technical assistance in Third-countries to enhance capacity-building activities by providing financial and operational support in the field of information-sharing, training, joint activities, research and development.<sup>223</sup>

In this respect, Frontex has, *inter alia*, taken further steps in the implementation of the Memorandum of Understanding with the Ministry of Foreign Affairs of

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216 Article 8 (6) of the Return Directive.

217 COM (2014) 199 final, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, page 5.

218 *Ibidem*, page 6.

219 *Ibidem*.

220 *Ibidem*, page 11.

221 The Russian Federation, Ukraine, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey and Azerbaijan as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans. More detailed information are available at: <http://frontex.europa.eu/partners/third-countries>.

222 Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Tunisia..

223 Frontex, *General Reports 2013*, page 12.

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Turkey and consolidated cooperation with the Kosovo Border police in order to expand the Western Balkans Risk Analysis Network (WB-RAN) to better analyze the migratory flows in the region.”<sup>224</sup> With regard to this region, Frontex continued its activities of risk analysis at the request of the European Commission in the frame of the EU post-visa-liberalization monitoring mechanism”.<sup>225</sup>

In 2013 Frontex established direct contacts with the authorities of Third-countries, such as United Arab Emirates, China, Thailand and Hong Kong, where important airport hubs are located with direct flight connections to Europe “to explore practical cooperation avenues in the areas of information exchange, risk analysis and air-border management.”<sup>226</sup>

“Contacts in the area of return with some key third countries, including Nigeria, were maintained.”<sup>227</sup>

It should be pointed out that such cooperation and practical agreements can contain provisions on return. Being not public, their scope and contents are unknown. In this respect, as underlined by PACE, it would be appropriate that the European Parliament is consulted before the conclusion of any agreements between Frontex and Third-countries, to ensure that human rights and refugee rights are fully respected in Third-countries when any Frontex operations are carried out in cooperation with them.<sup>228</sup>

#### IV.2.4.1 Monitoring Mechanisms

Frontex has been strongly criticised because of violations of human rights and other breaches of international law resulting from its co-ordinated activities as well as for a lack of clarity over its responsibility.<sup>229</sup>

Following the reaction of both Frontex and EU Institutions, in 2011, fundamental amendments of the legal basis for the activities of Frontex<sup>230</sup> have been adopted. Among them the obligation of full respect of fundamental rights as well as the rights of refugees and asylum seekers and of the principle of *non refoulement*,<sup>231</sup> the

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224 Frontex, *General Reports 2013*, pages. 12-13.

225 *Ibidem*.

226 *Ibidem*.

227 *Ibidem*.

228 PACE Resolution 1932 (2013) Frontex. *Human rights responsibilities*, 25 April 2013, para 9.2.2, page.3.

229 Amnesty International and the European Council on Refugees and Exiles, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEx), September 2010; Migreurop, *Frontex Agency: Which guarantees for Human Rights?*; Human Rights Watch, Simon Troller, *On the Borders of legality*, 8 February 2011; Jesuit Refugee Service Europe, *Safe and Secure: How do refugees experience Europe's Borders?*, December 2011.

230 Regulation 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending 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.

231 Recital 9, Article 1 (2), Article 2 (1) (a) of the Regulation 1168/2011.

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obligation of suspending or terminating joint operations or pilot projects in case of serious or persistent violations of fundamental rights or international protection obligations,<sup>232</sup> the obligation to provide training to border authorities on these rights and on the access to asylum procedures<sup>233</sup> as well as the obligation to address special needs of persons requiring international protection, including children, victims of trafficking and other vulnerable persons.<sup>234</sup>

Moreover, Frontex has endorsed a **Code of Conduct**<sup>235</sup> laying down procedures and ethical behaviour standards that must guide Frontex personnel and all other staff performing any Frontex activities in full compliance with the rules of law and the respect of fundamental rights and of the Code itself.<sup>236</sup> International protection seekers, in compliance with the principle of *non-refoulement* shall receive adequate assistance, be appropriately informed about their rights and relevant procedures and referred to the competent national authorities for receiving their requests.<sup>237</sup> The same provision provides that special consideration shall be given to vulnerable groups of people, in particular to women, unaccompanied minors, disabled people, (potential) victims of exploitation or trafficking.<sup>238</sup> This provision, however, should have clarified that the right to assistance, to appropriate information and the referral to competent authorities for the admission in relevant procedures should be applied to vulnerable persons who may not be necessarily in need of international protection.

*“Participants in Frontex activities who have reasons to believe that a violation of the present Code has occurred or is about to occur, are obliged to report the matter to Frontex via the appropriate channels.”*<sup>239</sup> In case of a violation of the Code, the Executive Director may take the decision to immediately remove the Frontex staff from the activity. However if the violation was committed by a person deployed by a Member State, he may request this latter to immediately remove the person concerned and *“expects that the relevant authority of the Member State will use its powers regarding the necessary disciplinary measures, and if applicable, to remove the person concerned from the respective pool for a defined period.”*<sup>240</sup> In this respect it is also worth noting that the Code does not provide any complaint mechanism for the victims of principle of *non-refoulement*, including those who were subject to

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232 Article 3 (1) (a) of the Regulation 1168/2011 .

233 Recital 18 of the Regulation 1168/2011.

234 Article 2 (a) of the Regulation 1168/2011.

235 Article 2 (a) of the Regulation 1168/2011.

236 Articles 1, 3 and 4 of the Frontex Code of Conduct for all persons participating in Frontex activities, available at: [http://frontex.europa.eu/assets/Publications/General/Frontex\\_Code\\_of\\_Conduct.pdf](http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf).

237 Article 5 (a) of the Frontex Code .

238 Article 5 (c) of the Frontex Code .

239 Article 22 of the Frontex Code.

240 Article 23 of the Frontex Code .

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abuse, harassment and to any other act contrary to the rules and principles set out in the Code of Conduct. **A complaint mechanism should be set up to ensure transparency and effective monitoring of any kind of abusive conduct.**

Following a consultative process with representatives of Member States, the European Commission, FRA, UNHCR, IOM, Frontex has also endorsed a **Fundamental Rights Strategy**<sup>241</sup> which establishes the objectives and measures to be taken to fully respect and promote fundamental rights being “*unconditional and integral components of effective integrated border management.*”<sup>242</sup> As stressed in the Preamble of the Strategy document, Frontex aims also at “*implementing proper monitoring mechanisms based on reporting to competent authorities and sanctioning, applying a zero tolerance policy.*”<sup>243</sup>

The Fundamental Right Strategy has been implemented by an Action Plan, adopted by the Frontex Management Board on 29 September 2011, and integrated into its Programme of Work to support Frontex in carrying out its activities and goals. An annual progress report on the implementation of this strategy and the Action Plan is issued. Frontex has published its report covering the period from January to December 2013,<sup>244</sup> underlining the steps taken in 2013 like the insertion of a specific obligation in all plans to refer persons in need of international protection or asylum seekers to the competent national authorities. In addition, the Frontex standard operating procedure (SOP) to report serious incidents, especially those related to allegations of violations of fundamental rights, was subject to an extensive internal revision to improve the existing internal processes and reporting procedures, thus contributing to put in place an effective monitoring system. The document will better define the procedure and responsibilities, the inclusion of violations in the Frontex Code of Conduct and “*strengthen follow-up mechanism (SIR Coordinator) in case of allegations reported by participants*” in Frontex operations.<sup>245</sup> In this respect, as underlined by PACE, an independent and external monitoring system should be set up to control the implementation of the Strategy and to measure its impact.<sup>246</sup>

In 2013 a **Fundamental Rights Officer** (hereafter “FRO”)<sup>247</sup> and a Consultation Forum on Fundamental Rights (hereafter “CF”)<sup>248</sup> were also established to monitor

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241 Article 26 (a) (1) of the Regulation 1168/2011.

242 Preamble and Article 1 of the Frontex Fundamental Rights Strategy.

243 Preamble of the Frontex Fundamental Rights Strategy.

244 Annex G. Fundamental Rights Progress Report, Frontex *General Report 2013*, page 68.

245 *Ibidem*, page 70.

246 PACE, Frontex: human rights responsibilities. C. Explanatory memorandum by Mr. Cederbratt, rapporteur, Report, Doc. 13161, 8 April 2013, page 15.

247 Article 26 (a) (3) of the Regulation 1168/2011. The Fundamental Rights Officer, MS. Inmaculada Arnaez Fernandez started her work in December 2012.

248 Article 26 (a) (2) of the Regulation 1168/2011. The Consultative Forum is composed *inter alia* by key European Institutions, the Council of Europe, (OSCE/ODIHR), the UNHCR, FRA, EASO, IOM, ECRE, ICMC, ICJ, JRS, CCME, PICUM.

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the effective compliance with human rights during Frontex operations and to increase their transparency.

The FRO, twice-monthly, reports on every infringement of fundamental rights to the Frontex Management Board, the Executive Director and the Consultative Forum. FRO also supported the revision of internal monitoring and reporting procedures such as the Standard Operating Procedure. *"She followed up incidents of alleged fundamental rights violations reported during operations and provided an assessment of their impact on fundamental rights, complementing other internal assessment (legal and operational)."*<sup>249</sup> A system for recording and updating information of alleged incidents was set up by the FRO which, *inter alia*, contributed to the establishment of a fundamental rights monitoring system. With regard to the planning and preparation of joint operations, the FRO supported the introduction of provisions of fundamental rights assessments and analysis of potential challenges and risks that could occur in the context of a joint operation having a negative impact on fundamental rights.<sup>250</sup> Moreover, the FRO, on the basis of its monitoring role in the frame of Eurosur Regulation, participated in the drafting of fundamental rights related aspects of the Handbook for Eurosur users with the cooperation of FRA.<sup>251</sup> Concerns were raised on the effective role of FRO. As also stressed by PACE *"It is, however, unclear in the Regulation as to what exactly her competences are and whether she will be able to receive complaints from individuals and if this information will be made public."*<sup>252</sup> In this regard, the **FRO role should be strengthened, its independence as well as the necessary means and resources to effectively monitor all Frontex activities guaranteed.**<sup>253</sup>

The **Consultative Forum on Fundamental Rights** (hereafter "Consultative Forum") was established in October 2012 to assist and advise the Executive Director and the Management Board on how Frontex should structurally improve the promotion and the respect of fundamental rights in all Frontex activities and provide opinions and recommendations on the development and implementation of the Fundamental Rights Strategy, the Code of Conduct and the Common Core Curricula.<sup>254</sup> In September 2012, the Management Board adopted the working methods for the Consultative Forum that, in January 2013, adopted its work programme for the year. In its advisory role the Consultative Forum was consulted for internal strategic and planning processes as well as on the Frontex 2014 Programme of Work, providing with relevant recommendations. The Consultative Forum

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249 Frontex, *General Report 2013*, pages 41 and 42.

250 *Ibidem*, page 42.

251 *Ibidem*, page 43.

252 PACE, Frontex. *Human rights responsibilities*. C. Explanatory memorandum by Mr. Cederbratt, rapporteur, Report, Doc. 131618 April 2013, page 16.

253 PACE, Frontex. *Human rights responsibilities*, Resolution 1932 (2013), 25 April 2013, para 9.4, page 3.

254 Article 26 (a) (2) of the Regulation 1168/2011.

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contributed also to the drafting of the Code of Conduct for Joint Return Operations and “visited joint operations in Greece and Bulgaria and gave recommendations on the inclusion of sensitive border management practices.”<sup>255</sup> In this respect, considering that the CF has not a monitoring role but only an advisory function, a follow-up and an impact assessment needs to be put in place with reference to the recommendations and activities of the Consultative Forum.<sup>256</sup> Moreover, as stressed by PACE, Frontex shall take into consideration the public annual activity reports of the Consultative Forum.<sup>257</sup> To this end, **the role of the Consultative Forum should be strengthened by guaranteeing its effective access to information on all Frontex activities and regularly observe joint operations.**<sup>258</sup>

In the light of the previous observation, even though the EU and Frontex have adopted relevant measures to improve and ensure adequate protection and guarantees of fundamental rights during Frontex activities, additional measures to effectively address structural shortcomings are needed. Additional measures, in fact, need to be taken in order to ensure a systematic, transparent and independent monitoring and an effective reporting system ensuring that all human rights related incidents are reported and that the consequences for not reporting are defined and reinforced.<sup>259</sup> The Parliamentary Assembly of the Council of Europe calls on the EU also to ensure that the FRO and the Consultative Forum “report directly to the European Parliament on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns.”<sup>260</sup> In line with the Parliamentary Assembly of the Council of Europe position,<sup>261</sup> the European Ombudsman<sup>262</sup> recommended Frontex to establish an individual complaint mechanism handled by the FRO for individuals who consider that their rights were violated during Frontex activities. Such a mechanism should be accessible to all the persons involved and to those who become aware, such as journalists and NGOs. As highlighted by the Ombudsman, reporting obligations and complaints mechanisms are not alternatives but rather “complementary means to guarantee the effective protection of fundamental rights.”<sup>263</sup> In this respect it should be noted that Frontex is considering “the most efficient way

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255 Frontex General Report 2013, page 43.

256 PACE, Frontex. *Human rights responsibilities*, Resolution 1932 (2013), 25 April 2013, para 8.4, at page 2.

257 Article 1 (2) and Article 26 (a) (2) of the Regulation 1168/2011.

258 PACE, Frontex. *Human rights responsibilities*, Resolution 1932 (2013), 25 April 2013, para 9.6, at page 3.

259 *Ibidem*, para 8.4, page 2.

260 *Ibidem*, para 9.2, page 3.

261 *Ibidem*, para 9.5, page 3.

262 European Ombudsman, Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013, paragraphs 79 and 81, available at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark>.

263 *Ibidem*.

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*to gradually ensure access of individuals to the mechanisms established by Frontex to monitor compliance of fundamental rights within all its activities.”*<sup>264</sup>

With regard to asylum, although the Code of Conduct and all operational plans contain specific rules on the obligation to refer persons in need of international protection or seeking asylum to the competent national authorities, concerns persist considering that the Frontex General Reports, including the 2013 Report,<sup>265</sup> do not provide any data concerning asylum applications eventually made during Frontex activities. These reports do not *“mention in any way the fact that among those intercepted and returned were or could have been persons in need of and entitled to international protection”*.<sup>266</sup>

Further considerations should be made on the role of Frontex. Even though Frontex initially was more focused on its role of coordinator, the Agency has quickly and increasingly performed a key role in enforcing EU immigration policy.<sup>267</sup> However, as denounced in different international fora, the legal framework about the responsibility and accountability of Frontex is still unclear considering that the Frontex Regulation allows the Agency to *“initiate and carry out joint operations and pilot projects,”*<sup>268</sup> while the same Regulation assigns *“the responsibility for the control and surveillance of external borders lies with the Member States.”*<sup>269</sup>

Indeed, staff and equipment deployed for the implementation of Frontex activities fall under the authority of both the sending and the hosting States, while Frontex plays the role of coordinator for preparing and implementing these activities. Therefore, as denounced by the Parliamentary Assembly of the Council of Europe, **Frontex could be held responsible for the manner in which joint operations are carried out in practice, at least when they are initiated by the Agency.**<sup>270</sup>

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264 Annex G. Fundamental Rights Progress Report, Frontex General Report 2013, page 72.

265 Frontex, General Report 2013.

266 Christopher Hein, *Common European Asylum System – An Analysis from the Human Rights Perspective*, commissioned by the Council of Europe, Rome, April 2013, page 57.

267 Human Rights Watch, *The EU’s Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, 2011, page 11, available at: [http://www.hrw.org/sites/default/files/reports/greece0911webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf).

268 Article 3 (1) of the Regulation 1168/2011.

269 Article 1 (2) of the Regulation 1168/2011.

270 PACE, Frontex. *Human rights responsibilities*. C. Explanatory memorandum by Mr. Cederbratt, rapporteur, Report, Doc. 131618 April 2013, page 13.

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## V. BORDER CONTROL AND SURVEILLANCE MEASURES

This chapter intends to analyze to which extent border control and surveillance measures dictated or at least allowed by EU legislation may affect access of aliens to protection. In this regard, the chapter highlights a number of key developments with regard to selected aspects related to border controls and surveillance activities carried out under the Schengen Borders Code and Frontex operations. Where relevant, reference is also made to legislations of partner countries, main shortcomings and good practices related to the admission to the territory and to protection procedures of persons arriving at EU borders by air, land or sea.

### V. 1. External Border Control and Surveillance

The “Borders Code” provides for the absence of border control of persons crossing the internal borders between the EU Member States and establishes rules governing border control at their **external borders**,<sup>271</sup> defining the latter as “*land borders, sea borders and airports*.”<sup>272</sup> Although the Borders Code abolishes controls at internal borders between EU Member States, police measures may be carried out on the basis of spot-checks.<sup>273</sup>

External borders may be crossed only at **border crossing points** authorized by the competent authorities and during the fixed opening hours that shall be clearly indicated at these official borders, whenever they are not open 24 hours a day.<sup>274</sup> However, the “Borders Code” allows for the introduction of some exceptions to the obligation to cross external frontiers only at designated border crossing points.<sup>275</sup>

The “Borders Code” sets out the **entry conditions** for third-country nationals for stays not exceeding 90 days per a 180-day period.<sup>276</sup> Without prejudice to their international protection obligations, Member States shall introduce penalties, in accordance with their national legislations, for the unauthorized crossing of external borders other than border crossing points or, at times, other than the fixed opening hours.<sup>277</sup>

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271 Article 1 of the Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

272 Article 2 (2) of the Regulation 562/2006, and Annex VI as amended by Regulation 610/2013.

273 Article 21 (a) (iv) of the Regulation 562/2006.

274 Article 4 (1) of the Regulation 562/2006.

275 Article 4 (2) of the Regulation 562/2006 as amended by Regulation 610/2013.

276 Article 5 (1) of the Regulation 562/2006 as amended by Regulation 610/2013.

277 Article 4 (3) of the Regulation 562/2006.

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Whereas third-country nationals do not fulfil the entry conditions, they may be authorised by a Member State to enter its territory on humanitarian grounds, on the basis of national interest or because of international obligations.<sup>278</sup>

The **border surveillance** is conducted by border guards in the areas between border crossing points and the surveillance of these latter outside the fixed opening hours<sup>279</sup> in order to prevent persons from circumventing border checks, *“to counter cross-border criminality and to take measures against persons who have crossed the border illegally.”*<sup>280</sup>

The amended “Borders Code” has introduced the concept of the so-called **“shared border crossing point”** which is conceived as *“any border crossing point situated either on the territory of a Member State or on the territory of a third country, at which Member State border guards and third-country border guards carry out exit and entry checks one after another in accordance with their national law and pursuant to a bilateral agreement.”*<sup>281</sup>

The new Regulation<sup>282</sup> specifies 3 typologies of shared border crossing points, established on the basis of **bilateral agreements**, where border controls can be carried out. The first is established between a Member State and neighboring third-countries and allows that border guards of both countries carry out the exit and the entry through checks one after another in accordance with their national laws on the territory of the other party and under conditions laid down in the bilateral agreement.<sup>283</sup>

The second typology provides that shared border crossing points are established on a Member State territory where third-country border guards are authorized to conduct border control.<sup>284</sup>

Whereas a third-country national makes an asylum application in the Member State concerned s(he) shall be given access to the asylum procedure in accordance

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278 Article 5 (4) (c) of the Regulation 562/2006.

279 Article 2 (11) of the Regulation 562/2006.

280 Article 12 (1) of the Regulation 562/2006.

281 Article 1 (1) (e) of the Regulation 610/2013 adds the point 8 (a) to Article 2 (8) of the Regulation 562/2006.

282 Annex I (4) (a) (i) of the Regulation 610/2013, amends Annex VI of the Regulation 562/2006 adding point 1.1.4 and subsequents.

283 Annex I (4) (a) (i) (1.1.4), point 1.1.4.1 of the Regulation 610/2013: *“Member States may conclude or maintain bilateral agreements with neighboring third countries concerning the establishment of shared border crossing points, at which Member State border guards and third-country border guards carry out exit and entry checks one after another in accordance with their national law on the territory of the other party. Shared border crossing points may be located either on the territory of a Member State territory or on the territory of a third country.”*

284 Annex I (4) (a) (i) (1.1.4), point 1.1.4.2 of the Regulation 610/2013: *“Shared border crossing points located on Member State territory: Bilateral agreements establishing shared border crossing points located on Member State territory shall contain an authorization for third-country border guards to exercise their tasks in the Member State, respecting the following principles...”*

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to national and EU asylum *acquis*.<sup>285</sup>

Another shared border crossing point can be established in third-country territory where, on the basis of a bilateral agreement, Member State border guards may be authorised to conduct border controls in the third-country territory. In this respect it is worth noting that any border check conducted in third –country “shall be deemed to be carried out on the territory of the Member State concerned.”<sup>286</sup> In addition, whereas a third-country national makes an asylum application in the third-country territory, after having passed exit control by third-country border guards, s(he) shall be given access to the asylum procedure in accordance to national and EU asylum *acquis*.<sup>287</sup> In this case, the concerned third-country shall accept the transfer of the asylum applicant into the territory of the Member State.<sup>288</sup> This provision recognises the discretionary power to each Member State to sign a bilateral agreement with a third-country where it is authorised to exercise border controls before the physical arrival of third-country nationals in the EU territory. While this provision recognises the exercise of jurisdiction of the Member State concerned, it is not clear which procedure is to be applied when a third-country national makes an asylum application in a third-country either if admitted to the asylum procedure either in case his/her request of international protection is rejected. How will the legal safeguards provided by the “Union asylum *acquis*” and the principles set out in the *Hirsi* decision will be applied in practice?

### V.1.1 Refusal of Entry and the Principle of *Non-refoulement*

A third-country national who does not fulfil the entry conditions laid down in the “Borders Code” shall be refused entry to the territories of the Member States.<sup>289</sup> S(he) may be immediately returned to the port of departure or receive a deportation order and pending the execution of the order, be put under administrative detention. In case of an asylum application, special procedures (see below chapter V.2) may be applied, eventually with detrimental effect for persons belonging to the most vulnerable groups such as victims of trafficking, torture victims, unaccompanied

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285 Annex I (4) (a) (i) (1.1.4), point 1.1.4.2 (a) of the Regulation 610/2013.

286 Annex I (4) (a) (i) (1.1.4), point 1.1.4.3 of the Regulation 610/2013: “*Shared border crossing points located on third-country territory: Bilateral agreements establishing shared border crossing points located on third-country territory shall contain an authorisation for Member State border guards to perform their tasks in the third country. For the purpose of this Regulation, any check carried out by Member State border guards in a shared border crossing point located on the territory of a third country shall be deemed to be carried out on the territory of the Member State concerned. Member State border guards shall exercise their tasks in accordance with Regulation (EC) No 562/2006 and respecting the following principles...*”

287 Annex I (4) (a) (i) (1.1.4), point 1.1.4.3 (a) of the Regulation 610/2013.

288 Annex I (4) (a) (i) (1.1.4), point 1.1.4.3 (a) of the Regulation 610/2013.

289 Article 13 (1) of the Regulation 562/2006. “*A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States*”.

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minors who may not be able to provide immediately good reasons for the protection request and to illustrate their personal history.

A third country national who does not fulfil the entry conditions shall be refused entry. A person who stays on the territory of a Member State, after having crossed a border illegally, shall be apprehended and returned<sup>290</sup> in compliance with the *non-refoulement* principle.<sup>291</sup> As prescribed by the “Borders Code”, the refusal of entry shall be adopted without prejudice to the right to asylum and to international protection.<sup>292</sup> Borders rules shall be applied by Member States in full compliance of fundamental rights, obligations as regards international protection and *non-refoulement* principle.<sup>293</sup> With regard to the **conduct of border checks**, border guards, while performing their duties, shall “*fully respect human dignity, in particular in cases involving vulnerable persons*”,<sup>294</sup> and “*shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*”<sup>295</sup>

With regard to asylum, the “Borders Code” is silent on how border guards have to deal with the applications made by international protection seekers at the border. In turn, the **Schengen Handbook**<sup>296</sup>, containing non-binding guidelines, provides that every application for asylum and international protection made at borders must be examined by the competent authorities of Member States who assess whether the applicant qualifies either for the refugee status or for the subsidiary protection status.<sup>297</sup> The applicant is considered as such when s(he) “*expresses – in any way – fear of suffering serious harm*” if returned to his/her country of origin. “*The wish to apply for protection does not need to be expressed in any particular form. The word “asylum” does not need to be used expressly. the defining element is the expression of fear of what might happen upon return*”. In case of doubt, border guards must consult the national authorities responsible for examining the applications for

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290 Article 12 (1) of the Regulation 562/2006. Article 5 of the Return Directive 2008/115/EC.

291 Return Directive 2008/115/EC, whose article 5 refers to the principle of *non-refoulement*. Art. 5 states that “*when implementing this Directive, Member States shall take due account of (...) respect the principle of non-refoulement.*”

292 Article 13 (1) of the Regulation 562/2006.

293 Recital 20 of the Regulation 562/2006.

294 Article 1 (6) of the Regulation 610/2013 amending article 6 (1) of the Regulation 562/2006.

295 Article 6 (2) of the Regulation 562/2006.

296 Schengen Handbook – Common “*Practical Handbook for Border Guards (Schengen Handbook)*” to be used by Member States’ competent authorities when carrying out the border control of persons, at page 7.

Available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT>

297 Schengen Handbook, point 10.

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international protection.<sup>298</sup> Any application must be transmitted either to the national authority competent for its examination or to the authority which is responsible for allowing the entry of the applicant so that the request can be then examined by the competent authority. *“No decision to return the applicant must be taken by the border guard without prior consultation with the competent national authority or authorities.”*<sup>299</sup>

### V.1.2 Fingerprints Obligations

The “Borders Code”, although providing an identity check, does not contain specific provisions concerning the duty to fingerprint third-country nationals.<sup>300</sup> This matter in turn is regulated by the “Eurodac System.” Each Member State shall, in accordance with the safeguards, laid down in the ECHR and in the UN Convention on the Rights of the Child, *“promptly take the fingerprints of all fingers of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back.”*<sup>301</sup>

The amendments to the Eurodac Regulation that will come into use in July 2015, following the recast process agreed upon in 2013 by the Council and the

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298 Schengen Handbook, point 10.1: *“A third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence. The wish to apply for protection does not need to be expressed in any particular form. The word “asylum” does not need to be used expressly; the defining element is the expression of fear of what might happen upon return. In case of doubt on whether a certain declaration can be construed as a wish to apply for asylum or for another form of international protection, the border guards must consult the national authority(-ies) responsible for the examination of applications for international protection.”*

299 Schengen Handbook, point 10.3: *“Any application for international protection must be transmitted either to the competent national authority designated by each Member State for the purpose of its examination/processing or to the authority which is responsible for deciding whether to permit the applicant entry to the territory so that his/her application can be examined by the competent authority. No decision to return the applicant must be taken by the border guard without prior consultation with the competent national authority or authorities”.*

300 Article 7 (2) of the Schengen Borders Code provides that: *“All persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.”*

301 Article 8 the Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention. This Regulation came into use on 15 January 2003.

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Parliament,<sup>302</sup> has modified this norm as follows: *“Each Member State shall promptly take the fingerprints of all fingers of every third-country national or stateless person of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back or who remains physically on the territory of the Member States and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back.”*<sup>303</sup>

Member States are also obliged to promptly transmit to the Central Unit database the prescribed data related to the **third-country nationals and stateless persons** concerned, as set out by the Eurodac Regulation.<sup>304</sup> This Regulation provides that the concerned Member State of origin is responsible for ensuring that fingerprints are taken lawfully,<sup>305</sup> and that the foreigner is informed *inter alia* on the purpose for which the data will be processed within Eurodac and on the obligation to have his or her fingerprints taken.<sup>306</sup> It should be considered that this norm has been amended, now providing that the concerned foreigner shall be informed *“in writing, and where necessary, orally, in a language that he or she understands or is reasonably supposed to understand,”*<sup>307</sup> on *inter alia* the purpose for which his or her data will be processed in Eurodac, including the scope of the Dublin III Regulation, by using *“an explanation in intelligible form, using clear and plain language, of the fact that Eurodac may be accessed by the Member States and Europol for law enforcement purposes.”*<sup>308</sup> In addition, the foreigner has the right to have access to data and the

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302 Regulation 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Recast).

303 Article 14 (1) of Eurodac Regulation n. 603/2013.

304 Article 8 (2) of the Council Regulation 2725/2000. It should be considered that Article 14 (2) of the Recast Eurodac Regulation provides that: *“The Member State concerned shall, as soon as possible and no later than 72 hours after the date of apprehension, transmit to the Central System the following data in relation to any third-country national or stateless person, as referred to in paragraph 1, who is not turned back:”* In addition, Article 14 (3): *“By way of derogation from paragraph 2, the data specified in paragraph 2 relating to persons apprehended as described in paragraph 1 who remain physically on the territory of the Member States but are kept in custody, confinement or detention upon their apprehension for a period exceeding 72 hours shall be transmitted before their release from custody, confinement or detention.”*

305 Article 13 (1) (a) of Eurodac Regulation n. 2725/2000.

306 Article 18 (1) (d) of Eurodac Regulation n. 2725/2000.

307 Article 29 (1) of Eurodac Regulation n. 603/2013.

308 Article 29 (1) (b) of Eurodac Regulation n. 603/2013.

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right to request that inaccurate data relating to him or her are corrected.<sup>309</sup> This norm has been amended and provides also that *“unlawfully processed data relating to him or her be erased”* and that the concerned foreigner has *“the right to receive information on the procedures for exercising those rights including the contact details of the controller and the national supervisory authorities.”*<sup>310</sup>

Moreover, this amended condition provides that information shall be provided at the time when his or her fingerprints are taken.<sup>311</sup>

The main purpose of this EU-wide database of asylum seekers' and irregular migrants' fingerprints is to assist competent authorities in determining which Member State is to be responsible for examining an asylum application according to the mechanism and the criteria laid down in the *“Dublin Convention,”*<sup>312</sup> in order to prevent abuse of the asylum system by the submission of several asylum applications by the same person. As highlighted by Statewatch, the number of multiple asylum applications recorded in the Central Unit has increased from 17,287 in 2003 to 78,591 in 2012, shows not only a more systematic use of Eurodac by national authorities but *“it also suggests that many asylum-seekers are not satisfied with their initial asylum applications.”*<sup>313</sup>

The significant divergences of standards with regard to the asylum procedural guarantees, the different recognition rates and reception systems across Member States and the determination of asylum seekers to reach their relatives and communities in other countries where they can benefit from more solid welfare and prospects for integration, are all factors that have led asylum seekers to try to circumvent identification in Eurodac and the consequent transfer to other States. For some years now, there is, in fact, an increasing number of individuals mutilating their finger cups by using razors, knives, or acid or burning their fingers on burning hobs.<sup>314</sup> As reported by Frontex, in Spain migrants are reluctant to cooperate with authorities in providing their real names and nationalities, however most of them are assumed to be sub-Saharan.<sup>315</sup> In Italy, the majority of Syrians and Eritreans rescued at sea in the frame of *“Mare Nostrum”* humanitarian operation refuse to be fingerprinted and to seek asylum in Italy in order to reach in particular Sweden,

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309 Article 18 (1) (e) of Eurodac Regulation n. 2725/2000.

310 Article 29 (1) (e) of Eurodac Regulation n. 603/2013.

311 Article 29 (2) of Eurodac Regulation n. 603/2013.

312 Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

313 Statewatch, *Analysis, 11 Years of Eurodac*, Chris Jones, page 5.

314 Harriet Grant and John Domokos, *Dublin regulation leaves asylum seekers with their fingers burnt*, The Guardian, 7 October 2011.

315 Frontex, *Annual Risk Analysis 2014*, page 39 available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf)

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Switzerland, Germany and the Netherlands where their relatives and communities live and where they can benefit from State social benefits. These asylum seekers are generally well informed on the fact that after being fingerprinted, once arrived in the destination countries, they will be transferred again to Italy in application of the Dublin III Regulation on the basis of their previous irregular entry and fingerprinting conducted in the Italian territory. Italy has been criticised by other States, in particular by the Bavarian Interior Minister, Joachim Herrmann<sup>316</sup> as well as by Christopher Chope of PACE Committee on Migration, Refugees and Displaced Persons who denounced the Italian *laissez-faire* policy and flaws in identifying adequately the migrants who refuse to disclose their identity or allow their fingerprints to be taken. In PACE report it was underlined that Sweden “received 4 844 asylum applications from Eritreans compared with the Italian number of 2 216. The same is apparent in relation to Syrians, only 695 of whom sought asylum in Italy while 16 317 chose Sweden.”<sup>317</sup>

The “Eurodac system” does not provide common rules to be applied to force migrants to be fingerprinted, leaving Member States free to handle such issue.

According to the Procedures Directive, when asylum seekers refuse to comply with fingerprint obligations as set out in the Eurodac Regulation for the effective application of Dublin III Regulation, they may be channelled into accelerated procedures and/or conducted at the border or in transit zones.<sup>318</sup> In Italy many Eritreans and Syrians refuse to undergo the fingerprinting or any other identification procedure since they do not want to apply for asylum in this country even though they generally would meet the criteria to obtain international protection.

Italy is presently facing unprecedented arrivals by sea from North Africa. Hundreds of migrants and refugees are rescued at sea in the Mediterranean every day and immediately placed in receptions centres dislocated in the whole Italian territory. As underlined by UNHCR and Doctors without Borders (Medici senza Frontiere- Italy), differently from what happens at airports or at land borders, the rescued migrants are often heavily traumatised by their dangerous journeys and, therefore, they need time to recover.

Following the disembarkation operation, the Italian authorities, UNHCR and NGOs have not enough time to provide the rescued persons adequate information

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316 See Ansa Politics, *Alfano tells Herrmann “no comment”*, 22 August 2014. Additional details are available at: [http://www.ansa.it/english/news/politics/2014/08/22/alfano-tells-herrmann-no-comment\\_04282b83-a41b-4c54-bf4a-69e861e2bd56.html](http://www.ansa.it/english/news/politics/2014/08/22/alfano-tells-herrmann-no-comment_04282b83-a41b-4c54-bf4a-69e861e2bd56.html).

317 PACE Report *The large-scale arrival of mixed migratory flows on Italian shores*, Committee on Migration, Refugees and Displaced Persons (Council of Europe), Doc. 13531- 09 June 2014 Rapporteur: Mr Christopher CHOPE, United Kingdom, European Democrat Group.

318 Article 31 (8) (i) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180.0060:0095:EN:PDF>.

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on their rights and obligations, on the asylum procedures as well as on the rules set out in the Dublin III Regulation and on the possibility to be legally transferred to other Member States if they fulfil the prescribed criteria.

Differently from what stated in the mentioned PACE report, during the Epim project research activities carried out in Italy, no evidence was found concerning the thoughts of the Italian authorities to introduce DNA testing as a surrogate of the fingerprinting obligations. This appears an unfeasible solution considering the very high costs and the time needed before getting the results of such tests.

A circular has been issued by the Ministry of the Interior on 25 September 2014 commanding the police to photograph and fingerprint all migrants under whatever circumstances<sup>319</sup> together with a leaflet to be distributed to migrants in six languages informing them that their fingerprints will be obtained, whenever necessary, by the use of force. It remains to see how this will be applied in practice since the Police Trade Unions have already raised serious concerns on how to implement this circular, more especially on the legal basis relative to the use of force, if necessary.

### **V.2 Admission to the Territory and to Protection**

The recasting process of the Asylum Procedures Directive has been 20 months longer than the fixed deadline mainly due to the unwillingness of Member States to abandon their sovereign prerogatives and a wide power of derogations. Consequently the procedural guarantees provided in different Member States continue to vary considerably. In this respect it is worth recalling that the 2005 Asylum Procedures Directive was already considered by ECRE *“one of the most problematic of all pieces of legislation that have been adopted so far in the area of asylum”*<sup>320</sup> and as stated by UNHCR it *“does not fully ensure compliance with international refugee and human rights law, and that problematic provisions in the Directive contribute to weakness in the procedures of some Member States”*.<sup>321</sup> After a difficult process a Political Agreement<sup>322</sup> was finally reached and a compromise text was adopted.<sup>323</sup>

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319 See: <http://www.avvenire.it/Cronaca/Pagine/Migranti-schedati-un-ordine-.aspx> and also <http://www.redattoresociale.it/Notiziario/Articolo/469104/Stretta-del-governo-schedati-tutti-i-rifugiati-Ora-l-accoglienza-scoppiera>.

320 ECRE on EC Proposal to recast the Asylum Procedures Directive, Introduction, May 2010.

321 UNHCR Bureau for Europe, *Comments on the EC's Proposals for a Directive of the EP and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection status*, August 2010.

322 The initial EC Proposal COM 82009) 554 Final of 21710/2009 did not reach the phase of “trilogue” between the Commission, the Council and the Parliament. On 1 June 2011, the Commission presented an Amended Proposal that was criticised for proposing lower standards and guarantees. The Council presented in May 2012 an amended text that was endorsed by COREPER in June 2012. At the 8<sup>th</sup> Trilogue session a Political Agreement was reached on 21 March 2013.

323 Directive 2013/32/EU.

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The Procedures Directive applies only when the asylum seeker is physically present in the territory of a Member State. It does not apply, in fact, to requests for diplomatic or territorial asylum submitted to representations of Member States in Third-countries.<sup>324</sup>

Member States are bound by the provisions of the asylum *acquis*, when applications for international protection are made in their territory, including at the border, in the territorial waters or in the transit zones of Member States as set out by the Procedures Directive.<sup>325</sup> This Directive clarifies that the persons present in the territorial waters of a Member State should be disembarked on the land and have their applications examined.<sup>326</sup>

The objective to establish common rules on asylum procedures in the EU allowing applicants for international protection to benefit from equal rights and procedural guarantees in all Member States is still far from being achieved mainly due to the fact that the Procedures Directive still allows Member States to adopt fast-track procedures in addition to the regular one. The adoption of different procedures continues to highly contribute to the existence of diverging practices in Member States, some of which keep using them for the majority of asylum applicants rather than on exceptional grounds, as reported by UNHCR.<sup>327</sup>

Concerns persist on the following procedures:

- **accelerated procedures** that can be applied in different situations *inter alia* for irregular entry, arrival from a “safe country of origin”, for “clearly inconsistent and contradictory declarations made by the applicant” or for his/her refusal to comply with fingerprint obligations.<sup>328</sup> These procedures may be applied at border or in transit zones. In practice it may happen that asylum applicants with a fragile psychological state or victims of torture showing a non-cooperative attitude or giving incoherent details regarding their personal history because of their condition, run the risk of seeing their asylum requests rejected by the competent authorities. In this respect, concerns were raised by specialised

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324 Article 3 (2) of the Directive 2013/32/EU. Moreover, according to Article 3(3): “Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Directive 2011/95/EU”.

325 Article 3 (1) of the Directive 2013/32/EU.

326 Recital 26 of the Directive 2013/32/EU.

327 UNHCR, *Improving Asylum Procedures, Comparative Analysis and Recommendations for law and practice*, March 2010, available at: [https://www.unhcr.it/sites/53a161110b80eeaac7000002/assets/53a165ec0b80eeaac70003de/5improving\\_asylum\\_procedures.pdf](https://www.unhcr.it/sites/53a161110b80eeaac7000002/assets/53a165ec0b80eeaac70003de/5improving_asylum_procedures.pdf)

328 Article 31 (8) of the Directive 2013/32/EU.

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organisations and experts<sup>329</sup> on the treatment of torture victims in particular on special provisions regarding victims of torture and serious violence and unaccompanied minors.

- **border procedures** that may be applied at border point areas or transit zones,<sup>330</sup> in order to set up the admissibility of the asylum application<sup>331</sup> as established in Article 33 of the Directive, and to process asylum applications in an examination procedure that may be accelerated.<sup>332</sup>
- **admission to the asylum procedure** that can be denied *inter alia* on the basis of the concepts of “first country of asylum” and “safe third country”.<sup>333</sup> In this respect, the ECtHR, as reiterated in the *Hirsi* decision, established clear benchmarks aimed at avoiding the violation of the principle of *non-refoulement*. According to the Court, the mere fact that a State has ratified the Human Rights Convention is not sufficient to consider that country “automatically safe.” Regrettably, the Procedures Directive keeps allowing EU Member States the possibility to establish the list of the “safe third countries of origin” that can vary from one Member State to another. In fact, “[A]n applicant originated from a “safe country” has –in a kind of shifting of the burden of proof– to show that in his/her particular case the country is “unsafe”. This reduces, considerably, the prospect for a positive outcome of the protection request.”<sup>334</sup>
- the possibility for Member States **to omit or not fully examine** the substance of the claim made by an applicant arriving irregularly from a “European safe third country,”<sup>335</sup> despite the position of UNHCR considering the “automatic” exclusion of international protection applications made by a EU citizen contrary to the Geneva Convention.<sup>336</sup>

The Procedures Directive lays down two concepts: the concept of safe country of origin and the notion of safe third country. EU States may resort to them where

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329 Maieutics Handbook, *Elaborating a common interdisciplinary working methodology (legal-psychological) to guarantee the recognition of the proper international protection status to victims of torture and violence*, December 2012.

330 Article 43 (1) of the Directive 2013/32/EU.

331 Article 33 of the Directive 2013/32/EU.

332 Article 43 and Article 31 (8) of the Directive 2013/32/EU.

333 Article 33 of the Directive 2013/32/EU.

334 Christopher Hein, *Common European Asylum System: An analysis from the Human Rights Perspective*, Commissioned by the Council of Europe, Rome, April 2013, page 46.

335 Article 39 of the Procedures Directive 2013/32/EU.

336 UNHCR, Bureau for Europe, *Comments on the EC's Proposals for a Directive of the EP and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection status*, August 2010.

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specific criteria are fulfilled, in order to assess asylum applications under admissible or accelerated procedures instead of the ordinary one.

The Procedures Directive states that *“Member States may provide that an examination procedure (...) be accelerated and/or conducted at the border or in transit if (...) the applicant is from a **safe country of origin**.”*<sup>337</sup>

A third country may, after an individual examination of the asylum application, be considered as a safe country of origin for a particular applicant only if this latter has the nationality of that country or is a stateless person who formerly had habitual residence in that country and in both cases if the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection.<sup>338</sup>

Notwithstanding the strengthened procedural safeguards surrounding the application of the concept in the Procedures Directive - the safe country of origin should be designated as such “after an individual examination of the application” and “for a particular applicant” - however, such a concept still risks to put an insuperable burden on the applicant to rebut the presumption of safety in practice.

With regard to the concept of **safe third country**, the Procedures Directive provides that Member States may consider an application for international protection as inadmissible, and thus may not examine whether the applicant qualifies for international protection *“if a country which is not a Member State is considered as a safe third country for the applicant”*.<sup>339</sup>

Member States may apply the concept of safe third country when they have assessed that the life and liberty of the asylum applicant is not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; when the applicant is not at risk of serious harm as defined in the Qualification Directive; when the principle of *non-refoulement* and the prohibition of removal, in violation of the right of freedom from torture and cruel, inhuman or degrading treatment are respected; when it does exist the possibility to request refugee status and, if previously granted, to receive protection.<sup>340</sup> Member States may either conduct a case-by-case examination or determine a list of countries that can be considered as safe.<sup>341</sup>

The concepts of “safe country of origin” and “safe third country”, thus, raise serious concerns since they risk to substantially affect the purpose of the asylum procedure, establishing whether the applicant needs international protection

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337 Article 31 (8) (b) read in conjunction with article 37 of the Directive 2013/32/EU.

338 Article 36 (1) of the Directive 2013/32/EU.

339 Article 33 (1) and (2) (c) of the Directive 2013/32/EU.

340 Article 38 (1) of the Directive 2013/32/EU.

341 Article 38 (2) (b) of the Directive 2013/32/EU.

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relying only on general presumptions with reference to the respect of human rights in the country concerned.

On this point, ECRE emphasises that *“the risk of undermining the quality of the examination of international protection needs is inherent in such concepts because of the procedural disadvantage and, in particular, due to the increased, insurmountable burden of proof they tend to create for the applicants concerned from the start of the procedure.”*<sup>342</sup>

Therefore, given the potentially irreversible harm that may result (directly or indirectly) from returning an applicant to a third country or to his/her country of origin, the question of whether a country may be considered safe or not for a particular applicant must necessarily be the subject of an independent and rigorous scrutiny and must be dealt with a substantive determination procedure.

### V.2.1 Border Control at the Airports

Upon arrival at an airport of a EU Member State, the asylum applicant may be immediately admitted to “regular procedure” or channelled into “special procedures” before possibly entering the regular one.

In some Member States the legislation does not provide “special procedures”. In **Italy**, for instance, border police must allow the entry to applicants of international protection who, following their asylum request, are invited to lodge their application before the provincial police Headquarter (Questura) which is not competent to examine the asylum application. According to the Italian legislation, in fact, border police are not allowed to examine in any manner whatsoever the asylum application.

However, other Member States have introduced special procedures to be applied at borders and in the so-called “International transit zone.” Some States, in fact, have introduced the fictive legal concept of “international zones” at international airports and seaports, arguing that these areas are, in legal terms, situated outside the national territory, beyond the State jurisdiction.<sup>343</sup> **France**, for instance, keeps arguing that individuals in **transit zones** do not fall within their jurisdiction<sup>344</sup> since these areas are deemed not to be part of national territory despite the international and European legislation. In this respect the jurisprudence has clearly recognised that the responsibility of the State is engaged in the case of persons staying in a transit zone, implying therefore the applicability of its human rights obligations in these areas. As previously mentioned, the Procedures Directive provides that the applications for international protection shall be made in the territory of the

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<sup>342</sup> ECRE, *AIDA Annual Report 2013-2014*, page 48.

<sup>343</sup> S. Taylor, *Sovereign Power at the border*, in Pub. Law, vol.16, N.1, 2005, pages 55-77.

<sup>344</sup> FRA, *Handbook on European law relating to asylum, borders and immigration*, April 2013, page 34.

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EU Member States, including at the border or **in transit zones**.<sup>345</sup> The European Court of Human Rights has issued a number of rulings on this subject, in particular it is worth mentioning the *Amuur v. France* decision<sup>346</sup>. In this case, the French authorities argued that the applicants did not fall within French jurisdiction since they were held in the transit zone of a Paris airport. Thus they were deemed not have 'entered' France. The Strasbourg Court, however, concluded that "*despite its name, the international zone does not have extraterritorial status.*"<sup>347</sup>

Since this ruling, the issue of **transit zone detention** has been raised in international fora. The Special Rapporteur on the Human Rights of Migrants, in his February 2008 Report to the UN Human Right Council, stated that: "*Migrants and asylum-seekers are sometimes detained at airport transit zones and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies before being returned to their countries. The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the State's decision to be detained and returned and to apply for asylum, even in the presence of legitimate claims.*"<sup>348</sup>

Regrettably, **France** keeps maintaining the legal fiction of extra-territorial zones. At Roissy Charles de Gaulle airport, third-country nationals, among them a number of asylum seekers, are treated as if they had not entered France, subjected to a different legal regime, essentially meaning that "*they have fewer rights*", as affirmed by Human Rights Watch.<sup>349</sup>

Third-country nationals arriving on the French territory through airports or harbours may request at the border the admission into the country on asylum grounds.at the border.<sup>350</sup> During this procedure in the transit area, French authorities assess whether the asylum application is manifestly unfounded, and thus whether the person may be granted the authorization to enter the French territory and admitted to the asylum procedure.

As highlighted by the NGO ANAFE, the filter of thousands of third-country nationals carried out every year at the border has always favored the logic of migration control at the expense of the protection of asylum seekers.<sup>351</sup>

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345 Article 3 (1) of the Directive 2013/32/EU.

346 ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996.

347 ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, paras. 52. See also ECtHR, *Nolan and K v. Russia*, No. 2512/04, 12 February 2009; ECtHR, *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03, 24 January 2008.

348 Jorge Bustamante, *Report of the Special Rapporteur on the Human Rights of Migrants*, 2008, para. 47.

349 Human Rights Watch, *Caught in a Net: Unaccompanied migrant children in Europe*, page 12, available at: <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/SubmissionsDGDMigration/HRW.pdf>.

350 Article R 213-2 of Céseda.

351 ANAFE, *Le dédale de l'asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013, page 5, available at : [http://www.anafe.org/IMG/pdf/anafe\\_ta\\_dec2013\\_web.pdf](http://www.anafe.org/IMG/pdf/anafe_ta_dec2013_web.pdf).

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The decision on whether an asylum request is manifestly unfounded is made by the Ministry of Interior, on the basis of the opinion delivered by the Border Division of OFPRA (Office for the Protection of Refugees and Stateless Person).

Theoretically speaking, authorities should only examine whether the facts reported by the applicant are manifestly irrelevant with regard to the criteria set to recognize the status of international protection. Nevertheless, in practice, authorities examine the asylum request on its merits and assess its credibility as well.<sup>352</sup>

As reported by Forum Réfugés, in 2012, the asylum applications presented at the border have seen their lowest level since 2004, given that they were only 2,223 requests. This alarming decrease is mainly due to the hardening of French and European migration policies, aiming at preventing third-country nationals from leaving their country of origin legally and/or from having access to the EU territory<sup>353</sup>.

In 2012, out of the 2,223 requests on the admission to the French territory on asylum grounds, OFPRA gave a positive decision in only 13.1% of cases.<sup>354</sup> Since 2008 the rate of positive decisions delivered by OFPRA decreased significantly, with a dramatic drop in 2011 to only 10.1% of the requests assessed.<sup>355</sup>

During the border procedure, the applicant is held in a “waiting area” or “international transit zone” for an initial duration of 4 calendar days, that may be extended by the Judge of Freedom and Detention (JLD). The duration of the stay in the “waiting area” may last up to maximum 26 calendar days<sup>356</sup>. At the present, almost all foreigners detained in transit zones are those kept at the airports of Roissy CDG and Orly.<sup>357</sup>

According to the figures of the Ministry of Interior, in 2011 the average duration of the stay (in the waiting areas amounted to 3.5 days at Roissy CDG and 1.9 days at Orly). This means that many foreigners are returned before having been able to present their situation before a decision taken by the court.<sup>358</sup>

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352 Forum Réfugés, *AIDA Country report*, April 2014, available at: <http://www.asylumineurope.org/print/39>.

353 ANAFE, *Le dédale de l'asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013, page 5.

354 Forum Réfugés, *AIDA country report*, April 2014, available at: <http://www.asylumineurope.org/print/39>, on the basis of the data provided by the OFPRA, in its 2012 Activity report, 25 April 2013.

355 In 2008 the rate of positive opinions given by OFPRA was 31.1% compared with that of 2007, which amounted to 44.6%. This trend was confirmed in 2009 (26.8%) and 2010 (25.8%). ANAFE, *Theoretical and practical Guide, Procedure in waiting areas*, January 2013, available at: [http://www.anafe.org/IMG/pdf/guide\\_anafe\\_web-1.pdf](http://www.anafe.org/IMG/pdf/guide_anafe_web-1.pdf).

356 ANAFE, *Le dédale de l'asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013, page 5. See also: Forum Réfugés, *AIDA Country report*, April 2014.

357 ANAFE, *Le dédale de l'asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013.

358 Forum Réfugés, *AIDA country report*, April 2014, available at: <http://www.asylumineurope.org/print/39>.

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Nobody is exempt from the application of this procedure. As confirmed by a decision of the Court of Cassation of 2 May 2001,<sup>359</sup> also unaccompanied minors may be held in a “waiting area”, together with adults, without any specific guarantees provided for them.<sup>360</sup> In this respect, Human Rights Watch has reported that “*France detains as many as 500 children who arrive in the country alone each year in transit zones at the borders, where they are denied the protection and due process rights afforded other unaccompanied children on French territory*”.<sup>361</sup> They are sometimes detained with unrelated adults – in violation of international standards – making them vulnerable to exploitation and abuse. France has recently, with the EU support, built a children’s zone in the detention area at Roissy airport, but ,as reported by Human Rights Watch, it is too small to hold all detained unaccompanied children. In 2013, in at least one occasion, more than half of the children detained were held with adults.<sup>362</sup>

With regard to **information, legal counseling and legal assistance** in the transit area, there is no permanent legal adviser or NGO presence in the “waiting areas.”<sup>363</sup> Asylum seekers must therefore try to contact a legal adviser by phone from these areas, where persons may not have effective access to a telephone.<sup>364</sup> As underlined by the NGO ANAFE, to contact a lawyer, these persons should dispose of a prepaid phone card. In some French airports asylum seekers held in transit zones are initially provided with a free phone card which is often used to get in contact with their families, whereas in some other airports no cards are given to asylum applicants.<sup>365</sup> These difficulties have also been highlighted by the General Controller of places of freedom deprivation who pointed out that in waiting areas, there are telephones generally in good conditions, but no explanation on how to use them is provided to foreigners. Only those who have money can purchase phone cards.<sup>366</sup>

No legal adviser is present during the OFPRA interview. With regard to the presence of a third party, only the legal representatives for unaccompanied children are allowed to be present during the interview. Nevertheless, the border police itself acknowledges that not all unaccompanied children at the Roissy airport “waiting

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359 Court of Cassation, civil chamber, 2 May 2001, Stella I., appeal no. 99-50008.

360 Forum Réfugiés, *AIDA country report*, April 2014, available at: <http://www.asylumineurope.org/print/39>.

361 Human Rights Watch, *France: Unaccompanied Children Detained at Borders, 500 a Year Held in Transit Zone*, 8 April 2014, available at: <http://www.hrw.org/news/2014/04/08/france-unaccompanied-children-detained-borders>.

362 *Ibidem*.

363 Forum Réfugiés, *AIDA Country report*, April 2014, available at: <http://www.asylumineurope.org/print/39>.

364 *Ibidem*.

365 ANAFE, *Le dédale de l’asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013, page 5.

366 Controller General of prisons and detention centers, 2011 Activity report, April 2012.

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area” are assisted by a legal representative (Administrateur Ad-Hoc) as provided by law.<sup>367</sup>

Against the decision of “non admission” into French territory, an **appeal** within the following 48 hours can be lodged before the Administrative Court. This appeal has a suspensive effect.<sup>368</sup>

There are, however, many practical obstacles for lodging appeals at the border, considering the short delay to write the appeal with a legal justification in French, and the lack of free interpretation service available in the “waiting areas”. ANAFE and other NGOs such as Forum Réfugiés generally rely on some volunteer interpreters who are not always available.<sup>369</sup> There is no “on duty” lawyers system in the waiting areas where, in most of them NGOs try to provide a telephone legal advice service. In “transit zones” attempts to return third-nationals may be carried out at any moment. In principle, this measure should not concern asylum seekers during the admissibility procedure. However, the NGO ANAFE has collected the evidence of several third-country nationals asylum seekers placed in the transit zone at the airport of Orly who have been subject to attempts of removal.<sup>370</sup> In December 2013, ANAFE has publicly denounced the case of an Eritrean asylum seeker who the Border police had tried to board on a plane directed to Bahrain within the 48 hours following the rejection of his asylum claim by OFPRA, disregarding his right to lodge an appeal to the Administrative Court.<sup>371</sup>

In **Germany**, the airport procedure applies “if a person arrives on a flight from a non-Schengen country, applies for asylum at the border and is a national of a third safe country or unable to present a valid passport, this asylum application will be treated in the fast track procedure”<sup>372</sup>. The “procedure in case of entry by air” is legally defined as an “asylum procedure that shall be conducted prior to the decision on entry” to the territory.<sup>373</sup> It should be also noted that this procedure can be applied only when asylum seekers can be accommodated in the airport premises during the whole procedure and “if a branch office of the Federal Office for Migration and Refugees is assigned to the border checkpoint”.<sup>374</sup> Currently these facilities do exist in five

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367 Article L 221-5 of Ceseda.

368 Article L 213-9 of Ceseda.

369 ANAFE, Newsletter no. 10, testimony of support workers, December 2012.

370 ANAFE, *Le dédale de l’asile à la frontière: comment la France ferme ses portes aux exilés*, décembre 2013, pages 24-25.

371 ANAFE, *Zone d’attente de l’aéroport de Roissy: La France tente de refouler illégalement un demandeur d’asile érythréen*, 3 December 2013, available at: <http://www.anafe.org/spip.php?article273>.

372 English version of the Asylum Procedure Act: [http://www.gesetze-im-internet.de/englisch\\_asylvfg/englisch\\_asylvfg.html#p0138](http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0138).

373 Section 18a of the Asylum Procedures Act.

374 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34 available at :<http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

airports.<sup>375</sup>

Border Police (*Bundespolizei*), the authority who firstly meet asylum seekers upon arrival, inform the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge- BAMF*) on the asylum requests in order to allow the latter to organize an asylum interview within a few days (not fixed by law).

As reported by the NGO Informationsverbund Asyl und Migration, the airport procedure *“usually applies to applicants who do not have valid documents upon arrival at the airport, but it may also apply to applicants who ask for asylum at the border authorities in the transit area and to those who come from a “safe country of origin.”*<sup>376</sup>

Pro Asyl has strongly criticized the selection of persons channeled into the accelerated airport procedure often based on general and unfair criteria, mainly when asylum seekers do not hold valid travel documents,<sup>377</sup> regardless of the 1951 Geneva Convention provision<sup>378</sup> stating that refugees (and asylum seekers) should not be punished for illegal entry if there are good reasons for it.

As reported by ProAsyl, the border police, being the first and only public authority to meet potential asylum seekers at the airport, have in some cases failed to recognize that the persons concerned were in need of international protection. *“Three Chinese minors and a Pakistani citizen did not get access to the procedure at all, while a Tunisian citizen was admitted to it with some difficulty”.*<sup>379</sup>

Asylum seekers, during the initial phase of the fast-track airport procedure get in contact only with police and BAMF authorities. The border police make interviews with the assistance of interpreters. The German legislation is silent on how such interviews must be conducted and on which kind of information material is to be distributed. Serious concerns have been raised on information and interpretation rights which are not always ensured in practice.

During the airport procedure, the **personal interview** aiming at the full examination of the asylum application is carried out by the Federal Office for Migration and Refugees (hereafter “Bundesamt”) with the presence of an interpreter. It should be considered that border police may also conduct a preliminary interview

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375 The necessary facilities exist in the airports of Berlin (Schönefeld), Düsseldorf, Frankfurt/Main, Hamburg and Munich. Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

376 By definition of the law, all EU member states are “safe countries of origin”. In addition, Ghana and Senegal are defined as “safe countries of origin” in an addendum to the Asylum Procedures Act. Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, at page 35 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

377 Epim German Country Report.

378 Article 31 of the 1951 Geneva Convention.

379 Epim German Country Report.

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which includes questions on the travel route and on the reasons for leaving the country of origin<sup>380</sup>. In these cases, the police report interview is then passed on to the Bundesamt who can use the information provided to the police authorities.<sup>381</sup> On this point UNHCR has expressed its concerns when reporting that discrepancies between the information gathered by the border police and the statements made during the personal interview are sometimes used to cast doubt on the applicant's credibility.<sup>382</sup>

Moreover, as reported by Pro Asyl, many asylum seekers arriving at the airport holding forged documents fear the reactions of the authorities. Migrants might, in fact, hesitate in presenting themselves spontaneously to the border police. This hesitation, however, is often interpreted as an indication that the person concerned has something to hide and is not genuinely in need of international protection. The observations made by border police in this regard are usually included in the police report related to the asylum seeker concerned, influencing negatively the decision taken by the competent decision-making authorities.<sup>383</sup>

NGOs have severely and repeatedly criticised the quality of airport procedures as deficient and "structurally flawed"<sup>384</sup> and that, *"based on case studies the opinion is maintained that the interviews at the airport are often imbalanced and that the decisions often are of an inadequate quality."*<sup>385</sup>

Pro Asyl has also criticised deficiencies *"regarding the assessment of the political and the Human Rights situation in the country of origin."*<sup>386</sup> With regard to Country of Origin Information, *"[T]here are numerous reports, that the BAMF google information or read on Wikipedia during the interview. Using this kind of unclear information from unclear sources is not an acceptable way of attempting to verify the information given by the asylum seeker. The access to and use of valid and reliable COI is pivotal to making a correct decision in an asylum case."*<sup>387</sup>

As reported by Informationsverbund Asyl und Migration, in December 2007, two Eritrean asylum-seekers were deported to Eritrea following the decision to reject their asylum applications as "manifestly unfounded" during the airport procedure at Frankfurt/Main, despite the declared fear of facing prosecution in their home

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380 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

381 Epim German Country Report.

382 UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, 2010, page 63.

383 Epim German Country Report.

384 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

385 Epim German Country Report.

386 *Ibidem*.

387 *Ibidem*.

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country for having deserted the army. In May 2008, upon arrival in Eritrea, they were arrested. The Frankfurt Administrative Court obliged the authorities to grant refugee status to both asylum-seekers after their deportation. The Eritreans finally managed to return to Germany in 2010.<sup>388</sup>

In April 2013, several NGOs reported that an Indian national, Devender Pal Singh Bhullar, was at risk of imminent execution in India for the alleged involvement in a bomb attack in 2013. After his asylum application had been rejected during an airport procedure in 1994, he was deported to India and arrested by the Indian authorities shortly after his return. When the Indian Supreme Court finally upheld the death penalty in April 2013 he had spent more than 18 years in prison. According to a statement by Amnesty International, the trial against Devender Pal Singh Bhullar's trial had fallen far short of international standards. Moreover, Pro Asyl reported that an administrative Court in Germany had overruled the decision following the airport procedure two years after the deportation.<sup>389</sup>

Within two calendar days subsequent to the asylum application the Bundesamt can take the following **decisions**:<sup>390</sup>

a) reject the application considered "manifestly unfounded." In this case the entry into the territory is denied. A copy of the decision is sent to the competent Administrative Court. The applicant may ask the Court for an interim measure against deportation within three calendar days.

b) the applicant is granted protection or receives a rejection decision considered not manifestly unfounded or "unfounded". In these cases, the entry into the territory and the access to the regular procedure is granted. However, this option seems to be irrelevant in practice since the Bundesamt always grants the entry to the territory and the access to the regular asylum procedure if the application is not rejected as manifestly unfounded.

c) authorize the entry into the territory and access to the regular procedure since the Bundesamt declares to be unable to decide upon the application within the prescribed deadline.

d) authorize the entry into the territory and access to the regular asylum procedure, since the Bundesamt has not taken a decision within two calendar days

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388 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

389 Amnesty International, India: Government urged to stop all executions as new concerns emerge. Public Statement, 17 April 2013; Pro Asyl. Nach rechtswidriger Abschiebung aus Deutschland: Davinder Pal Singh Bhullar in Lebensgefahr (After illegal deportation from Germany: Davinder Pal Singh Bhullar's life is in jeopardy). Press release, 17 April 2013.

390 Epim German Country Report. See also Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, at page 35 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>

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following the interview.<sup>391</sup>

In practice, the third option is the most common outcome. In fact, as reported by the NGO Informationsverbund Asyl und Migration,<sup>392</sup> in 2012, 720 out of 787 potential airport procedures were halted because the Federal Office notified the border police that no decision would be taken within the time-frame required by law, while in 2013, 899 out of 972 potential airport procedures were interrupted.<sup>393</sup> In 2012, only in 60 cases a decision was taken within the two-day period, 59 of which were rejections classified as “manifestly unfounded”, whereas in 2013 the Federal Office took a decision in two days in 48 cases, all of which were rejections classified as “manifestly unfounded.”<sup>394</sup>

Rejected asylum seekers who were considered inadmissible during the airport procedure may be sent either back either to the country of previous transit and/or stay, as it happens in most of the cases according to Pro Asyl, or back to their country of origin.<sup>395</sup>

Within two days from the decision rejecting the asylum application considered as manifestly unfounded, the border police notifies the applicant with the decision of not allowing the entry in Germany. The rejected asylum seeker is then subjected to the accelerated deportation procedure which provides with less procedural guarantees in comparison with those provided to asylum seekers applying for asylum within the German territory.<sup>396</sup>

As a general rule, the appeal against “manifestly unfounded” decisions is submitted to the court contextually with a request for an interim measure within three calendar days to suspend the deportation process.<sup>397</sup> The denial of entry as well as any other measures to enforce deportation are suspended for the whole period pending the decision of an administrative court regarding the request for an interim measure. Nevertheless, Pro Asyl has reported that “the German Border Police are allowed to start a deportation, even before the Court has adopted a decision rejecting the interim measure. According to German law, it is sufficient that the judge has written: “Der Antrag wird abgelehnt” (the application is rejected), for the border police

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391 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>.

392 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 35.

393 Federal Office for Migration and Refugees, Das Bundesamt in Zahlen 2013 – Asyl (*The Federal Office in numbers 2013 – Asylum matters*). February 2014, page 41.

394 In these cases, the Convention on International Civil Aviation (ICAO Convention) applies. See Annex 9, that has the title “Facilitation”, and within this Annex Chapter 5, that has the title “inadmissible persons and deportees”. For more information please see here: [http://www.icao.int/Documents/annexes\\_booklet.pdf](http://www.icao.int/Documents/annexes_booklet.pdf), pages 15 and 16.

395 Epim German Country Report.

396 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014.

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*to launch the deportation procedure.”<sup>397</sup> “If the Court does not decide on this request within 14 calendar days, the asylum-seeker must be granted entry to the territory.”<sup>398</sup>*

The appeal and the application of an interim measure are both based on written statements without hearing the applicant.<sup>399</sup> In fact, although these manifestly unfounded cases are mainly based on credibility, there is no face-to-face contact between the asylum seeker and the judge. The administrative court has the possibility to organise an oral hearing at the airport, however this possibility is never used in practice.

According to Pro Asyl, asylum seekers at airports face huge obstacles in benefitting from legal counselling and assistance for procedural or practical reasons: language difficulties, time constraints, lack of money and of knowledge on how to access free legal aid. In addition, it may happen that asylum seekers fear police authorities who might intimidate them.

The procedure is too short to allow, in practice, asylum seekers access to legal aid, especially at the early stage of the procedure.<sup>400</sup> For the lawyer or the legal counsellor it is extremely difficult to build in such a short time the necessary trust and cooperative relationship with the rejected asylum seeker, left alone during the previous administrative phase and who may not trust lawyers conceived as State representatives. In case of appeal, the deadline for bringing evidence to the court is of only 7 days from the notification of the negative decision. It is often impossible to present documentary evidence of the physical and psychological state of the asylum seeker concerned.

During the first phase of the airport procedure, free legal aid is not provided. Asylum seekers benefit from free legal aid soon after they are notified with a rejection decision which they can appeal before the administrative court. This right is not provided by law, but results from a decision of the Federal Constitutional Court.<sup>401</sup> According to this decision, legal aid can be provided by any available person or institution sufficiently qualified in asylum law. In practice, the association of lawyers of the region where the airport is based coordinates a consultation service with fully qualified lawyers paid by the State. If an asylum applicant wants to speak to a lawyer, the border police contacts one of the lawyers named by the association of lawyers as soon as a formal denial of entry is issued, which includes the rejection of the asylum application.

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397 Epim German Country Report.

398 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014.

399 Epim German Country Report.

400 *Ibidem*.

401 15. Federal Constitutional Court/Bundesverfassungsgericht, decision of 14 May 1996 – 2 BvR 1516/93 –, cf. Reinhard Marx. AsylVfG – Kommentar zum Asylverfahrensgesetz (Asylum Procedures Act – Commentary), 7th edition, 2009, page 432.

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In this respect, Pro Asyl calls for the establishment of a help-desk or institutionalized, independent legal aid office at border crossing points to make sure that potential asylum applicants are provided with the necessary and proper information and assistance. These services should be ensured during the initial phase of the airport procedure, considered that free legal aid is guaranteed only after an asylum request has been rejected.<sup>402</sup>

Moreover, Pro Asyl has denounced the fact that vulnerable persons are also subjected to the airport procedure despite the fact that they are minors, tortured victims, ill persons with special needs. Airport procedures are especially detrimental to vulnerable persons who may require additional time and adequate care and conditions to be able to trust their interlocutors and therefore describe their personal circumstances.<sup>403</sup> As reported by Pro Asyl, in general there are no independent doctors, psychologists or other health personnel available at the airports to conduct the necessary medical examinations and write medico-legal reports on the personal conditions of asylum seekers within such a short timeframe. This procedure does not envisage any possibility to identify and refer to specialists traumatized asylum seekers whose asylum requests should in any way be examined in the regular procedure.<sup>404</sup>

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402 *Ibidem*.

403 *Ibidem*.

404 *Ibidem*.

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## Frontex airport operations

Border control activities are of the exclusive responsibility of Member States, while Frontex coordinates joint operations at those borders which are subject to significant pressure, contributing to reinforce the capacities of States in a various areas related to border control.

Frontex air-border operations mainly consist in passport control as well as in “*information-gathering and analysis of new modi operandi and other intelligence, effective information exchange between airports, airlines and Member States*” and “*the use of cutting edge technology to detect forged documents and other deceptions*”<sup>405</sup> by specialised trained officers. Frontex presently receives up-to date information from more than 130 airports and provides weekly a European overview of the situation at EU external air borders and rapid alerts on new trends.<sup>406</sup>

The Pulsar Multiannual Programme includes air border joint operations and several pilot projects. The Pilot Project Flexi Force has been set up to increase the effectiveness of border controls at EU airports and to enhance operational cooperation with third countries, the EU Agencies and International organisations.<sup>407</sup>

The so-called “**new way of return**” whereby a charter flight is organised by a third country to collect their own nationals in the European territory is considered as a good practice in terms of good results and cost-efficiency by Frontex.<sup>408</sup>

Among operations at air borders carried out in 2013<sup>409</sup>, it is worth mentioning the joint operation “METEOR”, carried out from 19 September to 1 October 2013 at the Lisbon Airport in Portugal, targeting flights identified as at high-risk for document fraud: namely from Accra (Ghana), Bamako (Mali), Bissau (Guinea-Bissau) and Dakar (Senegal). “*The joint operation sought not only to identify irregular migrants entering the EU, but also those embarking in the EU en route to the same destinations, who had overstayed the time limit of their conditions of entry or who were illegally present in the EU with no evidence of lawful entry or stay.*” *The use of the Advance Passenger Information system in cooperation with air carriers significantly contributed to strengthening Member State capabilities.*”<sup>410</sup>

405 Additional information is available at: <http://frontex.europa.eu/operations/types-of-operations/air>.

406 *Ibidem*.

407 26 Member States and 7 non-EU countries and 26 airports participated in the Flexi Force implementation (107 officers deployed/redeployed and 1020 incidents recorded). For additional information see: Frontex, *General Report 2013*, page 21.

408 Frontex, *General report 2013*, page 18.

409 “Focal Points Air” (Region Concerned: EU and partner Third Countries) from 1 January to 31 December 2013, Aim “*To provide local support for easy implementation of Air Border activities, enhancing knowledge of officers involved. To enhance the capabilities of intermediate managers and to step up in effective operational cooperation with Third Countries having Working Arrangements with Frontex.*”; “Flexi Force”, (Region concerned: EU and partner Third countries), from 4 April to 3 July 2013, Aim: “*Joint Operation Flexi Force and its operational modules were aimed to be a key response mechanism to face flows of irregular migrants. By fully flexible operational actions, impacting as well illegal immigration and criminal networks. It enhanced operational cooperation with Third Countries, EU Agencies and International Organizations.*”

Any additional information concerning Frontex-coordinated air-borders operations can be found in the Agency’s archive of operations available at: <http://frontex.europa.eu/operations/archive-of-operations/>.

410 Frontex, *General Report 2013*, page 20.

### V.2.2 Land Border Control

The Schengen area extends along 44.000 km of external sea borders and almost 9.000 km of land borders.<sup>411</sup> Border checks are usually conducted at border crossing points set up at road and rail points of entry into the EU. In addition to these checks, border guards conduct border surveillance activities during joint operations at land borders.

The Eastern Mediterranean external borders, in particular the land and maritime borders between Greece and Turkey are still considered among the main entry point of irregular migration to Europe. **Greece**, having the duty to control its part of EU external border, has introduced a combination of measures aiming at reinforcing border controls at its land and sea borders. To face the significant influx of migrants and asylum seekers attempting to cross the Greek-Turkish border, the Hellenic authorities have adopted the “Action plan on Asylum and Migration Management” reforming the Greek migration and asylum system.<sup>412</sup>

Moreover, Greece has reinforced border controls through a series of operations. **Aspida operation** (Shield) was launched in August 2012 aiming at reinforcing surveillance and patrolling at the Greek-Turkey land border, deploying more than 1800 additional Greek officers in the Evros Region as well as patrol boats to strengthen river controls, using sophisticated surveillance technology.

In 2012, the construction of about **10 km long and 2,5 m high fence**, between the villages of Kastanies and Nea Vyssa, at the land border of the Evros river which separates Greece and Turkey was terminated, despite severe criticism raised by the European Commission on this project.<sup>413</sup>

Together with increased border controls, administrative detention remains the major deterrent policy response adopted by Greek authorities to migrants who attempt to entry and stay irregularly in Greece. According to this policy, in fact, all migrants detected when irregularly entering Greece are systematically detained since they are criminalised for the sole reason of their irregular migration. In addition, early August 2012, the Greek authorities launched the “**Xenios Zeus**” operation aiming at arresting migrants in irregular situation in Attica and Evros region as well as in Athens and other cities. As reported by the PACE-Council of Europe<sup>414</sup> and Human

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411 Additional information are available at: <http://frontex.europa.eu/operations/roles-and-responsibilities>

412 In August 2010, Greece has presented to the Commission a Plan of Action for the management of immigration, revised in January 2013, which addresses *inter alia* the access to international protection and the establishment for an effective system for border management and repatriation. Additional details are available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/p4\\_progressreport/p4\\_progressreport\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_progressreport/p4_progressreport_en.pdf).

413 Answer of Mrs. Malmstroem to a parliamentary question (2011).

414 PACE, Council of Europe (2013) *Migration and asylum: mounting tensions in the Eastern Mediterranean*.

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Rights Watch<sup>415</sup>, during the “cleansing operation”, 65.800 foreigners have been arrested between August and December 2012, out of which only 4.100 persons were irregularly living in Greece, raising concerns regarding the non-discrimination principle. ECRE<sup>416</sup> and other human rights organizations, in fact, have expressed serious concerns on the nature of this operation and the risk of arbitrary arrest mainly based on somatic traits, of arbitrary detention and of *refoulement*. This has resulted in widespread detention of migrants in police or pre-removal detention facilities where they were obliged to live in deplorable conditions, as denounced by several international organizations and NGOs.<sup>417</sup> The duration of detention has passed from 3 to 6 months and currently may be extended to 18 months.<sup>418</sup> The Greek State Legal Council published on 20 March 2014 an opinion authorizing detention pending removal beyond 18-month limit set by the EU Return Directive when foreigners refuse to cooperate with the authorities during the expulsion procedure<sup>419</sup>. This appears to be in violation of both the Greek legislation<sup>420</sup> and the EU law as well as in contradiction with the relevant European jurisprudence.<sup>421</sup>

All these measures have caused the significant decrease of arrivals of asylum seekers and migrants in the Evros region by land, from 200 persons per week at the beginning of August 2012 to 10 people per week in October 2012.<sup>422</sup>

With the increasing obstacles at land border, a growing number of asylum seekers and migrants are being forced to make use of more dangerous sea routes,<sup>423</sup> departing from Turkey, mainly from Izmir, and directed to the islands of the Aegean Sea or to Bulgaria and some countries of the Western Balkans.

According to the Council of Europe, 3 280 persons were arrested from August to December 2012 at the Greek sea border in comparison with the 65 persons arrested between January and July 2012.<sup>424</sup>

With the heightened security in the Greek territory, many migrants and refugees are changing their routes trying to cross the border between Turkey and Bulgaria.

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415 Human Rights Watch (2013) *Unwelcome guests. Greek police abuses of migrants in Athens*.

416 Ecre Press Statement on the round-ups of migrants in Greece, ECRE, 16 August 2012.

417 MSF (2010) *Migrants in detention. Lives on hold*.

418 Law 3907/2011.

419 For additional information see UN Working Group on Arbitrary Detention (2013) mission to Greece (21-31 January 2013).

420 Articles 5 and 6 of the Greek Constitution and article 325 of the Criminal Code.

421 CJUE, C 357/09 Kadzoev and ECtHR John v. Greece 2007.

422 Frontex, *Entre Grèce et Turquie: la frontière du déni*, FIDH-Migreurop- REMDH, page 19.

423 *Migration and asylum: mounting tension in the Eastern Mediterranean*, PACE, Council of Europe, Committee on Migration, Refugees and Displaced Persons Report, Doc. 13106 of 23 January 2013. Rapporteur, Ms. Tineke Strik. Additional information is available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19349&Language=en>.

424 *Ibidem*.

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In **Bulgaria**, in 2012<sup>425</sup>, the total number of migrants were about 1,700, but in 2013 the number rose up to 11,158,<sup>426</sup> *“ten times the annual figure before the Syrian conflict.”*<sup>427</sup>

Bulgaria has immediately reacted by securing its borders through different measures, among them the completed 30-kilometre barbed-wire fence, three meters high, and the deployment of more than 1500 additional police officers posted at intervals of some 300 meters, to stem the flow of migrants and refugees, mainly Syrians. The head of the State agency for refugees, Nikolay Chirpanliev stressed that, in line with commitment of Bulgaria to protect EU external borders and prevent illegal immigrants from trespassing land borders, the fence and the increased police presence has highly contributed to the decrease of irregular entries, in fact *“[C] ompared with a rate of 2,000 per month between October and December 2013, between 300 and 400 people now enter the country illegally every month.”*<sup>428</sup> Unhcr,<sup>429</sup> Amnesty International,<sup>430</sup> and the Bulgarian Helsinki Committee<sup>431</sup> have raised serious concerns regarding the dramatic drop of the number of people entering Bulgaria via this border. Whereas in the autumn of 2013, almost 8,000 people entered Bulgaria from Turkey irregularly, only 139 and 124 entered in January and February 2014 respectively.<sup>432</sup>

Push-backs at the border with Turkey were reported by Human Rights Watch that in its April 2014 report<sup>433</sup> presents testimonies of migrants and asylum seekers who after being apprehended either in the Bulgarian territory or at the border, were collectively returned to Turkey, after having been beaten or otherwise mistreated by the Bulgarian border police.

In a meeting with the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament<sup>434</sup>, the European Commission confirmed that it

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425 Daily Report from the Ministry of Interior of the Republic of Bulgaria, 2 January 2014.

426 Daily Report from the Ministry of Interior of the Republic of Bulgaria, 26 March 2014.

427 Daily News *“Bulgaria underfire over anti-refugees border fence.”* Available at: <http://www.hurriyetdailynews.com/bulgaria-under-fire-over-anti-refugee-border-fence.aspx?pageID=238&nID=69269&NewsCatID=351>.

428 Daily News: *Bulgaria underfire over anti-refugees border fence.*

429 Additional details available at: <http://www.unhcr-centraleurope.org/pdf/where-we-work/bulgaria/refugee-situation-in-bulgaria-7-february-2014.html>.

430 Additional details available at: <http://www.amnesty.org/en/library/asset/EUR15/002/2014/en/7a706247-94ac-4e65-a2e5-c7f8804c02bd/eur150022014en.pdf>.

431 Additional details available at: <http://www.novinite.com/articles/158133/Bulgaria's+Turn+to+Rejection+Immigrants>.

432 Ecre <http://ecre.org/component/content/article/70-weekly-bulletin-articles/666-european-commission-launches-infringement-procedures-against-bulgaria-and-italy-for-possible-refoulement-of-syrian-refugees.html>.

433 Human Rights Watch, *Containment Plan Bulgaria's Pushbacks and Detention of Syrians and Other Asylum Seekers and Migrants*, April 2014.

434 Additional information is available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20140401-0900-COMMITTEE-LIBE>.

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has launched an infringement procedure against Bulgaria,<sup>435</sup> based on the reports denouncing the possible *refoulement* of Syrian refugees.<sup>436</sup> In line with this procedure, during the initial phase of this pre-litigation administrative process, carried out through a letter of formal notice sent to Bulgaria, the European Commission itself has requested to the Bulgarian authorities to submit their reasoned opinions on the identified concerns to allow them to conform voluntarily to European law.

**Hungary**, according to the police statistics, 4.476 persons were removed in 2012, out of which 4.315 persons were expelled to Serbia through the Serbian-Hungarian border where the highest number of migrants and asylum seekers try to enter Hungary. During the same year, 696 asylum applications were registered.<sup>437</sup>

Border police, as one of the immigration authorities, when ordering a return, are required to contact the Office of Immigration and Nationality ("hereafter OIN") in cases of doubt concerning the risk of torture or inhuman, degrading treatment the foreigner(s) may face upon return.

Concerns were raised by UNHCR and HHC on the OIN practice providing a very short (one- sentence long) opinion on the risk of *non-refoulement* without really giving any explanation on the decision taken. Actually, OIN has approved the expulsion of third-country nationals in almost 100% of the cases, showing that this safeguard is not adequately applied in practice. The police is obliged to implement such a decision accordingly. There is no NGO permanently present at land borders, therefore no independent organisation is monitoring how the first interview is conducted by the competent authorities. With regard to HHC monitoring activities conducted twice a month at the Serbian-Hungarian border, it is quite rare that a foreigner is actually present in the short-term detention facilities at the border crossing point.

By law, in line with the *non-refoulement* principle, a third-country national lodging an asylum application and admitted to the asylum procedure cannot be

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435 The infringement procedure was launched against Bulgaria due to its choice to reinforce significantly controls on the Bulgarian-Turkish border through the erection of a 32 km fence and the massive use of police personnel along this border, causing a significant drop in the number of persons trying to enter the country via this border.

436 The European Commission took its decision on the basis of the concern expressed by UNHCR, Amnesty International and Bulgarian Helsinki Committee about the access to Bulgarian territory. Please see ECRE, *European Commission launches infringement procedures against Bulgaria and Italy for possible refoulement of Syrian refugees*, included in ECRE Weekly Bulletin, 4 April 2014, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/666-european-commission-launches-infringement-procedures-against-bulgaria-and-italy-for-possible-refoulement-of-syrian-refugees.html>.

437 <http://frontex.europa.eu/trends-and-routes/migratory-routes-map>; for more details please see "Menedékkérők hozzáférése a nemzetközi védelemhez. Access to protection: a human right, Epim Hungarian Country Report.

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expelled or returned.<sup>438</sup> S(he) is allowed to access the Hungarian territory and the asylum procedure.

However, a significant number of asylum seekers were rejected during the admissibility procedure due to the concept of “safe third country”. Following the admissibility procedure asylum applicants may be returned to third-countries without an in-merit examination of their protection requests.<sup>439</sup>

When a third-country national is apprehended at the border, the police carry out a short interview with the person that aims to assess whether s(he) should be expelled from Hungary. When the foreigner manages to inform the police of his or her need for protection, the police authorities transfer the case to OIN as the competent asylum authority. Communication problems between the police authorities and the asylum applicants may occur. For this reason, the HHC has recommended to introduce in the Hungarian Aliens legislation the requirement for police authorities to conduct a more-in depth interview to obtain detailed information on the reasons that have pushed third-country nationals to leave their home countries.<sup>440</sup>

The Hungarian legislation does not provide a list of “safe-third countries”. When a country is *de facto* considered as such, like Serbia, for instance, asylum seekers arriving at the border were immediately rejected by Hungary to Serbia.

By law, the OIN shall provide reasons for the rejection of the asylum application. In practice, however, negative decisions do not contain detailed reasoning. The appeal against expulsion has no suspensive effect. The applicant, in fact, has to lodge an explicit request to the court asking the suspension of the execution of the expulsion order. However, in practice there is no access to an effective remedy since most applicants are unable to appeal such decisions without the assistance of a lawyer. According to the police there are hardly any appeals against expulsion orders issued at the border, meaning that foreigners are either unaware of their right to appeal against orders or in the impossibility to find a lawyer to challenge such decisions in a very short timeframe.

The HHC has access to those rejected asylum seekers who are in one of the facilities in Hungary, but nobody has access to asylum seekers when they are being apprehended (during the deportation phase). The police authorities would need to take a more proactive role to ensure access to legal aid to third-country nationals arriving at the border. In order to make the access to legal assistance effective, UNHCR recommends to introduce a referral mechanism whereby the police inform legal advisors about the apprehension of third-country nationals requiring legal

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438 Section 51(2) of the TCN Act (effective 1 January 2013) of the Act II of 2007 on the entry and stay of third country nationals (“TCN Act”) “If the third country national is under pending asylum procedure, return and/or expulsion may not be ordered and executed, if the third country national has the right to lawful presence in Hungary in accordance with specific provisions of the law.”

439 Epim Hungarian Country Report.

440 *Ibidem*.

assistance. In addition, there should be a possibility to make use of legal assistance by phone at border crossing points.<sup>441</sup>

Following the increasing number of persons expelled to Serbia in 2012 compared to 2011, UNHCR<sup>442</sup> and the Hungarian Helsinki Committee, which carried out in June 2011 and April 2012 two fact-finding missions in Serbia,<sup>443</sup> denounced the limited access to protection in Serbia, where returned asylum seekers generally face serious risk of chain *refoulement*, or destitution in case they remain in Serbia.

The Supreme Court in Hungary (Kuria)<sup>444</sup> issued guidelines to promote a harmonised practice at Hungarian courts with regard to the concept of “safe third country” in asylum cases,<sup>445</sup> stating that: “[w]hen reviewing administrative decisions regarding the application of the safe third country concept, the court shall *ex officio* take into consideration the precise and credible country information at its disposal at the time of deciding, obtained in any of its procedures. In this context, country information issued by the UNHCR shall always be taken into consideration.” Presumably, as a consequence of these complaints and the issuance of the mentioned guidelines, the OIN currently seems to have changed its practise and no longer considers Serbia as a “safe third country”. “However to date there is no written, publicly available record of this policy.”<sup>446</sup>

With regard to readmissions carried out at the border, Hungary readmits foreigners within the framework of the readmission agreements concluded by the European Union with Serbia (8 November 2007)<sup>447</sup> and with Ukraine (18 June 2007).<sup>448</sup>

In this respect, concerns were raised on the way these are implemented in practice. As denounced by HHC, in case of readmission of unaccompanied minors, the Hungarian police inform the Serbian counterpart who is *inter alia* in charge of informing the competent Serbian child protection service on their readmission in Serbia. The representative of this service has to be present at the border to receive the readmitted minors. However, the Hungarian authority does not examine under what circumstances the concerned minor would be placed in the receiving country,

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441 *Ibidem*.

442 Additional information is available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=50471f7e2&skip=0&query=serbia&querysi=Serbia%20as%20a%20country%20of%20asylum&searchin=title&sort=date>.

443 More information is available at: <http://helsinki.hu/en/serbia-not-a-safe-country-of-asylum>.

444 Additional information is available at: [http://www.kuria-birosag.hu/h\\_u/kollvel/22012-xii10-kmk-velemen-y-biztonsagos-harmadik-oroszag-megitelesenek-egyes-kerdeseirol](http://www.kuria-birosag.hu/h_u/kollvel/22012-xii10-kmk-velemen-y-biztonsagos-harmadik-oroszag-megitelesenek-egyes-kerdeseirol).

445 Opinion no. 2/2012. (XII.10.) KMK.

446 Epim Hungarian Country Report.

447 Additional details available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:334:0045:0045:EN:PDF>

448 Additional information is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0048:0065:EN:PDF>

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neither it conducts any follow-up activity. According to unofficial information, readmitted minors often try to cross the Serbian-Hungarian border again, shortly after having been readmitted to Serbia.<sup>449</sup>

### Case of *refoulement*<sup>450</sup>

A Palestinian man was arrested and interviewed in English by the police authorities on 17 April 2012. He stated that he had been expelled to Serbia along with 14 others where he had been tried at court and taken to the prison in Szabadka. Nine days later he was transferred to Belgrade to a camp designated for foreigners. Six days later he was taken to the Serbian-Macedonian border by bus and was let go back with a warning not to return to Serbia. He spent six days in Macedonia, then decided to try to get to Serbia illegally and then to Hungary on his own. He travelled by train and then on foot until he was arrested. According to his statement, he left his country due to the lack of employment opportunities and fearing of being killed during the war. He was interviewed again due to his injuries, and he stated that "I got injured when I was taken to the Serbian-Macedonian border by Serbian police officers." The principle of *non-refoulement* was not applied by the OIN and – in accordance with the Readmission Agreement between the EU and Serbia on Readmission of persons residing without authorization - he was handed over to the Serbian authorities on 23 April 2012.

In **Germany** "*there is no special procedure at land borders.*"<sup>451</sup> If asylum seekers are apprehended at the border - defined as a strip of 30 kilometres at land borders and a strip of 50 kilometres at sea borders<sup>452</sup> - without the required documentation, they are denied entry and the border police initiate the "removal" procedure to the neighbouring country (*Zurückschiebung*).<sup>453</sup>

As reported by Informationsverbund Asyl und Migration, in general asylum applications are not accepted in the mentioned cases because of the legal assumption that asylum seekers who have previously transited through a "safe third country" are not entitled to seek asylum.<sup>454</sup> Only if a "removal" to the neighbouring country proves not to be feasible, access to the German territory and to the asylum

449 Epim Hungarian Country Report.

450 Access to Territory and Asylum Procedure in Hungary 2012, page 11 available at [http://helsinki.hu/wp-content/uploads/hel2013\\_menekulteng\\_final.pdf](http://helsinki.hu/wp-content/uploads/hel2013_menekulteng_final.pdf)

451 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34 available at: <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/border-procedure-border-and-transit-zones#sthash.fWNYkkmR.dpuf>

452 Federal Office for Migration and Refugees. The Organisation of Asylum and Migration Policies in Germany, Research Study I/2008 in the framework of the European Migration Network (EMN), page 20.

453 Section 57 of the Residence Act.

454 Informationsverbund Asyl und Migration, AIDA German national Report, May 2014, page 34.

procedure is granted. In these cases asylum-seekers have to be referred to the competent authority, the Bundesamt and then they have access to the regular asylum procedure.<sup>455</sup>

The increased border control and surveillance activities conducted in the Western Mediterranean especially in the frame of Frontex joint operations<sup>456</sup>, near **Spain and the Canary Islands**, have provoked a significant decrease of migratory flows toward the Canaries and in the Strait of Gibraltar. As a result, it was registered an increased number of migrants attempting to enter Spain through Ceuta and Melilla, Spanish enclaves in North Africa. Migrants, in fact, attempt to enter Spain mainly by swimming to Ceuta via El Tarajal and Benzu, and in Melilla mainly by climbing the fence or by using large inflatable launches. Other migrants prefer to cross the border crossing points hidden among thousands of people or in cars and trucks, or using *pateras* and small leisure boats. Once entered in Ceuta and Melilla, migrants are addressed to the Spanish police authorities for identification. Many are transferred to the Temporary Centre for Immigration (Centro de Estancia Temporal de Inmigrantes – CETI), while others are transferred to mainland Spain.

In October 2013, as occurred in 1995 and 2005, Spanish authorities to deter irregular migration decided to re-install the razor wire on the Melilla fence and add “anti-climb” mesh to prevent migrants entering Spain exposing them of being seriously injured. Push backs are carried out also in these areas.

On 6 February 2014, approximately 300 hundreds persons left the woods near Ceuta where they were hidden to try their chance to enter Spain. The Moroccan authorities managed to stop 100 people, while the other 200 migrants made it at sea provoking the disproportionate reaction of the Spanish Civil Guard who started to shoot up on the air. When authorities realised that some migrants succeeded to enter the Spanish territory they began firing rubber bullets and teargas provoking the death by drowning of 15 persons.<sup>457</sup> The Spanish Civil Guard’s reaction was considered unnecessary and excessive in preventing migrants from clinging on the rocks of the breakwaters. Regrettably, those who managed to enter Spain were collectively expelled to Morocco in violation of the Spanish legislation, and international and EU law.

The Spanish authorities claimed that it was legal to deport the 23 people because they had not yet crossed the Spanish border. However, as denounced by several NGOs and by Amnesty International, these persons were “*under the Spanish control and jurisdiction as they had been apprehended by the Spanish Civil Guard officers.*”<sup>458</sup>

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455 *Ibidem*.

456 JO-EPN Hera 2013, JO-EPN Indalo 2013 and JO EPN Minerva 2013 (western Mediterranean sea ports), Frontex General Report 2013, page 59.

457 APDHA- *Human Rights on the Southern Border 2014*, pages 40-41.

458 Amnesty International *The Human cost of Fortress Europe – Human rights violations against migrants and refugees at Europe’s borders*, page 22.

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Some NGOs have denounced these facts before the European Parliament<sup>459</sup>, while other organizations and the European Commissioner, Cecilia Malmström called for an investigation, but no concrete actions have been adopted at the time of writing.

On 29 August 2012, 73 migrants collectively expelled to Morocco on the basis of the readmission agreement<sup>460</sup> between Morocco and Spain. They had entered Isla de Tierra by swimming on 29 August 2012 and were intercepted by the Spanish authorities. The migrants then forcibly conducted by bus to the Algerian border.<sup>461</sup> Migrants were not identified individually, had no access to NGOs nor to information on asylum procedure and legal assistance in violation of Spanish legislation. Spanish and Moroccan authorities did not apply their own national return procedures nor the readmission agreement rules, considering *inter alia* that in the case of transit with the aim of carrying out expulsion to third countries Article 8 of the readmission agreement states that the transit for expulsion may be denied “*When the foreigner faces risk of ill treatment in the destination State.*”<sup>462</sup>

As reported by CEAR<sup>463</sup>, in addition to the reinforced border control and surveillance activities, the fact that asylum seekers in Ceuta and Melilla are banned from travelling to mainland Spain is another factor explaining the decreasing number of applications for international protection (of up to 63.5% in Ceuta). As a consequence, Ceuta and Melilla are becoming large detention centres or city-prisons where third-country nationals are obliged to remain during either expulsion proceedings or asylum procedure.<sup>464</sup> As reported by CEAR, asylum seekers are subjected to exceptional measures, such as the ban on freedom of movement, a right to which they are entitled under article 19 of the Spanish Constitution and the Asylum Act, which represents now an unprecedented step backwards for the Spanish international protection regime.<sup>465</sup> Despite the repeated legal rulings against this practice and complaints made by the Ombudsman, the UNHCR and the Special Rapporteur on Racism and Xenophobia, this situation persists and is pushing asylum seekers to withdraw their asylum application, while others put at risk their lives by trying to cross the Strait of Gibraltar hidden in the ferries directed to Spain.<sup>466</sup>

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459 Additional information available at: [http://www.apdha.org/index.php?option=com\\_content&task=view&id=1272&Itemid=97](http://www.apdha.org/index.php?option=com_content&task=view&id=1272&Itemid=97)

460 Agreement between the Kingdom of Spain and the Kingdom of Morocco concerning the movement of people, transit and readmission of foreigners entering the country illegally” (BOE no.100 of 25 April 1992) came into force on 21 October 2012 (BOE no. 299 of 13 December 2012).

461 Epim Spanish Country Report, *Acceso a la protección: un derecho humano*, page 7.

462 APDHA- *Human Rights on the Southern Border* 2014, page 49.

463 Epim Spanish Country Report.

464 *Ibidem*.

465 *Ibidem*.

466 *Ibidem*.

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### Frontex land joint operations

According to Frontex Agency, monitoring the migratory flows and reacting accordingly to changing trends and *modi operandi* at different land borders is a constant challenge for Frontex and Member States, considering that more than 3,500 km of land borders run along the EU's eastern frontier, from northern Finland to the Evros river region of Greece. In 2013, 27 Member States and Schengen-associated Countries participated in 7 joint activities at external land borders hosted in 13 Member States and Schengen-associated Countries<sup>467</sup>.

The Frontex's biggest land border operation took place on the Greek-Turkish and Bulgarian-Turkish land borders, following a shift in migratory routes from sea to land by irregular migrants arriving mainly via Turkey.<sup>468</sup> In this operation hundreds of guest officers were deployed in rotation to stem the flow of irregular migrants arriving via Turkey. To this end Joint Operation Poseidon Land 2012 extension and Poseidon Land 2013 were implemented continuously throughout 2013, and partly on the Hungarian-Serbian and Croatian-Serbian land borders, where Joint Operations Focal Points Land, Neptune and REX 2013 were carried out. The operations were focused on specialized green-border surveillance and debriefing activities.

In 2013, additional Greek police officers were deployed along the Greek-Turkish land border within the framework of Hellenic operation Aspida (Shield), along with the use of camps as temporary detention facilities. In November 2013, Bulgaria launched a similar large-scale operation leading a sharp decrease in illegal border crossing at its land borders with Turkey. To this end Frontex relocated *"Member State resources from Greece to Bulgaria to a proportion of up to 65%, and the relocation of the International Coordination Centre of Joint Operation Poseidon Land 2013 from Athens to Sofia."*<sup>469</sup>

During 2013, a relevant number of irregular migrants started to reach Hungary, therefore, Hungarian Focal Points were reinforced with additional guest officers and equipment for border checks as well as for green-border surveillance.<sup>470</sup>

According to Frontex, *"[T]he platform of Focal Points was also used for implementation of various regional operations and short-term operational activities including JO Poseidon Land 2013 (Greece, Bulgaria), JO Neptune 2013 (Slovenia), JO Jupiter 2013 (Finland, Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Romania), and to facilitate cooperation with non-EU countries."*<sup>471</sup>

467 Frontex, *General Report 2013*, page 62.

468 *Ibidem*.

469 Frontex, *General Report 2013*, page 62.

470 Frontex, *General Report 2013*, page 19.

471 *Ibidem*.



Third-countries also deployed officers at Focal Points as observers with a view to later using them during the establishment of coordination points in third-countries. With regard to cooperation with Third-Countries, guidelines were established in the Multiannual Focal Points Programme 2010-2013, which continued to serve as a *“platform for the further development of cooperation with third countries through the deployment of observers for the collection of experience and best practices.”*<sup>472</sup>

Among **Operations carried out in 2013 at land borders**<sup>473</sup> it is worth mentioning two land border joint operations — Jupiter and Neptune which contributed for many years to the overall border security and operational coordination at eastern land borders and at the borders with Western Balkan countries. Thanks to these joint operations it has been possible to develop and test the *Joint Border Control Teams concept, which will form the basis for operational activities in coming years and will be connected as a flexible mechanism of deployment and redeployment with the activation of Focal Points.*<sup>474</sup>

Another important Frontex operation was constituted by the **Rapid Intervention Exercise - “Rex 2013,”**<sup>475</sup> implemented during July and August 2013 at Hungarian-Serbian and Romanian-Serbian external land border with the deployment of a large number of guest officers and technical equipment. Frontex, for the first time, coordinated the operation with two EASO asylum support teams.

472 In addition, the Programme also promoted the implementation of other regional operations launched in the same operational areas and contributed to reinforce the border sections concerned by irregular migration Frontex, *General Report 2013*, page 63.

473 *“JO Focal Points 2013 Land (incl. Jo Focal Points 2012 Land extension)”* (Permanent Operation); Operational Area: Designated border crossing points and green border area at EU external land border; *“JO Poseidon Land 2012 (extension)”* Operational Area: South Eastern External land border; (Host MS: Greece and Bulgaria; *“JO Poseidon Land 2013”* Operational Area: South Eastern External land border; (Host MS: Bulgaria, Greece); *“JO Neptune 2013”* Operational Area: Western Balkan area and Croatian external border; (Host MS: Croatia, Hungary; *“JO Jupiter 2013”* Operational area: Eastern Land Border, (Host MS: Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia); *“JO Coordination Points 2013”* Operational Area: Designated border crossing points in Third Countries, (Host MS: Albania, Croatia, FYR of Macedonia, Moldova, Ukraine); *“Rex 2013”* Operational Area: Hungary-Serbia and Romania-Serbia external land border, (Host MS: Hungary, Romania). See General Report 2013, p. 58, additional information on 2013 Frontex-coordinated Operations at land borders are available at: [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2013/General\\_Report\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf).

474 For more detailed information with regard to the procedures to identify Focal and Coordination Points, please see Frontex, *General Report 2013*, page 19.

475 *The Focal Points involved were integrated into the structure of the exercise in the first such operational merger of its type.* Frontex, *General Report 2013*, page 33.

Additional information is available at: <http://frontex.europa.eu/operations/roles-and-responsibilities>



### V.2.3 Maritime Border Control

As previously mentioned, sea border controls consist of border controls at sea ports considered as official border crossing points and border surveillance, conducted at sea. Sea border controls and surveillance activities are much more problematic comparatively to those conducted at air and land borders, due to the peculiar nature of the maritime environment and to the number of different authorities with diverse competence and approach that may be involved in sea operations. As underlined by Frontex, the Schengen area extends along some 44,000 km of external sea borders,<sup>476</sup> and sea border activities involve 8 countries responsible for the integrated management, 50 different authorities of 30 ministries, often with different competence and parallel systems, and at least 40 agencies all over Europe committed in sea surveillance along the EU's southern borders.<sup>477</sup> With the view to reduce duplicated effort, in May 2007, the European Patrols Network ("hereafter EPN") was established, aiming at coordinating the efforts between Member States and different agencies in order to tackle criminal networks more effectively. As it will be further illustrated, EPN operations have been reinforced by complementary Frontex sea operations such as Joint Operations and pilot projects,<sup>478</sup> carried out in particular in the Western and Central Mediterranean regions.

As previously underlined, Member States are bound by the provisions of the **asylum acquis**, when applications for international protection are made in their territorial waters<sup>479</sup> of the Procedures Directive which clearly states that the persons present in the territorial waters of a Member State should be disembarked on land and have their applications examined.<sup>480</sup>

This Directive, however, does not contain any provisions concerning rules that shall apply when the asylum request is made in contiguous zones and high seas, in particular when the authorities of a Member State may order the vessel engaged in the smuggling of migrants at sea not to enter the territorial sea or may request the vessel to alter its course towards a destination other than the territorial waters of the Member State or may conduct the vessel to a third country where the vessel is departed or is assumed to have departed. As it will be further illustrated, the EU external sea borders surveillance Regulation<sup>481</sup> provides for common rules on procedures to be applied with regard to interception, search and rescue operations and disembarkation operations carried out by Member States solely when participating in Frontex operations.

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476 Additional information is available at: <http://frontex.europa.eu/operations/roles-and-responsibilities>

477 See Frontex, *General Report 2013*, December 2012, at page 59, available at: [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2013/General\\_Report\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf)

478 *Ibidem*.

479 Article 3 (1) of the Directive 2013/32/EU.

480 Recital 26 of the Directive 2013/32/EU.

481 Regulation (EU) 656/2014.

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To ensure the effective assess to the examination procedure, the Directive clarifies that officials who first come into contact with asylum seekers, in particular those conducting border control and surveillance of land and maritime borders *"should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO."*<sup>482</sup> Moreover, these officials should be able to provide to asylum seekers present in the territorial waters of a Member State with *"relevant information as to where and how applications for international protection may be lodged."* Asylum seekers should be disembarked and admitted to the asylum procedure.<sup>483</sup>

The research carried out under the EPIM project demonstrates, as it will further developed in chapter VII, that in general, Coast guards, Custom police and the Navy carrying out surveillance at maritime borders in partner countries are not (adequately) trained on how to recognise and deal with asylum seekers, trafficked persons, vulnerable persons such as unaccompanied minors, victims of torture and violence. Moreover, they do not provide asylum seekers with relevant information on their rights and duties, given that this task is mainly assigned to immigration and police authorities during the sea operations or following disembarkation. It should be also underlined that in partner countries, no national guidelines have been issued to provide instructions on how to deal with migrants on board, in particular with persons in need of specific assistance and protection and avoiding inappropriate and illegal conduct during sea surveillance and border checks activities.

In addition, the responsibility of different authorities is not always clear. In this respect, the FIDH, Migreurop and Euro-Mediterranean Human Rights Network (EMHRN) delegation, while on mission in Lesbos in October 2013, has reported that according to Greek police authorities, refugees were considered of maritime authorities concern on the basis of an order given orally by the public prosecutor issued in April 2013. By contrast, the interviewed Coastguard representatives declared that they are exclusively involved in search and rescue operations and that following disembarkation, rescued persons are directed to police authorities competent on immigration issues.<sup>484</sup>

In **Italy**, surveillance, rescue activities and police operations are coordinated by the Central Directorate for Immigration and Border Police that is under the Public Security Department of the Ministry of Interior, competent *inter alia* for border management.<sup>485</sup>

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482 Recital 26 of the Directive 2013/32/EU.

483 Recital 26 of the Directive 2013/32/EU.

484 *Frontex entre Grèce et Turquie: la frontière du déni*, FIDH-Migreurop-REMDH, October 2013, page 83.

485 Decree 14 July 2003.

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Since July 2004, a specific agreement specifies the key procedures and different competences and responsibilities of all institutional actors involved in coordinating resources regarding irregular migration at sea. Signatories to the agreement include the Navy, the General Command of the Tax and Customs Police (Guardia di Finanza), the General Command of the Carabinieri, the General Command of the Coastguard Authorities (Guardia Costiera).

The Directorate for Immigration and Border Police takes the decision on sea operations also on the basis of readmission agreements and agreements with the country of which the vessel flies the flag or with the country from which the vessel is departed, and on operations carried out on vessels without flag or whose departure place is unknown.<sup>486</sup>

In the territorial sea and in contiguous zones, State vessels, during police activities, when suspect a boat being engaged in the illegal transportation of migrants, they can stop it, submit it to inspection, or seize and conduct it to a State sea port.<sup>487</sup>

In high seas the surveillance activity is aimed at the localisation and identification of vessels suspected of smuggling of irregular migrants. Italian State vessels may proceed *inter alia*, where possible, by stopping the vessels suspected of being used for migrants' irregular transport with the aim also to turning them away to ports of departure.<sup>488</sup>

These operations shall be conducted in the respect of safeguard of human life and the dignity of the person concerned.<sup>489</sup> However, the Decree does not contain any provision with regard to the (direct and indirect ) *non refoulement* principle nor to procedural guarantees to be applied towards asylum seekers, trafficked persons, vulnerable persons such as unaccompanied minors, victims of torture and violence that should be applied involved authorities.<sup>490</sup> Moreover, no guidelines addressed to all authorities conducting sea operations have been issued so far on how to recognise and deal with the mentioned categories. According to the principles set out by the *Hirsi* judgement, during the sea operations, Italian authorities shall assess the personal circumstances of each individual and make sure that they will not face the risk of *refoulement* in the country of origin or of previous transit or stay, and allow them to be admitted into the Italian territory and to the relevant procedures.

With regard to **controls at sea border crossing points**, the Italian legislation prescribes the refusal of entry and immediate rejection at official border crossing points ("*respingimento*") adopted by border police and enforced through the

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486 *Ibidem*.

487 Article 12 (7) and 12 (9-bis) of Immigration Law 286/98.

488 Article 7(2) of the Decree 14 July 2003.

489 Article 7 (1) of the Decree 14 July 2003.

490 Epim Italian Country Report.

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obligation upon the maritime carrier to bring the undocumented migrant back to the port of departure. The Italian authorities, among the forms of removal from the national territory, still apply the bilateral readmission agreement signed with Greece<sup>491</sup>, based on the 1994 standard model recommended by the Council of the EU.

On the basis of this agreement, third-country nationals who are not allowed to enter Italy via Adriatic ports are “informally” entrusted to the captain of the vessel who is obliged to bring them back to the Greek port of departure. Whereas third-country nationals who have entered Italy without meeting entry and stay requirements, after they stayed or transited in Greece, they must be readmitted “*without formalities*” in the latter country within a fixed time-frame, on the request of the Italian State.<sup>492</sup> Readmission may be refused if the evidence is insufficient to prove State obligation to readmit the concerned person.

Moreover, even though this readmission agreement includes a provision stating that the agreement shall not be applied to refugees and asylum seekers,<sup>493</sup> it does not expressly make reference to the *non refoulement* principle and fundamental human rights.<sup>494</sup> In this respect it should be also considered that migrants driven back to Greece might not have access to the asylum procedure and might be notified with an expulsion order and returned to the third-countries where they can risk persecution, being submitted to torture and to inhuman treatments in violation of the *non refoulement* principle.<sup>495</sup> Neither the Italian legislation nor the EU law regulates this case, allowing the “rejection” to another EU country.

Considering the irreversible consequences these “informal rejections” may cause, readmission agreements between EU Member States and, thus relating to internal borders should be abolished or at least revised in compliance with the EU and international law, in particular the Schengen *acquis* and the human rights provisions.

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491 Agreement between the government of the Hellenic Republic and the government of the Italian Republic on the Readmission of Persons in an Irregular Situation, Rome, March 20, 1999.

492 Article 5 of the Agreement between the government of the Hellenic Republic and the government of the Italian Republic on the Readmission of Persons in an Irregular Situation, “Rome, March 20, 1999.

493 Article 6 (d) and (e) of the Agreement between the government of the Hellenic Republic and the government of the Italian Republic on the Readmission of Persons in an Irregular Situation, Rome, March 20, 1999.

494 Epim Italian Country Report, pages 22 -23.

495 *M.S.S. c. Belgium v. Greece...*; N.S. c. Secretary of State for the Home Department and M.E. V. ALTRI C Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform available at [www.curia.eu.int](http://www.curia.eu.int). See also Amnesty International, *Frontier Europe Human Rights Abuses on Greece’s border with Turkey* (2013); Pro Asyl, *PUSHED BACK systematic human rights violations against refugees in the Aegean sea at the Greek-Turkish land border* (2013).

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As stressed by several NGOs<sup>496</sup> this type of bilateral agreement allows to reject and expel a migrant to another EU country without applying appropriate safeguards that are instead provided during the expulsion and return procedures.

In different occasions Italian authorities, after having intercepted migrants hidden in TIR or vehicles on board of ferry boats, had driven back migrants without notifying them with a removal order,<sup>497</sup> depriving them the right to appeal such measure.

Moreover, during the research activities, CIR made contacts with the Greek organisation Praksis – working with unaccompanied minors, finding out that some unaccompanied minors, considered as adults by the police authorities, were sent back to Greece, deprived of the protection measures provided by the Italian legislation.<sup>498</sup>

Against this practice, as declared on 1 April 2014, during a meeting of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs,<sup>499</sup> the European Commission has confirmed the launch of infringement procedures<sup>500</sup> against Italy, based on reports denouncing push-backs of migrants and asylum seekers from the Italian Adriatic ports to Greece.<sup>501</sup>

Following the *Hirsi* decision at least two push-backs have been carried out.

On 21 August 2011, 104 Tunisians intercepted in the Maltese SAR zone, after being rescued were conducted to Lampedusa Island by the Italian Custom police. All Tunisians, with the exception of a disabled person on wheelchair, 2 women and a child, were firstly transferred to the Italian vessel "Borsini" and then transferred on Tunisian State vessels to be conducted in Tunisia. The identification of persons on

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496 Epim Italian Country Report, Medici per i Diritti Umani (MEDU), *Porti Insicuri – Le riammissioni dai porti italiani alla Grecia e le violazioni dei diritti fondamentali dei migranti*, November 2013; Pro Asyl, *Human cargo: Arbitrary readmission from the Italian sea ports to Greece*, July 2012, pages 7-8; Migreurop, *European borders: controls, detentions and deportations*, 2009/2010, pages 82-86; Human Rights Watch, *Turned Away: Summary Returns of Unaccompanied Migrant Children and Adult Asylum Seekers from Italy to Greece*, 2013, pages 25-28. <http://reliefweb.int/report/italy/turned-away-summary-returns-unaccompanied-migrant-children-and-adult-asylum-seekers>

497 Francois Crépeau, *Report by the Special Rapporteur on the human rights of migrants*, Addendum, Mission to Italy (29 September – 8 October 2012), April 2013.

498 Epim Italian Country Report.

499 For further details about the 1 April 2014 meeting, please see at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20140401-0900-COMMITTEE-LIBE>.

500 For further information about the procedure applicable in case of infringements of EU law, please see at: [http://ec.europa.eu/eu\\_law/infringements/infringements\\_en.htm?](http://ec.europa.eu/eu_law/infringements/infringements_en.htm?).

501 Push-backs of migrants and asylum seekers have raised deep concern of several NGOs, in particular CIR, MEDU, and Proasyl, all of which have described the phenomenon through detailed reports. Epim Italian Country Report. Proasyl, *Human Cargo – Arbitrary Readmissions from the Italian sea ports to Greece*, July 2012, at: [http://www.proasyl.de/fileadmin/fm-dam/p\\_KAMPAGNEN/Flucht-ist-kein-Verbrechen/humancargo\\_01.pdf](http://www.proasyl.de/fileadmin/fm-dam/p_KAMPAGNEN/Flucht-ist-kein-Verbrechen/humancargo_01.pdf). Medici per i Diritti Umani (MEDU), *Porti Insicuri – Le riammissioni dai porti italiani alla Grecia e le violazioni dei diritti fondamentali dei migranti*, November 2013, at: [http://www.mediciperidirittumani.org/pdf/low\\_rapporto\\_Medu\\_2013.pdf](http://www.mediciperidirittumani.org/pdf/low_rapporto_Medu_2013.pdf).

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board was conducted in a very hasty way, on the basis of the skin tone and physical features, without an individual examination of the case and identification of those in need of international protection.<sup>502</sup>

As denounced by the Habeshia Agency<sup>503</sup> and reported by media,<sup>504</sup> another pushback to Libya occurred on 29 June 2012. A group of 76 persons, almost all of them Eritreans, after having been intercepted by Italian and Libyan joint patrolling vessels, were pushed to Libyan territorial waters and handed to the Libyan authorities who, after disembarkation in Tripoli port, conducted them to detention centres in Sibrata Mentaga Delila, near Tripoli where they were threatened to be returned back to Eritrea.<sup>505</sup>

Custom police authorities interviewed on this incident during research activities have stressed that the Italian authorities could not be involved in such push-back given that joint patrolling with Libyan authorities stopped on 18 March 2011 when the 2008 Friendship Agreement between Italy and Libya was suspended due to the war in Libya.<sup>506</sup>

In the aftermath of the tragic incident occurred in Lampedusa in October 2013, the military and humanitarian operation "*Mare Nostrum*" was launched on 18 October of the same year by the Italian Government with the aim to strengthen surveillance on the high seas and rescue activities as well as to intercept and arrest smugglers and traffickers. According to the Italian Ministry of Interior, the operation costs 9 million euros a month and involves about 920 officers from the Navy, Custom police, Army, Air Force, Coast Guards, police authorities.<sup>507</sup> A number of Navy vessels, helicopters with infrared equipment are used when conducting the operations at sea. Slovenia is the only country that participated in this operation and it was also reported that a vessel of the Armed Force of Malta assisted the Italian Navy during the sea operations leading to the rescue of over 5000 people in few days.<sup>508</sup>

Thanks to this operation, 142.085 persons have been rescued from 1<sup>st</sup> January to 6<sup>th</sup> October 2014.

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502 Epim Italian Country Report, pages 38 -39; Raffaella Cosentino, *Respingimenti in atto da mesi sulla rotta Tunisia-Lampedusa*, 30 August 2011.

503 Father Mussie Zerai, President of Habeshia Agency for the Cooperation and Development, available at: <http://habeshia.blogspot.it/>

504 Epim Italian Country Report.

505 *Ibidem*.

506 *Ibidem*.

507 A summary of the operation in English is available at <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>

508 The New York Times, *Italians Rescue Thousands From Teeming Migrant Boats*, 8 June 2014.

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The majority of those rescued are Syrians and Eritreans.<sup>509</sup>

Despite criticism from Northern EU countries of having created a pull factor attracting increasing numbers of asylum seekers and migrants to be smuggled to the EU, “*Mare Nostrum*” has a broad support by relevant parts of the public and political opinion in Europe; it represents a “cultural shift” with respect to the push-back policy adopted in 2009 by the Italian authorities condemned by the ECtHR in the *Hirsi* decision. At the time of writing this report, the debate on the continuation of the operation is open.

The “*Mare Nostrum*” life-saving approach is in evident contrast with push-backs practices carried out in **Greece** whose sea and land borders continue to be considered as one of the main entry points of external EU border. In these areas Greek authorities together with Frontex have strongly reinforced control and surveillance activities thanks to the substantial EU funds deployed for this purpose. Cooperation between Greece and Turkey on border control is developing. The “early detection” by both Greek and Turkish authorities is in fact facilitated by the proximity of the coasts of these two countries which are developing thanks also to Frontex that favoured a closer and effective border cooperation (MOU). In general, when Greek authorities detect a boat directed to Greece by sea, they inform their Turkish homologues to impede the intercepted vessel to enter Greece.

While EASO annual report on the situation of asylum in the EU territory stresses that in 2013 the Greek coastguards rescued 2.511 people in 110 separate incidents, too many reports based on hundreds of eyewitnesses denounce the unacceptable brutal conduct of coastguards and Masked Special Forces officers, who are generally employed in antiterrorism, armed robbery, piracy and fight against organised crimes. Increased numbers of migrants and asylum seekers are currently arriving on the Greek Aegean islands of Lesbos, Chios, Samos, Symi, Farmakonisi and Leros; a considerable number of them, following interception and apprehension, are subjected to ill-treatment and brutal intimidation. This consists in the steal of their personal belongings such as ID cards and passports, mobile phones and money, before leaving them in life-threatening situations, either pushing back them in unseaworthy boats towards Turkey or even throwing them into the water of the Evros river.<sup>510</sup> According to some estimates by Pro Asyl, the number of people that were pushed back within a year was around 2000 migrants, most of them Syrians, but also Eritreans, Somalis and Afghans.<sup>511</sup> Among the push-backs, the tragedy in

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509 UNHCR, Statement Council of Europe Parliamentary Assembly Resolution 2000 (2014) and Recommendation 2047 (2014) on *The large-scale arrival of mixed migratory flows on Italian shores*, 8 July 2014, available at: <http://www.refworld.org/pdfid/53bbef784.pdf>

510 See Pro Asyl, *Pushed Back, Systematic human rights violations against refugees in the Aegean sea and the Greek-Turkish land border*, November 2013.

511 Amnesty International, *Greece : frontier of hope and fear. Migrants and refugees pushed back at Europe's border*, pages 15-18, 2014.

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Farmakonisi occurred on 20 January 2014, have to be mentioned: Greek coastguards towed at high speed a fishing boat carrying 27 migrants near the Farmakonisi island towards Turkey. This operation provoked that the boat sank in which eleven people died, eight of whom were children.<sup>512</sup> Upon apprehension, at land or sea borders, migrants are arbitrarily detained outside any formal procedures, without any forms of identification and registration, and forcibly deported to Turkey in violation of domestic and International law.<sup>513</sup> As a consequence, the Commissioner of Human Rights of the Council of Europe Nils Muiznieks, requested the launch of a judicial investigation on these push-backs carried out at the Greek-Turkish border.<sup>514</sup> Following the Farmakonisi tragedy, several NGOs, including ProAsyl and ECRE as well as the EU Commissioner for Home Affairs, Cecilia Malmström, together with a number of Members of the European Parliament, urged Greece to conduct a thorough and independent investigation.<sup>515</sup> Following the shelving of this case by the Public Prosecutor of the Marine Court who classified the case as manifestly ill-funded and denied the Greek authorities involvement. In reply to this decision, the Commissioner for Human Rights states *"Impunity risks covering up these serious human rights violations. This would be a grave mistake. Greek authorities have to take more resolute efforts to ensure accountability for this tragedy."*<sup>516</sup> The Greek Council for Refugees, the Hellenic League for Human Rights, the Network of Social Support to Refugees and Migrants, and the Group of Lawyers for the Rights of Migrants and Refugees, raised serious concerns on the fact that *"the decision not to investigate practically approves of the push backs carried out in the Greek seas, perpetuates the impunity of the coast guard involved and shows a complete lack of will and effort to decrease the number of migrant deaths in Greece's and Europe's external borders"*.<sup>517</sup>

Considering the significant number of witnesses and the reports denouncing the fact that push-backs occur in the areas where Frontex-led operations are carried out, humanitarian organisations and academics wonder why Frontex continue to conduct its operations in Greece without using its prerogatives to stop such operations that are still putting migrant's lives at serious risk.

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512 Amnesty International, *Greece : frontier of hope and fear. Migrants and refugees pushed back at Europe's border*, pages 15-18, 2014.

513 For further information see also Amnesty International, *Greece : frontier of hope and fear. Migrants and refugees pushed back at Europe's border*, at page 10, 2014 and *The human cost of Fortress Europe. Human rights violations against migrants and refugees at Europe's borders*, pages 20-21, 2014

514 Commissioner of Human Rights of the Council of Europe, Press Release: *Greece must end collective expulsions*, 14 January 2014

515 European Parliament Newsroom, [Debate on Syrian refugees in Bulgaria and "push backs" off the Greek coast](#), 05 February 2014.

516 *Greece defends handling of illegal immigrants*, 8 September 2014. [http://www.setimes.com/cocoon/setimes/mobile/en\\_GB/features/setimes/features/2014/09/08/feature-01](http://www.setimes.com/cocoon/setimes/mobile/en_GB/features/setimes/features/2014/09/08/feature-01)

517 *Ibidem*.

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### Malta

Migrants and asylum seekers arrive in Malta from Libya mainly by boat. Between 2002 and 2013 over 16,800 third-country nationals arrived from Libya. As reported by The People for Change Foundation and according to the statistics provided from the Refugee Commissioner, between 2008 and 2013 over 92% of asylum applicants (10,372 compared to 995 who had arrived via different channels) reached Malta by boat<sup>518</sup>.

Immigration control responsibilities are vested in the Malta Police Force, while sea control and surveillance powers are vested in the Armed Forces.

When a migrant is refused entry, he is notified with a removal order which clarifies that the return may be either to the country of origin or to another country to which the entrance may be permitted. This has to be done in accordance to the international obligations, without prejudice to domestic legislation on the right to asylum.

The removal order may be appealed before Immigration Appeals Board within three days of the order being issued. A number of important safeguards have been promulgated through the Return Regulations, however, are not applicable to persons intercepted while trying to irregularly cross the sea or air border and not having therefore obtained any authorisation or right to stay in Malta.<sup>519</sup>

As reported by The People for Change Foundation, Malta had never formally endorsed the push-back system, however *“political statements following Hirsi indicated that even though return to Libya was not ideal, it was actually possible”*.<sup>520</sup> In this respect, on 9<sup>th</sup> July 2013, 102 Somali migrants, after being intercepted at sea by the Armed Forces of Malta, were brought to Malta. The UNHCR and various NGOs were denied access to migrants who were kept at Police Headquarters, with the women and children later being transferred to a detention centre.<sup>521</sup>

Knowing that a number of male migrants risked to be returned to Libya that same evening on two flights, the People for Change Foundation and the Jesuit Refugee Services, supported by a number of Maltese NGOs, filed a request with the ECtHR in order to stop deportation of these persons. This request mainly relied on the *Hirsi* judgment as the decision to deport these migrants resulted in a breach of Articles 3 and 13 of the ECHR and Article 4 of Protocol 4 of the ECHR. The ECtHR accepted the request and issued the interim measure under Article 39 of the ECHR stopping deportation.<sup>522</sup> Subsequently, the EU Home Affairs Commissioner, Cecilia Malmström stated that any person arriving in the EU should access to the asylum

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518 Epim Maltese Country Report, page 19.

519 *Ibidem*, page 22.

520 *Ibidem*, page 27. See also K Sansone, *Sending migrants back is ‘not wrong’*, *Times of Malta*, 23 June 2012; K Sansone, *Watchdog surprised by Malta’s support for migrant push backs*, *Times of Malta*, 30 June 2012.

521 *Ibidem*, page 28.

522 *Ibidem*.

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procedure and have a proper assessment of their situation and protect them in accordance of the *non-refoulement* principle.<sup>523</sup>

On 4<sup>th</sup> August 2013, another case occurred concerning the MV Salamis incident. The Rome Maritime Rescue Coordination Centre (MRCC) requested the Salamis boat to respond to a distress situation in which there was involved a boat with 102 migrants, including four pregnant women, a five-month-old baby and a injured woman located in Libyan Search and Rescue Area (SAR). The Rome MRCC instructed the master of the Salamis vessel to return migrants to Khoms, in Libya, considered as a port of safety. Despite these instructions, the master proceeded on the vessel's initial route towards Malta. However the master was prevented entering in the Maltese territory waters, as a reaction to the orders that had not been followed. On 7<sup>th</sup> August 2013 the Italian authorities agreed to allow the disembarkation of rescued migrants in Sicily following a not-uncommon stalemate between Italy and Malta.<sup>524</sup>

#### **Frontex Sea Operations**

Frontex has co-ordinated 48 sea operations between 2006 and 2012 that often turned out to become search and rescue (SAR) operations<sup>525</sup>. In 2012, during Frontex joint sea operations, 53 758 migrants and 357 suspected facilitators were apprehended.

<sup>526</sup> During maritime operations 683 search-and-rescue cases were registered with 37.036 migrants rescued<sup>527</sup>.

Among sea operations it is worth mentioning "Poseidon operation" between Greece and Turkey, "Nautilus operation" between the Sicily Channel and Malta, Libya, Tunisia and Lampedusa Island., "Hera operation" at the Canaries Islands, considered the most successful operation carried out by Frontex.<sup>528</sup> The success of this operation, measured by the number of boats intercepted and of persons prevented from arriving in Europe, is also due to the substantial funds given, through the Spanish cooperation to North African countries that have highly contributed to reduce the migration flows to the EU<sup>529</sup>.

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523 *Ibidem*, page 28. 9 July MEMO Ref: MEMO/13/676 *Malta considering Push-Backs: Statement by Home Affairs Commissioner, Cecilia Malmström* Ref: [http://europa.eu/rapid/press-release\\_MEMO-13-676\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-676_en.htm).

524 Epim Maltese Country Report, page 29. See also: <http://www.pfcmalta.org/migrant-arrivals-2013.html>.

525 See PACE Resolution *Frontex: human rights responsibility*, Report Committee on Migration, Refugees and Displaced Persons, Rapporteur: Mr. Michael Cederbratt, Sweden, Group of the European People's Party, Doc. 13161, 8 April 2013, page 8.

526 Frontex, *General Report 2013*, page 63.

527 Data provided by Frontex, *General Report 2013*.

528 Agence Frontex: *quelles garanties pour les droits de l'Homme? Etude sur l'Agence européenne aux frontières extérieures envue de la refonte de son mandat*, page 11.

529 *Ibidem*.

This operation has nearly abolished the arrival of cayucos from the maritime costs of Senegal and Mauritania following the aero-maritime surveillance in proximity of the territories of these third-countries. In 2013<sup>530</sup>, seven joint maritime operations and seven tailored pilot projects were carried out and national patrolling in EPN areas by Frontex.<sup>531</sup>

A consistent number of migrants was detected in the Central Mediterranean area. In particular during the **JO/EPN- Hermes**, 35.454 migrants were detected in 2013, while in 2012 were only 6.616. In the area of **JO Poseidon Sea**, 10 815 migrants were detected in 2013 against 4 726 migrants intercepted in 2012.<sup>532</sup> Due to the increased activity on migratory routes in the Mediterranean Sea, **Italy and Greece** have been supported with tailored projects, also by extending and reinforcing joint maritime operations. Border surveillance and Search and Rescue capacity was implemented in the Central and Eastern Mediterranean regions. In addition, Frontex contributed actively to the **Task Force for the Mediterranean**, with the purpose of reinforcing the existing EPNs across the Mediterranean sea to better control irregular migration and to contribute to SAR activities coordinated by Member States in the Mediterranean Sea<sup>533</sup>.

530 “*Focal Points Sea*” (Region Concerned: Border Crossing Points in 6 host Countries) from 3 May 2005 to 16 October 2013; Aim: “Implementing activities to control irregular migration flows and other cross-border crime at specific border crossing points or selected border areas, not covered by joint operations, or complementing regular joint operations.” (Host Countries: Bulgaria, Lithuania, Portugal, Romania, Slovenia, Spain); “*Poseidon Sea*” (Region concerned: Central Mediterranean) from: 01 April to 31 December 2013, Aim “Implementing activities to control irregular migration flows and other cross-border crime from the Turkish coast and Egypt towards Greece and Italy as well as contributing to the control of secondary migration movements from Greece towards the European Union.” (Host Country: Greece; - “*EPN Aeneas*” (region concerned: Central Mediterranean) from 3 June to 31 December 2013, aim: “Implementing activities to control irregular migration flows and other cross-border crime from Turkey, Albania and Egypt towards south east coasts of Italy, especially Puglia and Calabria.” (Host Country: Italy; “*EPN Hermes*” (Region concerned: Central Mediterranean) from: 6 May to 31 December 2013 Aim: “Implementing activities to control irregular migration flows and other cross-border crime from Tunisia, Algeria and Libya towards Lampedusa, Sardinia and Sicily.” (Host Country: Italy; “*EPN Minerva*” (Region concerned: seaports, Western Mediterranean) from 1 August to 16 September 2013, aim: “Implementing activities at border crossing points on the southern coast of Spain in order to control illegal migration flows and other cross-border crime originating from Morocco.” (Host Country: Spain); “*EPN Indalo*” (Region concerned: Western Mediterranean) from 16 May to 31 October 2013, aim: “Implementing activities to control irregular migration flows and other cross-border crime from North African and Sub-Saharan countries towards the Southern Spanish coast.” (Host Country: Spain); - “*EPN Hera*” (Region concerned: Canary Islands and Western African coasts), from: 1 August to 31 October 2013, aim: “Implementing activities to control irregular migration flows and other cross-border crime from West African countries towards the Canary Islands.” (Host Country: Spain);

Any information concerning Frontex-coordinated sea operations can be found in the Agency’s archive of operations available at: <http://frontex.europa.eu/operations/archive-of-operations/>

531 Frontex, *General Report 2013*, page 63, available at: [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2013/General\\_Report\\_EN.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2013/General_Report_EN.pdf).

532 *Ibidem*.

533 Frontex, *General Report 2013*, page 16.

As reported by Frontex, migrants are forced to embark on unseaworthy boats by unscrupulous smugglers in the Central Mediterranean who tend to use the so-called 'mother ships' and trans-shipments. Big vessels depart from Egypt and towing smaller boats used for later disembarkation. In high seas migrants are transferred to the smaller unseaworthy and overloaded boats mainly directed to Italy. After the trans-shipment, the 'mother ship' returns to the point of departure. Three such 'mother ships' were intercepted and the suspected smugglers were arrested and were subjected to criminal processes.<sup>534</sup>

**Poseidon Sea** aims at controlling the mixed migration flows from the west of Turkey and from Egypt directed to both Greece and Italy<sup>535</sup>. Sea patrolling is conducted by 15 Member States in addition to Greece to "early detect" vessels with migrants on board and control secondary migration movements from Greece to other EU countries. As it will further developed in chapter V.3, during Frontex operations, in application of the EU External sea borders surveillance Regulation, Frontex can order the vessel suspected of being engaged in the smuggling of migrants at sea not to enter the territorial sea or request the vessel to alter its course towards a destination other than the territorial waters or conduct the vessel to a third country where the vessel is assumed to have departed putting the migrants at serious risk of *refoulement*.

### V.3 The EU External Sea Borders Surveillance Regulation

The EU Agency Frontex has been initially involved in coordination activities, but following the entry into force of Regulation (EU) No.1168/2011<sup>536</sup> it is principally also responsible for initiating and carrying out joint operation at sea.<sup>537</sup>

In 2010, the Council adopted Decision 2010/252/EU<sup>538</sup> aimed at improving surveillance at the EU external sea borders and strengthen coordination in sea operations coordinated by Frontex "*to establish clear rules of engagement for joint patrolling and disembarkation of intercepted or rescued persons in order to ensure the*

<sup>534</sup> Frontex, *General Report 2013*, page 18.

<sup>535</sup> Poseidon sea 2012 Operational plan, "Operation aim", page 10.

<sup>536</sup> Article 3 (1) of the Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending 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, OJ2011 L304/1.

<sup>537</sup> *Ibidem*.

<sup>538</sup> Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU).

*safety of those seeking international protection and to prevent loss of life at sea*<sup>539</sup> to more efficiently face, *inter alia*, the impressive number of arrivals of migrants and protection seekers arriving in the EU via the Mediterranean Sea. The Decision incorporates the existing provisions of EU and international law with the aim to overcome different interpretations of international maritime law and diverging practices adopted by Member States and to eliminate legal uncertainty deriving from different and even conflicting rules that could apply to the same situation,<sup>540</sup> based on the *“practical experience of Member States and the Agency when implementing the decision.”*<sup>541</sup> The amended measures to the Schengen Borders Code, in fact, provide for rules and procedures to be applied with regard to interception, search and rescue and disembarkation operations carried out by Member States merely when participating in Frontex operations.

The European Parliament sought the annulment of the Decision before the Court of Justice of the European Union (CJEU), considering that the Decision should have been adopted through the ordinary legislative procedure and not under the “comitology” procedure and that it exceeded the implementation powers laid down in the Schengen Borders Code.<sup>542</sup> On 5 September 2012, the CJEU annulled the Council Decision since it considered that it introduced new essential elements in Regulation (EC) No. 562/2006 in excess of its powers holding that *“it is important to point out that provisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.”*<sup>543</sup>

On annulling the Decision, the Court required to maintain its effects within a reasonable time and until replaced by new rules.<sup>544</sup> To this end, on 12 April 2013, it was issued the proposal of the Commission<sup>545</sup> for a Regulation establishing rules for

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539 European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union COM(2013)197 final. P.1, available at: <http://www.refworld.org/pdfid/535649094.pdf>.

540 *Ibidem*, Explanatory Memorandum, para 1.1.

541 *Ibidem* Proposal, Explanatory Memorandum, para 5.1.

542 Article 12 (5) of the Regulation 562/2006.

543 CJEU, Case C-355/10, *European Parliament v. Council of the European Union*, Judgement of 5 September 2012, para. 77. at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-355/10&td=ALL#>.

544 *Ibidem* para 90.

545 European Commission: Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union COM(2013)197 final.

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the surveillance of the external sea borders in the context of Frontex operations<sup>546</sup>, which contains similar scope and content to those of the Decision.

The Regulation<sup>547</sup> was approved on the 15 May 2014, following the 16 April 2014 approval in first reading by the European Parliament of the Commission proposal<sup>548</sup>, introducing, however, more stringent rules to ensure the respect of fundamental rights and the principle of *non-refoulement* in the context of maritime surveillance. Although the rules adopted by the EP include some clear improvements and more extensive provisions on the protection of fundamental rights and the principle of *non refoulement* as enshrined in Article 33 (1) of the 1951 Refugee Convention and Article 19(2) of the Charter of Fundamental Rights of the European Union, concerns persist that sea operations will still allow to push-back “boat people” to third countries without properly assessing their personal circumstances and their protection needs. This appears not to be complying with the principles set out in the *Hirsi* Decision.

In line with the policy of the Union on the field of EU external borders, the Regulation aims at ensuring the efficient monitoring of the crossing of external borders, including through border surveillance “*while contributing to ensuring the protection and saving of lives.*”<sup>549</sup> To this end, border surveillance is not limited to the detection of attempts at irregular border crossing, but extends to interception as well as search and rescue operations that may arise during a sea operation.

The Regulation shall apply during border surveillance operations conducted by Member States at their external borders merely when participating in operations coordinated by Frontex<sup>550</sup> and imposes on the Member States participating units conducting interception and rescue operations to ensure the safety of life of migrants in all instances.<sup>551</sup> The Regulation states that Member States shall do so in compliance with international law and respect for fundamental rights, regardless of their nationality, status or circumstances in which that person is found.<sup>552</sup>

The provision regarding the protection of fundamental rights and the principle

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546 This proposal is based on Article 77 (2) (d) of the Treaty on the Functioning of the European Union with a view to develop external border policy, ensuring inter alia efficient surveillance of the external borders as set out in Article 77 (1) and Article 77 (2) (d).

547 Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

548 European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union COM(2013)197 final. P.1.

549 Recital 1 of the Regulation 656/2014.

550 Recital 3 and Article 1 of the Regulation 656/2014.

551 Article 3 of the Regulation 656/2014.

552 Article 9 (1) of the Regulation 656/2014.

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of *non refoulement* has been reinforced in the amended version considering that no person shall be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where s(he) may be at risk of *refoulement*. In this regard it should be noted that, as previously recommended by UNHCR,<sup>553</sup> the full refugee definition has been included in this provision.<sup>554</sup>

In this respect Member States should apply the Regulation in full compliance with the principle of *non-refoulement* as defined in the Charter and as interpreted by the case-law of the Court and of the European Court of Human Rights.<sup>555</sup>

In line with the principles set out in the *Hirsi* decision, when considering the possibility of disembarkation in a third country, in the context of conducting a sea operation, the host State, in coordination with the other participant States and Frontex, shall **assess the general situation** in that third country on the basis of a broad range of sources<sup>556</sup> as well as the treatment to which persons would be exposed upon their arrival in that country. The assessment should aim to verify the compliance in practice of the third-country with its international obligations and if this latter offers sufficient guarantees to prevent arbitrary removal to the country of origin of the returnees.<sup>557</sup>

Reflecting the ruling of the *Hirsi* decision, “*before the intercepted and rescued persons are disembarked in, forced to enter, conducted to or otherwise handed over to ‘third-countries authorities’*”, the Regulation provides the obligation for the participating units to **use all means to identify** the concerned migrants and **to assess their personal circumstances**.<sup>558</sup>

Moreover, the participating units shall **inform** intercepted and rescued persons of their destination “*in a way that those persons understand or may reasonably be*

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553 UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union COM(2013)197 final., April 2014, page 13.

554 “No person shall, in contravention of the principle of non refoulement, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement.” Article 4 (1) of the Regulation 656/2014.

555 Recital 12 of the Regulation 656/2014.

556 “The assessment shall be part of the operational plan, shall be provided to the participating units and shall be updated as necessary”. Article 4 (2) of the Regulation 656/2014.

557 Recital 8 of the Regulation 656/2014.

558 Article 4 (3) of the Regulation 656/2014.

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*presumed to understand and to give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle on non- refoulement.*"<sup>559</sup>

In addition, the participating units shall **address the special needs** of asylum seekers and those of vulnerable persons, in particular of unaccompanied minors, victims of trafficking, persons in need of urgent medical assistance and the disabled.<sup>560</sup>

In this respect, it is worth noting that the **Operation Plan** of each Frontex joint operation shall include *inter alia* references to the Union and international law with regard to interception, search, rescue and disembarkation as well as to **procedures ensuring identification and appropriate assistance**, to persons in need of international protection, victims of trafficking, unaccompanied minors and other vulnerable persons.<sup>561</sup> The norm states that *"further details shall be provided for in the operational plan including, when necessary, the availability of shore-based medical staff, interpreters, legal advisors and other relevant experts of the host and participating Member States. Each participating unit shall include at least one person with basic first aid training."*<sup>562</sup>

However, serious concerns have been raised<sup>563</sup> in relation to the modalities of implementation of the cited procedural guarantees.

How will these provisions be implemented in practice? Which criteria will be used to determine "when necessary" to deploy this professional staff? By which means will the persons in need of international protection and humanitarian assistance on board of a vessel be able to effectively contest disembarkation or their handing over to the third-countries authorities?

The Regulation makes a general reference to the principle that everyone would have the right to an effective remedy<sup>564</sup>, to the Schengen Borders Code and to the Procedures Directive,<sup>565</sup> it does not address the issue on how the concerned persons will exercise such a right.

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559 Article 4 (3) of the Regulation 656/2014.

560 Article 4 (4) of the Regulation 656/2014.

561 Recital 17 of the Regulation 656/2014.

562 Article 4 (3) of the Regulation 656/2014.

563 Green migration policy spokesperson Ska Keller in press release - Strasbourg, 16 April 2014 *Rescuing refugees at sea: New Frontex rules an improvement but concerns remain as regards treatment of refugees*, available at: <http://www.ska-keller.de/en/topics/migration/borders/rescuing-refugees-at-sea-new-frontex-rules-an-improvement-but-concerns-remain-as-regards-treatment-of-refugees>. Maria de Donato radio interview available at <http://www.rai.it/dl/radio1/2010/popup.html?t=Voci%20dal%20mondo%20del%2019%20aprile%202014&p=Voci%20dal%20mondo%20del%2019%20aprile%202014&d=&u=http%3A%2F%2Fwww.radio.rai.it%2Fpodcast%2FA45623961.mp3>.

564 Recital 19 of the Regulation 656/2014.

565 Recital 10 of the Regulation 656/2014.

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An important aspect of ensuring protection-sensitive border management is providing appropriate **training to border guards and other operating staff** who shall be trained on relevant provisions of fundamental rights, refugee law and the international legal search and rescue regime in accordance with the Frontex Regulation<sup>566</sup>

Another relevant provision has been introduced by the EP concerning any exchange with third countries of personal data during sea operations conducted in the frame of the Regulation. Any exchange of personal data *“shall be strictly limited to what is absolutely necessary”* and *“shall be prohibited where there is a serious risk of contravention of the principle of non-refoulement.”*<sup>567</sup> This provision is extremely relevant for third country nationals who, by virtue of the legislation of their country, can be subject to arrest and detention.

While some reference is made to international law, concerns have been raised in relation to some provisions that potentially contravene the principle of *non-refoulement* as established in international human rights law and jurisprudence, concerning sea operations and disembarkation.

During **interception in territorial waters**, when evidence that a vessel suspected to carry persons with the intention to circumvent checks at border crossing points or is engaged in the smuggling of migrants at sea, is found, Member States may order the vessel *“to alter its course outside or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby, until it is confirmed that the vessel is keeping to that given course.”*<sup>568</sup>

In this respect it should be considered that whether procedural safeguards are not applied and, consequently the direct and indirect *non-refoulement* principle might be violated by Member States, asylum seekers on board the concerned boats would be denied access to the territory and to relevant asylum procedure as provided by the Procedures Directive. As previously specified, in fact, the Regulation<sup>569</sup> states that during interception and search and rescue operations in territorial water the “recast Procedures Directive” applies to applications for international protection made in the territory, including at the border, **in the territorial waters** or in the transit zones of Member States. In this case, asylum applicants must be admitted to the territory and relevant procedure and benefit from the legal safeguards provided.

Concerns have been raised as well with regard to the measures that can be adopted in case of **interception on the high seas** when evidence confirms that a vessel is engaged in the smuggling of migrants by sea. The participating units, subject to the authorisation of the flag State, in compliance with the Protocol

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<sup>566</sup> Article 4 (8) of the Regulation 656/2014.

<sup>567</sup> Article 4 (5) of the Regulation 656/2014.

<sup>568</sup> Article 6 (2) (b) of the Regulation 656/2014.

<sup>569</sup> Recital 10 of the Regulation 656/2014.

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against the Smuggling of Migrants and with relevant national and international law,<sup>570</sup> may order the *“vessel not to enter the territorial sea or the contiguous zone, and, where necessary, requesting the vessel to alter its course towards a destination other than the territorial sea or the contiguous zone.”*<sup>571</sup> In addition, participating units may also conduct *“the vessel or persons on board to a third country or otherwise handing over the vessel or persons on board to the authorities of a third country.”*<sup>572</sup> In this respect, it should be also considered that in case of interception in territorial sea or the contiguous zone, **disembarkation** shall take place in the coastal Member States *“without prejudice”* to the possibility to order the vessel to alter its course and consequently impeding the boat and the migrants on board to enter in the territorial waters and contiguous zones.<sup>573</sup> When interception is carried out on the high seas, disembarkation may take place *“in the third country from which **the vessel is assumed to have departed**. If that is not possible, disembarkation shall take place in the host Member State.”*<sup>574</sup>

Concerns are raised with reference to the third-country from where the vessel “is assumed to have departed” implying that a room for error may exist during the assessment process, implying that persons might be sent to the “wrong” country.

When taking any decision aiming at ordering the vessel to alter its course or at handing over the boat and the migrants on board to third countries authorities, these persons may be subject to collective expulsion.<sup>575</sup> In this respect it is worth noting that the Strasbourg Court has pointed out that the purpose of the prohibition of collective expulsion is *“to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.”*<sup>576</sup> Regrettably, the Regulation does not make any reference to the prohibition of collective expulsion.

The discussions on the proposal of the Commission<sup>577</sup> on the present Regulation during the experts Round Table, held in Rome in May 2013, in the framework of the EPIM project activities, the police and military authorities involved in interception and rescue operations underlined that the mentioned provisions concerning interception at sea must be read in conjunction with the UN Protocol against the

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570 Article 7(1) of the Regulation 656/2014.

571 Article 7 (2) (b) of the Regulation 656/2014.

572 Article 7 (2) (c) of the Regulation 656/2014.

573 Article 10 (1) (a) of the Regulation 656/2014.

574 Article 10 (1) (b) of the Regulation 656/2014.

575 Article 4 of the Protocol N. 4 ECHR; Article 19(1) of the EU Charter.

576 *Hirsi* decision, para 177.

577 European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union COM(2013)197 final. P.1.

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Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime (hereafter “UN Smuggling Protocol”) to which the EU is a Party, whose purpose is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties, while protecting the rights of smuggled migrants.<sup>578</sup> In particular, when a State Party has *“reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”*<sup>579</sup> However, as underlined by the mentioned stakeholders, this norm is silent concerning the type of measures that may be taken by States. In any case the Protocol does not contain any provision allowing expressly the push-back of smuggled migrants at sea, the rights of whom must be instead protected and the special needs of women and children must be taken into account.<sup>580</sup> Moreover, the same Protocol states that *“Nothing[...]shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”*<sup>581</sup> In line with the *Hirsi* decision,<sup>582</sup> the possible existence of agreements between Third-country authorities and Member States does not absolve these ones from their obligations under EU and international law and in particular the *non-refoulement* principle.<sup>583</sup>

With regard to **search and rescue** operations, the Regulation provides that *“where the search and rescue situation has been concluded, the participating unit shall ... resume the sea operation”*<sup>584</sup>. However, the provision does not specify that the sea operation is deemed concluded only when the rescued persons are disembarked in a place of safety. In this respect, according to the Regulation provides that the host Member State and the participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify **a place of safety** and when it is identified, they *“shall ensure that disembarkation of the rescued persons is carried out*

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578 Article 2 of the UN Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime.

579 Article 8 (7) of the UN Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime.

580 Article 16 (1) (2) (3) of the UN Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime.

581 Article 19 of the UN Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime.

582 *Hirsi* Decision, para 134.

583 Recital 13 of the Regulation 656/2014.

584 Article 9 (3) of the Regulation 656/2014 .

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*rapidly and effectively*”,<sup>585</sup> seeking to avoid that rescued persons remain on board of vessels for long period of time. When this is not possible, in the interest of the safety of the rescued persons and of the participating unit itself, disembarkation will take place in the host Member State.

The Regulation defines the place of safety as a location where rescue operations are considered concluded and where the safety of life of survivors is not threatened, their basic needs are met and *“the protection of fundamental rights in compliance with the principle of non-refoulement”* is taken into account.<sup>586</sup> As recommended by PACE,<sup>587</sup> *“it is clear that the notion of “place of safety” should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights.”*

The Regulation provides an important provision establishing that *“the shipmaster and crew should not face criminal penalties for the sole reason of having rescued persons in distress at sea and brought them to a place of safety”*.<sup>588</sup> Recalling that the Regulation rules only on Frontex coordinated operations, hopefully, a similar norm should be introduced in national legislations considering that private ships after having rescued migrants at sea have been then accused of aiding of illegal immigration or have turned their eyes blind instead of rescuing them.

Undoubtedly the Regulation has introduced relevant provisions with regard to guarantees in the context of sea operations and disembarkation. However concerns persist on how the procedural guarantees will be applied in practice. As stressed by the experts interviewed during the Epim project activities, it is extremely difficult if not impossible to ensure the same procedural guarantees applied in the national territory on board of vessels, considered the particular emergency-type sea operational context.

As already stressed by UNHCR,<sup>589</sup> a vessel is inappropriate to ensure reception arrangements and adequate facilities<sup>590</sup> to meet the basic needs of international protection seekers’.

The authorities involved in sea operations have to manage objective security risks and keep calmness on board where it is gathered a consistent number of migrants under stress for the traumatic experience during their perilous journeys and for the fear of being sent back after disembarkation. Time is needed to carry out

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<sup>585</sup> Article 10 (1) (c) of the Regulation 656/2014.

<sup>586</sup> Article 2 (12) of the Regulation 656/2014.

<sup>587</sup> Resolution 1821 (2011), *The interception and rescue at sea of asylum seekers, refugees and irregular migrants Pace*, Council of Europe, para 5.2 and para 9.5.

<sup>588</sup> Recital 14 of the Regulation 656/2014.

<sup>589</sup> See UNHCR, *Protection Policy paper: Maritime interception operations and the processing of International protection claims: legal standards and policy considerations with respect to extraterritorial processing*. November 2010, para 56.

<sup>590</sup> *Ibidem*.

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proper identification, profiling and assessment of the personal situation and specific needs of each intercepted and/or rescued person and of the general situation in a third country.

Based on the “*Mare Nostrum*” approach and experience, persons intercepted or rescued at sea, after having been summarily identified and (on a voluntary basis) fingerprinted on board of military vessels, are conducted on the Italian territory where they are identified and channelled to the relevant procedures.

Following disembarkation, burden-sharing mechanisms could be envisaged among EU Member States like, for instance, the distribution of asylum applicants in other Member States or the mutual recognition of positive asylum decisions and the transfer of protection statuses among Member States in line with Article 80 TFEU, which establishes the principle of solidarity and fair sharing of responsibility among Member States.<sup>591</sup>

As stressed by ECRE, cooperation between EASO, FRA and Frontex could further “*mainstream respect for fundamental rights into EASO’s activities as well as protection sensitive border controls in Frontex operations. In this regard, EASO’s expertise must be systematically integrated into the planning and implementation of Frontex border control operations.*”<sup>592</sup> The involvement of experts from EASO Asylum Intervention Pool and UNHCR in Frontex operations will highly contribute to promptly identify persons with international protection needs and consequently to reduce the risk of violations of the principle of *non refoulement*.<sup>593</sup>

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<sup>591</sup> Recital 2 of the Regulation 656/2014.

<sup>592</sup> ECRE, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013, page 3: <http://www.ecre.org/component/downloads/downloads/687.html>.

<sup>593</sup> *Ibidem*.

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## VI. EXTERNALISATION OF BORDER CONTROL MEASURES AND READMISSION AGREEMENTS

Over the last two decades, the EU and its Member States have increasingly been looking at introducing legislation and practices aiming at advancing and externalising border controls that are carried out outside their national territories.

Following the significant increase of mixed migration flows, in particular by sea, EU Member States continue “outsourcing” border enforcement by contracting private actors and by signing bilateral and multilateral agreements with third countries which cooperate in strengthening such controls on their territories to effectively prevent irregular migration<sup>594</sup>. The adoption of these measures has determined the progressive development of the so-called phenomenon of the externalisation of the borders. The term “externalisation” refers to a range of measures of border control including those implemented outside the national territory – either in the territory of another country or on the high seas, thus shifting the responsibility to fight irregular migration in the EU to countries of origin or of transit.<sup>595</sup>

As it will be illustrated further, through such policy and practice, States try to circumvent their obligations, in particular the principle of non *refoulement*.

The removal of an individual to his/her country of origin or of transit is a costly and lengthy procedure, due to the lack of cooperation by third countries and/or to the fact that migrants themselves do not always provide information on their (real) identity and nationality. This implies that a large number of migrants remain in an irregular situation in the EU, given the impossibility to return them to their country of origin. All these factors, *inter alia*, have pushed Member States and the EU to conclude specific agreements with third countries, mainly aiming at preventing the irregular departure of migrants and facilitating their return to their countries of origin or countries of previous transit/stay through established readmission procedures, that can also be simplified and accelerated. In this respect, it should be noted that the Stockholm Programme considers the conclusion of readmission agreements at the EU or at bilateral level among the key priorities to combat “illegal immigration.”<sup>596</sup>

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594 Fundamental Rights Agency Report, *Fundamental Rights at Europe’s Southern Sea Borders*, 2013, page 44.

595 Amnesty International, *S.O.S. Europe, Human Rights and Migration Control*, 2012, page 3, available at: <http://www.amnestyusa.org/research/reports/sos-europe-human-rights-and-migration-control>.

596 Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010XG0504(01)&from=EN); para 6.1.6.

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## VI.1 Externalisation of Border Control Measures

Among the externalisation measures, it is worth mentioning the deployment of Immigration Liaison Officers (ILOs)<sup>597</sup> in third countries of origin or third countries of transit in order to prevent and combat irregular immigration. An “immigration liaison officer” is a representative of a Member State deployed abroad by the national authorities in order to ensure better cooperation and exchange of information among Member States and for the purpose of establishing and maintaining contacts with the authorities of the host country for the management of migratory flows and of returns. *“However, this Regulation fails to include any mention of Member States’ international obligations concerning persons in need of protection.”*<sup>598</sup>

Among the externalisation measures to prevent unauthorised access to the EU territory it is worth mentioning the EU rules on **sanctions against carriers**, introduced in the 1990s and now part of the Schengen *acquis*. More and more often, passengers are subject to the control of their travel documents carried out by contracted civil staff or members of private companies performing the function of border control on behalf of a Contracting Party, without any possibility to challenge the refusal to check-in and depart from the country where such controls are conducted. In this respect, implementing the EU law<sup>599</sup>, Member States have introduced provisions laying out a set of obligations for carriers transporting by air, land and sea undocumented third country nationals into the EU. At the request of the local authority, carriers must, therefore, take charge and return, without delay, undocumented passengers to the third country from which they were brought, to the third countries which issued the documents authorising them to cross the border or to any other third country guaranteeing their admittance.<sup>600</sup> When unable to carry out the return of non nationals whose entry is refused by Member States, carriers are obliged to find immediately means of onward transportation and to bear the costs thereof. If this is not possible, carriers must assume responsibility for the costs of the stay and return of the concerned third-country national.<sup>601</sup>

Moreover, sanctions are applied also when entry is refused to a third-country national in transit, if the carrier taking the person concerned to his/her country of destination refuses to take the passenger on board, or when the country of destination has refused entry to the migrant and has sent him/her back to the transit country.<sup>602</sup>

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597 Article 1 (1) of the Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

598 C. HEIN, *Access to Protection and International Human Rights Obligations: Challenges for the European Union*, page 6.

599 Schengen Borders Code 562/2006: Annex V, Part. I, Article 3.

600 *Ibidem*.

601 Article 3 of the Carriers Sanctions Directive (2001/51/EC), adopted on 28<sup>th</sup> June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

602 *Ibidem*, Article 2.

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Member States are, however, bound by their obligations in case a third country national seeks international protection.<sup>603</sup> It should be noted that the Directive makes reference only to refugee law obligations without mentioning the obligations to respect fundamental rights and the principle of *non-refoulement*.

It should also be pointed out that EU Member States may decide not to impose sanctions in case the behaviour of the carrier is intended to provide humanitarian assistance in applying its national law and practise, even if there is no obligation to do so.<sup>604</sup>

**The case of Portugal – cooperation between the national airline and the immigration Authorities**

As reported by the Portuguese Refugee Council<sup>605</sup>, in the framework of a cooperation agreement with the Immigration and Borders Service (hereafter “SEF”), employees of the Portuguese national airline TAP are specifically trained and assisted by SEF inspectors to screen and detect passengers without travel documents or with fraudulent ones at airports and third countries in order not to incur in sanctions.<sup>606</sup> This kind of activity is not considered as border control. These informal controls are conducted during check-in operations, at the terminal apron or when boarding the aircraft. In this respect, it should be noted that in practice such controls were also carried out at the airport in Bissau under the above mentioned cooperation agreement between TAP and SEF, even though there was no formal agreement between Portugal and Guinea Bissau. According to SEF, such checks were stopped at the end of 2012 for instability and security reasons in Guinea Bissau.

In this regard, however, the media reported that extraterritorial border controls have been carried out at the Lisbon airport, namely on the Syrian refugees coming to Portugal from Bissau.<sup>607</sup>

This joint practice, carried out by both TAP employees and SEF authorities with the acquiescence of the Guinean authorities has raised serious concerns among international community due to the consequences that may negatively affect potential asylum seekers. In this respect, the *Hirsi* Decision has clarified the extraterritorial scope of obligations deriving from the principle of *non-refoulement*<sup>608</sup>.

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603 *Ibidem*, Recital 3 and Article 4 (2).

604 Article 1 (2) Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

605 Epim Portuguese Country Report: *O acesso à protecção: Um direito humano*- Access to protection: a Human Right.

606 Chapter III of Annex IX of the UN Convention on International Civil Aviation signed in Chicago on the 7th December 1944 (13<sup>th</sup> edition), section I (3.31-3.33) and Chapter V (5.9 and 5.9.1).

607 The daily *Público*: *Syrian Families claim political asylum to Portugal*, 11/12/2013 and *Tap President admits there were “orders of higher magnitude” to board Syrian passengers* 13/12/2013. Epim Portuguese Country Report, *O acesso à protecção: Um direito humano*- Access to protection: a Human Right, page 21, footnote 17.

608 See ECHR Judgment, *Case of Hirsi Jamaa and others v. Italy*, 23 February 2012, Concurring opinion of Judge Pinto de Albuquerque.

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## **VI.2 Readmission Agreements and the Principle of *Non-refoulement***

Readmission agreements are considered key tools in the fight against irregular immigration at national and EU level, since they are used by Member States as a type of an expulsion measure to return third-country nationals to their countries of origin and/or non nationals that have previously transited/stayed in the third country concerned.

Readmission measures are usually applied to persons caught at border areas and the return generally takes place a few days after the arrival of the migrant in a Member State. The success in implementing readmission measures depends much on the existing relations between the Member State and the third-country concerned. It should be recalled that, under international law, a State has the obligation to accept its own nationals,<sup>609</sup> but there is no equivalent obligation with respect to third country nationals. Third countries are rather reluctant to readmit non-nationals into their territories since such readmissions represent a substantial burden, also in financial terms. Generally speaking, in third countries, there is a need of improving effective integration conditions for returnees upon arrival in order to prevent them to irregularly return to EU Member States. In this respect, it should be pointed out that the EU has already financed several projects to support reintegration policies and reception capacities within the framework of some European Readmission Agreements (hereafter “EURAs”) concluded with third-countries.<sup>610</sup>

Considering the consistent number of persons arriving every year by irregular means by land and sea, Member States continue to try and find ways of returning irregular migrants to the neighboring third countries through which they have previously transited, especially when they are caught while crossing the border or immediately thereafter.<sup>611</sup>

### **VI.2.1 Readmission Agreements concluded by the EU**

In the framework of the EU policy, European Readmission Agreements (hereafter “EURAs”) are considered as necessary for an efficient management of migration flows into the EU Member States. They are supposed to be a major element in tackling irregular immigration, since they facilitate the swift return of irregular migrants.<sup>612</sup>

EURAs do not define the presence of a person in the EU or in the partner country

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609 Article 12 (4) of the International Covenant on Civil and Political Rights (1966).

610 European Commission, COM (2011) 76 final, page 7.

611 Instead, “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”. 8 UN, Convention on International Civil Aviation (1944), Annex 9, Chap. 5.

Please see the Fundamental Rights Agency report, *Fundamental Rights at Europe’s southern sea borders*, 2013, page 98.

612 See Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, COM(2011) 76 final, para 1.

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from a legal point of view, such assessment being instead a prerogative of the national authorities in accordance with national and, where applicable, EU law.

Member States have concluded a relevant number of Readmission agreements at bilateral level. Over the last ten years the EU has also been active in negotiating and in adopting readmission agreements with third countries.<sup>613</sup> As from May 2014, the EU has concluded readmission agreements with 17 third countries.<sup>614</sup>

The European Commission has the prerogative of concluding EURAs, while Member States implement them.

#### **The EU-Turkey readmission agreement**

On 6 December 2013, Cecilia Malmström, the EU Commissioner for Home Affairs, and Muammer Güler, the Turkish Minister of Interior, signed the EU-Turkey readmission agreement. Furthermore, the EU-Turkey Visa liberalization dialogue was initiated with the Turkish Minister of Foreign Affairs.

The agreement, which has been made available to the public,<sup>615</sup> provides that Turkey will take back third-country nationals who previously transited in its territory and irregularly entered the EU.<sup>616</sup>

This agreement has been widely criticized by human rights NGOs,<sup>617</sup> in view of the bad practices of push-backs from Bulgarian and Greek authorities brutally removing third-country nationals to Turkey and the serious shortcomings in the asylum systems in Bulgaria and Greece.

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613 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 fulfill the conditions for entry, presence or residence in the territory of one of the Member States.”*

In addition to classical readmission agreements, it should be also underlined the conclusion of at least some 30 other agreements in the past by the EU and the European Communities. These contain an enabling readmission clause, and include the euro-Mediterranean agreements concluded with Algeria, Egypt, Morocco, Tunisia as well as the Cotonou Agreement covering Mauritania and Senegal (Please see Table 12, p.100 of the Fundamental Rights Agency report, *Fundamental Rights at Europe’s southern sea borders*, 2013.)

614 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, Macao, FYR of Macedonia, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine. Negotiations were continuing with Algeria, Belarus, China and Morocco. Additional information can be found at: European Commission, Commission Staff Working Document (SWD(2014) 165 final), 22 May 2014, available at: <http://www.statewatch.org/news/2014/may/eu-com-5th-annual-report-on-immigration-and-asylum-swd.pdf>.

615 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0239:FIN:EN:PDF>.

616 This provision concerning the readmission of third-country nationals will be applicable three years after the signing of the readmission agreement.

617 Policy brief by EuroMedRights, available at [http://www.euromedrights.org/eng/wp-content/uploads/2013/06/En\\_TurkeyReadmis\\_Pb\\_web.pdf](http://www.euromedrights.org/eng/wp-content/uploads/2013/06/En_TurkeyReadmis_Pb_web.pdf), and Amnesty International Report, *The Human costs of Fortress Europe – Human rights violations against migrants and refugees at Europe’s borders*, July 2014, page 15.

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The Stockholm Programme considers relevant the conclusion of “*effective and operational readmission agreements on a case-by-case basis at Union or bilateral level*”<sup>618</sup> in the framework of the priority measures to combat illegal immigration following a comprehensive approach to return and readmission in cooperation with countries of origin and transit confirmed by the Strategic Guidelines.<sup>619</sup>

It should be considered that all EU readmission agreements contain the so-called TCN clause for the readmission of third-country nationals, including stateless persons,<sup>620</sup> although in some EURAs its applicability is deferred (2 years for Albania and Ukraine, 3 years for the Russian Federation).<sup>621</sup>

Moreover, the implementation of these agreements may be suspended on the grounds of the protection of the security, the public order or the public health of the State.<sup>622</sup> Four EURAs include a temporary suspension clause with regard to third-country nationals and stateless persons due to the reasons mentioned before.<sup>623</sup> However, it should be pointed out that a suspension is not provided in case of serious violations of human rights harming the persons returned under the readmission agreements.

Since the Lisbon Treaty entered into force, the EU Parliament<sup>624</sup> has to approve the EURAs. In this respect it should be noted that the Parliament has commissioned a study on readmission policies, that was published in 2010 and that dealt *inter alia* with fundamental rights. With regard to EURAs, the study raised “*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.*”<sup>625</sup>

In 2011, the European Commission published an evaluation of EURAs which analyzed the legal framework in force as well as the bad practices with regard to

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618 Stockholm Programme, Para (6.1.6).

619 European Council Conclusions, 26/27 June 2014.

620 Some of the EURAs contain a simplified procedure clause. In particular, 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). “*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)”.

621 The clause has been operational since 1 May 2008 for Albania, since 1 January 2010 for Ukraine and since 1 June 2010 for Russia. Please see European Commission, COM (2011) 76 final, page 5.

622 Council of the European Union (1996c), Annex to Annex II.2, Article 13, page 20 and following.

623 Please see EC-FYROM agreement, Article 22 (4); EC-Bosnia and Herzegovina agreement, Article 22 (4); EC-Montenegro agreement, Article 22 (4); EC-Serbia agreement, Article 22 (4).

624 Article 218 of the TFEU.

625 Cassarino, J.P. and European University Institute (2010), as reported by FRA’s Report, page 99.

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human rights, recommending possible actions to prevent human rights violations in the future readmission agreements.<sup>626</sup> Although in most cases EURAs explicitly refer to one or more human rights instruments, among them the 1951 Geneva Convention relating to the refugee status, the ECHR and the Convention Against Torture<sup>627</sup>, the Commission explicitly asked the inclusion of safeguard clauses for accelerated readmission procedures providing for the suspension of the readmission of an individual in case of possible violations of human rights. The Commission also asked the temporary suspension of a readmission agreement in case of persistent and serious risk of violation of human rights of a readmitted person and commitments to prefer voluntary return and to treat third-country nationals in compliance with international human rights law.<sup>628</sup>

EURAs are applied also to persons illegally staying on the territory of a contracting State, subject to a return decision in application of the relevant (administrative) laws in compliance with the principle of *non refoulement* and of fundamental rights, in particular the EU Charter of Fundamental rights as set out in the Return Directive. Furthermore, the Commission has underlined that EURAs legal framework already inhibits their application to persons potentially subject to persecution and human rights violations. However, based on the actual administrative practices of Member States, the Commission has recognized the need to adopt “*flanking measures, control mechanisms and/or guarantees in future EURAs, to ensure that the human rights of returnees are fully respected at all times.*”<sup>629</sup> In this regard, the Commission called also for improvements, especially through the enhancement of the role of the Joint Readmission Committees (hereafter “JRCs”)<sup>630</sup>, which are charged with the monitoring of the implementation of the EURAs and, where necessary, taking decisions which are binding on the Parties.

It has also been recommended the possibility of inviting relevant International organizations and NGOs to JRC meetings, considering the increasing importance of EURAs in the process of return and their interrelation with human rights and

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626 European Commission, Communication from the Commission to the European Parliament and the Council, “*Evaluation of EU Readmission Agreements*”, COM (2011) 76 final, 23 February 2011, page 14, available at: [http://ec.europa.eu/home-affairs/news/intro/docs/COMM\\_PDF\\_COM\\_2011\\_0076\\_F\\_EN\\_COMMUNICATION.pdf](http://ec.europa.eu/home-affairs/news/intro/docs/COMM_PDF_COM_2011_0076_F_EN_COMMUNICATION.pdf).

627 For Macao, Hong Kong and Sri Lanka, however, the wording of this clause is weaker and of a very general nature (Please see Hong-Kong, Art. 16; Macao, Art. 16; Sri Lanka, Art. 16). Furthermore, with regard to the wording used in EU R. A., the readmission agreement concluded with Pakistan does not contain any human rights safeguard clause. Cfr. Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorization, OJ 2010 L 287/52.

628 FRA Report, *Fundamental rights at Europe’s southern sea borders*, August 2013, page 101, and available at: [http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13\\_en.pdf](http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf).

629 European Commission, COM (2011) 76 final, pages 11 -12.

630 European Commission, COM (2011) 76 final, page 14. JRCs are co-chaired by the Commission on behalf of the EU.

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international protection standards. According to the European Commission, this would also help in obtaining more detailed information on the situation *"on the ground that can be gathered from NGOs and international organizations, MS' Embassies and EU Delegations."*<sup>631</sup>

Recognizing the importance that such recommendations assume in relation with the human rights of the persons readmitted under the application of EURAs and with the principle of *non-refoulement*, it remains to see to what extent these agreements will be implemented in the coming years.

Since Member States are responsible for implementing EURAs, the Commission required detailed data on their implementation. However, it should be noted that, in general, such data are not complete and do not correspond to those gathered by EUROSTAT. *"For example, for 2009 EUROSTAT reports about over 4300 returns of Russian citizens from the MS, whereas according to the data provided by MS only over 500 effective returns took place under the EURA with Russia."*<sup>632</sup>

Moreover, it should be noted that the majority of Member States apply EURAs, while others keep using the bilateral agreements signed prior to the EURAs entry into force, mainly because of the absence of a bilateral implementing protocol as well as of the need to adapt national administrative procedures. In this respect, the Commission has stressed that the EURAs are self-standing, operational instruments which do not necessarily require the conclusion of bilateral implementing protocols with third countries. *"The inconsistent application of EURAs undermines greatly the credibility of the EU Readmission Policy towards the third countries, which are expected to apply the EURA correctly. More seriously, human rights and international protection guarantees in EURAs may be ineffective if MS do not return irregular migrants under EURAs."*<sup>633</sup>

With regard to the readmission of nationals, there were significant numbers of readmission applications to practically all relevant third countries,<sup>634</sup> while the TCN clause is actually seldom used by Member States, even with transit countries like the Western Balkans, with which the EU shares land borders. *"The TCN clause in the EURAs with countries not bordering the EU (i.e. Sri Lanka, Montenegro, Hong Kong and Macao) was only used 28 times. Some MS stated that as a matter of policy they only send persons to the countries of origin"*<sup>635</sup>

Concerning the third country nationals readmitted to third transit country, it should be noted that these persons may be subjected to a risk of disproportionate administrative measures, forbidden under human rights standards, such as prolonged or indefinite detention periods pending the expulsion to their countries

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631 Please see European Commission, COM (2011) 76 final, page 10.

632 European Commission, COM (2011) 76 final, page 4.

633 *Ibidem*.

634 *Ibidem*.

635 *Ibidem*.

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of origin, readmission to their home countries in violation of the principle of *non refoulement*, destitution due to the lack of means of subsistence.

The European Commission strictly requires that any EURA with TCN clause should provide with a clause where *“the parties explicitly engage in treating the returnees in compliance with their obligations set out in international human rights conventions to which they are party”*. *“If the readmitting country has not ratified the key international human rights conventions, the EURA should explicitly oblige that country to comply with the standards set out in those international conventions.”*<sup>636</sup>

With regard to stateless returnees, it should be pointed out that they may be exposed to various violations of their human rights and to any kind of abuse. When these persons are readmitted in third-countries, the consular authorities of the country where they had habitual residence may refuse to issue travel documents and prevent them from returning there, since they are not nationals. Therefore, these persons can be subject to arbitrary arrest and detention, discrimination and no possibility to locally integrate, since third-countries may not have ratified nor enforced the UN statelessness Conventions.<sup>637</sup> In this case, stateless persons are obliged to live in an “orbit like-situation” without protection and assistance.

### **VI.2.2 Bilateral Readmission Agreements**

The absence of EURAs signed with a specific third country does not prevent a Member State to use bilateral readmission agreements. Over the years, Member States have adopted standard and non-standard bilateral agreements related to readmission.<sup>638</sup> Standard readmission agreements, substantially reflecting the provisions and the structure of the *specimen* recommended by the Council of the EU in 1994, are generally based only on the modalities of return of irregular resident migrants. The non-standard bilateral agreements may be of different nature, among them cooperation agreements in which readmission and the fight against irregular migration are treated together with migration, economic or security issues. *“Others are 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.”*<sup>639</sup>

Over the last years, in fact, Member States have tended to conclude any sort of agreements like memoranda of understanding, arrangements, police cooperation agreements which include a clause on readmission. Generally speaking, these

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636 European Commission, COM (2011) 76 final, page 13.

637 1954 Convention Related to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

638 For an analysis of readmission agreements in the Mediterranean, see Cassarino, J.P. 2010.

639 FRA, *Fundamental rights at Europe's southern sea borders*, August 2013, page 100, and available at: [http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13\\_en.pdf](http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf).

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agreements cover the fight against unauthorized migration, the strengthening of borders through technical assistance and the joint management of labour migration with third countries of origin, including development aid. *"For example, this approach is enshrined in Spain's Plán Africa as well as in France's pacts on the joint management of international migration and co-development"*.<sup>640</sup>

It is worth noticing that these agreements can be renegotiated by Member States more easily and speedily in order to respond to new and unexpected migratory pressure. It should also be considered that Member States tend to adopt them without any Parliamentary scrutiny<sup>641</sup> and do not make them public. In this respect, the European Parliament has stressed that: *"The characteristics of such hybrid patterns of cooperation linked to readmission might be critical when it comes to evaluating the extent to which national practices comply with the principles of EU law."*<sup>642</sup>

As reported by FRA<sup>643</sup>, southern EU Member States<sup>644</sup> have concluded at least 26 agreements related to readmission with third countries like Algeria, Egypt, Libya, Mauritania, Morocco, Senegal, Tunisia and Turkey.

### **VI.2.3 Concerns relative to the Implementation of Readmission Agreements**

Various human rights organizations have been denouncing at national, European and international level, for many years now, the lack of transparency of readmission agreements and in particular the modalities employed in their implementation in practice, (too) often not in compliance with the human rights obligations and the principle of *non-refoulement*.<sup>645</sup>

Concerns have been raised, in fact, on the great number of agreements between Member States and third countries neighbouring the EU, containing specific rules for persons who, after having been apprehended at the border, are channelled to accelerated procedures which provide less legal safeguards than those applied during the regular ones. In practice, it may happen that border guards prefer to push-back migrants immediately at border in order to avoid the application of the national legislation and the procedural guarantees in favour of the migrant concerned. Member States may tend to avoid the application of the Return Directive which provides instead legal safeguards, such as the principle of *non-refoulement*, applicable also to returns of persons apprehended while crossing the

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640 European Union: European Parliament, Readmission Policy in the European Union, September 2010, page 28.

641 Amnesty International, *S.O.S Europe, Human Rights and Migration Controls*, 2012, pages 17-18. <http://www.amnestyusa.org/research/reports/sos-europe-human-rights-and-migration-control>.

642 European Union: European Parliament, Readmission Policy in the European Union, September 2010, page 28.

643 FRA, *Fundamental rights at Europe's southern sea borders*, August 2013, table n. 13, page 100.

644 Italy, fifteen; Spain, six; Greece, four; and Malta one.

645 Amnesty International, *S.O.S Europe, Human Rights and Migration Controls*, 2012, pages 17-18. <http://www.amnestyusa.org/research/reports/sos-europe-human-rights-and-migration-control>.

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border unlawfully.<sup>646</sup> As stressed by FRA, “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 (...),” mainly due to the lack of adequately trained officers, to the exclusion of safeguards in the readmission agreements themselves and to operational assistance to officers during the implementation of the agreement.<sup>647</sup>

It should be noted that the Return Directive contains also detailed rules on the suspensive effect of appeals and the right to effective remedy, even though “In practice, there might be some attempts to return a persons despite the fact that an appeal with suspensive effect is still pending.”<sup>648</sup>

As already underlined by the special Rapporteur on the human rights of migrants, bilateral readmission agreements often do not provide adequate guarantees on the obligation to respect fundamental rights and in no case any specific safeguards for migrants and applicants of international protection against the risk of violation direct and indirect *refoulement*.<sup>649</sup>

Moreover, serious concerns have been raised on those agreements that have introduced simplified and accelerated the readmission procedure. As stressed by the Fundamental Rights Agency, accelerated returns primarily concerned Moroccan nationals removed from Spain, and Egyptians and Tunisians removed from Italy. Migrants were repatriated to their countries of origin on the basis of such technical dynamic operational tools that easily meet strict return deadlines although they are not subjected to public scrutiny.<sup>650</sup>

During simplified and accelerated procedures, the readmitted persons do not go through the same process as other irregular migrants, even if they arrived together. The choice is made on the basis of the nationality and the type of readmission agreement concluded by a concerned Member State with a third country based on different factors, among them the geographical proximity, the nature and trends of migration flows, as well as financial or other incentives. In practice, migrants may not have the possibility to seek asylum and benefit from any of the procedural guarantees set out in the *Hirsi* Decision. Indeed, being separated from other migrants and having a limited access to information and legal counselling, they

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646 Article 4 (4) (b) of the Return Directive.

647 FRA, *Fundamental rights at Europe's southern sea borders*, August 2013, page 103.

648 European Commission, COM (2011) 76 final, page 12.

649 François Crépeau, Report by the Special Rapporteur on the human rights of migrants, Addendum, Mission to Italy (29 September – 8 October 2012), p. 12; Amnesty International, S.O:S Europe, Human Rights and Migration Controls, 2012, pages 17-18, available at: <http://www.amnestyusa.org/research/reports/sos-europe-human-rights-and-migration-control>.

650 Amnesty International, *We are foreigners, we have no rights: the plight of refugees, asylum-seekers ad migrants in Libya*, London, 13 November 2012; Amnesty International, *S.O.S. Europe Human Rights and Migration Control*, USA, 13 June 2012.

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may face difficulties in seeking protection.

They would be also denied the access to international organizations and NGOs specialized in providing information and legal counselling, to a fair examination of their protection requests and to the right to appeal against the readmission decision. During the implementation of such procedures, there are no mechanisms in place to properly identify potential asylum requests, unaccompanied minors, victims of torture and trafficked persons.<sup>651</sup> Doubts were also raised on the modalities of the identification procedures carried out by consular authorities who generally meet their nationals on the same day of departure to third countries. In Italy, the Tunisian consular authorities met the Tunisian migrants to be readmitted at the airport without making any previous checks on whether they really were Tunisians.

### **The readmission of a Tunisian migrant from Italy to Tunisia**

A Tunisian woman, regularly residing in France made contacts with the office of the Italian Council for Refugees (CIR) in Rome to verify how she could get in contact with her brother who, after leaving Tunisia by boat, had not called her to inform her on his whereabouts. The legal officers of CIR tried to get information from the manager of the reception centre in Pozzallo who refused to provide it explaining that only local police authorities could provide information on detainees. CIR, after several attempts to talk to the competent police authorities, got in contact with the local IOM officer working in the framework of the Praesidium project. CIR was informed that IOM had no access to the centre in absence of a specific authorisation from the police. In the meantime, the sister of the Tunisian boy's tried to get in touch with the Tunisian consular authorities who were reluctant to provide the information and to verify whether the boy was among the persons detained in the centre in Sicily. She was shocked by the lack of sensitiveness and cooperation of the consular staff, who were supposed to assist their nationals. After the repatriation in Tunisia, the boy explained that, against the willingness of his family, he had decided to try and reach France irregularly via Italy since it had been impossible for him to obtain a visa to visit his relatives regularly residing in France. He explained that after having been rescued at sea, he was conducted to a centre where he could have no contacts with a lawyer and/or NGOs. He met for the first time the Tunisian consular authorities at Palermo airport when he was embarking on the plane. At the airport he was notified with a document he supposes is a return order. He did not want to make an appeal against the return order because he feared that this would have had a negative impact on his request to obtain a visa to enter France.

With regard to the migrants' personal data, it should be noted that FRA states that *"only personal data on returnees that is strictly necessary for the readmission should be forwarded to the transit country"*, with particular regard to asylum-related

<sup>651</sup> François Crépeau, *Report by the Special Rapporteur on the human rights of migrants*, Addendum, Mission to Italy (29 September – 8 October 2012), page 12.

information, in order not to contradict the spirit of the requirement of confidentiality provided by the Procedures Directive<sup>652</sup>.

It should be also considered that when nationals and non-nationals (including stateless persons) are readmitted to third countries, they can be punished for having left such countries irregularly. Third-countries, in fact, in order to prevent irregular migration, have introduced measures to prohibit their citizens and third-country nationals to leave their territories without authorization in their domestic legislations. Besides the norms criminalizing the smuggling of migrants,<sup>653</sup> most North African countries and Turkey have introduced provisions aiming at punishing those people who have left the country through the established border crossing points and/or because they travelled without the required passport and exit visa.

As reported by FRA, authorities impose fines and determine prison sentences<sup>654</sup> that, in general, may vary depending on whether they are applied to their citizens or to non-nationals. This is the case, for instance, of Tunisia, where citizens risk from 15 days to 6 months of imprisonment and a fine from 30 to 120 Tunisian dinar, while non-citizens risk a prison sentence from 1 month to 1 year and a fine from 6 to 120 Tunisian dinar.

The period of imprisonment may be doubled in case of recidivism.<sup>655</sup>

In Libya non-nationals are systematically detained indefinitely. Moroccan authorities usually detain non-nationals who can be forcibly conducted to the land border with Algeria.<sup>656</sup>

When implementing accelerated procedures, Member States should ensure that all the officers involved are provided with clear instructions and training on the respect of fundamental rights safeguards during the readmission process.<sup>657</sup>

In case of agreements with third countries responsible for systematic human rights violations, readmission should not be carried out. An independent monitoring mechanism<sup>658</sup> should be also established.

**Italy** has applied simplified and accelerated readmission procedures to return Egyptian and Tunisian nationals. In the framework of Epim research activities carried out in Italy, it emerged that since the beginning of 2013 hundreds of Tunisian and Egyptian nationals have been returned to their countries of origin without having any possibility to access UNHCR and NGOs specialized in providing services to migrants, asylum seekers, victims of torture, unaccompanied minors, victims of trafficking. Generally speaking, as denounced by a number of NGOs and by the UN

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652 Article 41 of the Procedures Directive.

653 FRA, *Fundamental rights at Europe's southern sea borders*, August 2013, page 43.

654 *Ibidem*.

655 *Ibidem*.

656 UN, CAT (2011) para 26 ; Jesuit Refugee Service Europe (2012), pages 14, 17, 19.

657 FRA, *Fundamental rights at Europe's southern sea borders*, August 2013.

658 *Ibidem*, page 103.

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Special Rapporteur on the human rights of migrants,<sup>659</sup> after having been rescued at sea or intercepted while trespassing border crossing points or after having disembarked in other parts of the southern coasts, migrants were superficially identified and separated from the other migrants. They are generally placed in first aid reception facilities (Centri di Primo Soccorso ed Accoglienza – CPSA), used as administrative detention centres although they were created on a different legal basis such as the Identification and Expulsion centres (CIE) where migrants can be detained only in those cases specified by law. Migrants were placed in facilities located in Sicily (Pozzallo, Porto Empedocle and other centres near Syracuse) and in Sardinia (Elmas) where their personal freedom was limited without any judicial validation, as prescribed by law.<sup>660</sup>

In general, they were notified with a “deferred rejection at the border” order and speedily returned to their countries of origin. In this respect it should be highlighted that the Italian legislation prescribes two forms of rejection at the border: 1) refusal of entry and immediate rejection at the official border crossing points (“*respingimento*”) adopted by police authorities and enforced through the obligation, upon the transportation carrier, to bring the undocumented person back to the place of departure; 2) “deferred rejection at the border” (“*respingimento differito*”) that may occur when foreigners have irregularly entered Italian territory and have been apprehended immediately after the crossing or when foreigners who could not be rejected at the frontier, are admitted for humanitarian assistance. It should be noted that the legal construct of “deferred rejection at the border” allows the circumvention of the procedural guarantees ordinarily required for expulsion orders issued by the Italian authorities, raising serious doubts of constitutional legitimacy regarding this measure that, limiting the personal freedom of an individual, should imply the compulsory control of a judicial authority as provided in case of expulsion.<sup>661</sup>

As reiterated by the Special Rapporteur on the human rights of migrants and the Rapporteur of the Committee on Migration, Refugees and Displaced Persons of the Council of Europe, Tunisian and Egyptian nationals were identified by their respective consular authorities and returned within 48 hours from their entry in Italy.<sup>662</sup> The identification of Tunisians is generally made at the airport of Palermo from where return flights to Tunisia are organised two times per week.<sup>663</sup> Italian

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659 François Crépeau, *Report by the Special Rapporteur on the human rights of migrants*, Addendum, Mission to Italy (29 September-8 October 2012), April 2013, page 12.

660 Epim Italian Country Report, page 36.

661 *Ibidem*, at pages 19 and 20.

662 François Crépeau, *Report by the Special Rapporteur on the human rights of migrants*, Addendum, Mission to Italy, (29 September-8 October 2012), April 2013, page 12.

663 Agreement signed in Tunis on the 5th April 2011 by the Italian Minister of Interior Roberto Maroni with the Tunisian Minister Habib Hessib.

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NGOs, academics, organisations implementing the “Praesidium project”<sup>664</sup> have protested since for several months they had no access to these persons after the identification activities carried out by the police authorities and before the adoption of the return orders notified also to unaccompanied minors.<sup>665</sup> On 19 August 2013, CIR tried to meet a group of Egyptians who after having been transferred to the airport of Catania were repatriated only 24 hours after their arrival in Italy. CIR and Praesidium Organisations’ request was refused and migrants returned speedily to Egypt.<sup>666</sup>

Following the above-mentioned protests, while presently Egyptians are admitted to the asylum procedure, although the vast majority of them tend not to apply for international protection, Tunisians continue to be subject to a discriminatory practice forbidden by EU Law. Tunisian nationals, in fact, upon arrival together with other migrants, are systematically placed in CIE where they are allowed to enter the prioritized (shorter) asylum procedure. However, concerns persist also in relation to the absent or limited services provided in the CIE such as the right to receive proper information and legal counselling/assistance, thus preventing the people detained to access the legal guarantees provided by law.

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664 “Praesidium project” was initiated in 2006 by the Italian Interior Ministry and in a multi-agency approach brings together Italian Red Cross UNHCR, IOM, Save the Children, providing counselling services and assistance to migrants and asylum seekers. For more details please see the section Right to information in Chapter VII of this report. For additional details see: <http://www.unhcr.it/cosa-facciamo/progetti-europei/progetto-praesidium>.

665 Epim Italian Country Report, page 37.

666 See UNHCR press release of 30<sup>th</sup> April 2013 “*Le organizzazioni umanitarie chiedono di incontrare i migranti egiziani e tunisini che sbarcano sulle coste italiane*”. For press articles, see EPIM 2013 Report, *Access to protection: a human right*, page 37, note 107.

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## VII. THE RIGHTS AND PROCEDURAL GUARANTEES RELATED TO THE ACCESS TO THE TERRITORY AND TO PROTECTION

The Strasbourg Court in the *Hirsi* decision assigns high relevance to the rights and procedural safeguards all migrants should benefit from, regardless of their status, when they are apprehended at border crossing points, when they are intercepted or rescued at sea and disembarked in a place where safety and protection should be guaranteed in line with the *non-refoulement* principle.

### VII.1 Right to Information

.....  
*Countries must guarantee anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.*<sup>667</sup>  
.....

In the *Hirsi* decision, the ECtHR has clearly affirmed the importance of the right to information to migrants that has a significant relevance at border crossing points where higher is the risk to violate the *non-refoulement* principle. Where the right to information is denied, migrants may face serious difficulties in having effectively access to the territory and to the relevant procedures, especially if they are asylum seekers, victims of torture, unaccompanied minors and victims of trafficking.

National authorities are primarily responsible for the identification of migrants, corresponding to the official registration phase aimed at establishing the identity of the migrant who is photographed and fingerprinted. Following registration, through a profiling activity authorities should establish preliminary profiles of each person to be able to refer him/her to relevant procedures that best meet his/her specific needs.

Information about their rights and duties as well as the relevant procedure the migrant would be channelled to and the appropriate services offered should be, in fact, provided on the basis of the migrant's profile and needs.

Migrants are required to self-identify in order to have access to relevant procedures. They may, however, have difficulties in communicating with their

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667 European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, application n. 27765/09, 23 February 2012, para 204.

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interlocutors or they may be scared or ashamed or too traumatised to be able of recalling the shocking events they have previously experienced.<sup>668</sup>

To identify migrants personal circumstances and their needs, appropriate and effective channels of communication necessitate to be established between them and border guards to allow the application of relevant provisions and to avoid the violation of *non-refoulement* principle. In this respect, States must provide to each individual a sufficient, correct and friendly use of information regarding his/her rights as a migrant and on the relevant procedure that may apply in his/her case. The fact that third-country nationals rarely know national legislation and hardly have access to an interpreter or a legal advisor<sup>669</sup> is to be taken into account.

The revised **Schengen Borders Code**<sup>670</sup> provides additional guarantees with respect to the previous formulation of the provision related to the right to information to third-country nationals subject to a thorough second line check. The previous norm<sup>671</sup> provided a mere right to information available in all EU official languages and in the language(s) of the country or countries bordering the Member State. The amended provision, instead, provides that information shall be given in writing “*in a language which they understand or may reasonably be presumed to understand, or in another effective way, on the purpose of, and the procedure for, such a check.*”<sup>672</sup>

As underlined by stakeholders interviewed in the frame of Epim project activities, the Schengen Borders Code does not provide for the obligation to offer information to foreigners *tout court* about the possibility to ask for a form of protection, since such a service is provided only after the foreigners have expressed their willingness to seek asylum.

With regard to **asylum**, the non-legally binding **Practical Handbook for Border Guards** (Schengen Handbook) provides that the possibility to apply for asylum at the border (including transit zones of airports and ports) must be given to all third-country nationals seeking protection. Indeed, border guards must inform asylum applicants, in a language they may reasonably be expected to understand, of the asylum procedure, in particular “*how and where to make the application*” of their rights and obligations, including the possible consequences of not complying with their duties and not cooperating with the authorities. Where an asylum applicant

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668 MAIEUTICS Handbook, *Elaborating a common interdisciplinary working methodology (legal-psychological) to guarantee the recognition of the proper international protection status to victims of torture and violence*, Maria de Donato, December 2012.

669 Columbia Law School Human Rights Clinic's position, European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, application n. 27765/09, 23 February 2012, para 195.

670 Regulation 610/2013 of the European Parliament and of the Council.

671 Article 7(5) Regulation 562/2006.

672 Article 1(7) (b) of the Regulation 610/2013 of the European Parliament and of the Council.

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*“does not have sufficient knowledge of the language spoken in the Member State concerned, the services of an interpreter must be called upon where necessary.”<sup>673</sup>*

It should be noted that the “**Procedures Directive**” specifies that Member States provide information on the possibility to apply for asylum *“where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection”*.<sup>674</sup>

To facilitate access to the examination procedure at border crossing points information should be made available on the possibility to seek asylum.<sup>675</sup>

State authorities shall ensure that the applicant is informed in a language s(he) understands or is reasonably supposed to understand of the asylum process and their procedural rights and obligations. They shall ensure applicants even regarding the possible consequences of not complying with their obligations and not cooperating with the competent authorities. The information shall be given in time to enable the persons concerned to exercise their rights guaranteed in the Directive.<sup>676</sup>

Training of border guards is key to effectively ensure access to the asylum procedure. As prescribed by the Procedures Directive, **officials conducting surveillance and border control activities should receive pertinent information and necessary training on how to recognise and deal with asylum seekers, taking into account the EASO guidelines.**<sup>677</sup>

Moreover, police, border guards, immigration authorities and **personnel of detention facilities receive appropriate necessary level of training and instructions to inform asylum seekers as to where and how their applications may be lodged.**<sup>678</sup>

The Procedures Directive has also introduced an important provision when clarifying that persons **seeking asylum in territorial waters must also receive these information** and, following disembarkation on land, be admitted to the asylum procedure.<sup>679</sup>

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673 Section I.10.2 of the Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States’ competent authorities when carrying out the border control of persons. Established on 6 November 2006 with Commission Recommendation, Asylum-seekers/applicants for international protection.

674 Article 8 (1) of the Procedures Directive 2013/32/EU.

675 *Ibidem*, Recital 28.

676 *Ibidem*, Article 12.

677 *Ibidem*, Recital 26.

678 *Ibidem*, Recital 26 and Article 6 (1).

679 Recital 26 and Articles 3 (1) and 6 of the Procedures Directive 2013/32/EU.

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The Directive provides also the **involvement of third parties** in ensuring the right to information. Member States, in fact, shall ensure that *“organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders,”* on the basis of specific agreements stipulated with competent authorities. Restrictions on such access may be imposed exclusively where, by virtue of domestic law, *“they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.”*<sup>680</sup>

As it will be further illustrated, in partner countries **national legislations do not always ensure the effective access to the right to information to all migrants and to asylum seekers, mainly due to legal vacuum, to the absence of specific guidelines and an adequate training to competent authorities.** Access to information may be difficult due to many factors, among which a too short timeframe to enable asylum applicants to make an informed choice, language barriers, illiteracy, not friendly use communication in particular with minors, and the use of highly complex legal and technical wording. Video material has proven to be more effective than written information but less than information provided orally, in particular when asylum seekers are illiterate.

Generally speaking national legislations of partners countries do not provide any (clear) rule on the authorities' obligation to inform migrants on the possibility to lodge an asylum application at border crossing points.

Authorities tend in practice not to informing third-country nationals on this possibility given that they want to avoid abusive asylum applications. In **Spain**, migrants have to state expressly that they wish to claim asylum to gain access to the relevant procedure. In this respect as reported by CEAR, the Spanish Ombudsman denounced that one of the main difficulties for accessing asylum procedures is the lack of detection of (potential) asylum seekers by police officer at borders during the first interview before admitting or removing third-country nationals. In **Italy** and **Portugal** as explained by police authorities, when there are elements that lead authorities to believe that migrants may be in need of international protection they are immediately admitted to the asylum procedures. In reality, the admission to the asylum procedure much depends on the personal skills, attitude and discretionary power of police officers who conduct such interviews. No guidelines to police authorities have been issued clarifying the content of the first interview with migrants and on interview techniques to be used in particular with vulnerable persons like unaccompanied minors, victims of torture, victims of trafficking and disabled.

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680 *Ibidem*, Article 8 (2).

**National Guidelines should be issued to avoid a divergent approach and conduct on how to recognise and deal with asylum applicants.**

**In this respect the Guidelines developed by EASO are considered an important tool to ensure the application of common EU rules.**

**A common standard friendly use interview model** should be introduced at national level to facilitate border guards' task in the registration, identification and profiling of third-country nationals in order to be referred to relevant procedures. This would be in the interest of competent authorities that can prove that they have carried out their tasks correctly.

The research activity conducted in partner countries revealed that in **Italy, Germany, Greece Malta** there is no explicit provision in national law in relation to the duty to inform migrants on the purpose of and the procedure for border checks as well as on removal procedure and their rights and obligations during such process.

In **Hungary** this occurs before removal information on rights is provided orally and in writing, however it is done in such a way and in a language that very few people understand it.

In **Spain and Portugal**, by law, competent authorities at border points provide migrants with specific information in writing related to the refusal of entry and return procedures, to the right to appeal these decisions and the pertinent deadlines. This information is provided in writing in a document annexed to the notification of the refusal of entry decision available in English, French and Spanish.

In **Portugal**, instead, information is provided during the refusal entry procedure and includes the right to communicate with consular authorities and/or the person of migrant's choice, to an interpreter, to health care and basic assistance, to free legal aid. Interpretation is available for the notification of the refusal of entry order to the person concerned. The information provided in writing consists however of articles of Law which are too technical and not easily understandable. No right to information is provided by law during interception at sea or extraterritorial controls.

Generally speaking in **Greece**, at land, air and sea borders, foreigners have no access to any type of information. However, by law, all third-country nationals who are arrested while irregularly entering the Hellenic territory, are subjected to First Reception procedures during which adequate information is generally provided on their rights and obligations and in particular on the conditions under which they can be admitted to the asylum procedure. This information is provided in the First Reception Centres (screening centres) where migrants who pass a screening procedure in order to be identified. Presently in Greece there is just one First Reception Centre in Evros river region and two mobile units in Samos and

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Lesbos also called Mytilene and Chios islands. As stressed by the Greek Council for Refugees, it happens often that newcomers remain in detention centres without any information when the First Reception Centre is overcrowded.

With regard to asylum, all partner countries' legislation provide asylum seekers with the right to information, even though divergences do exist on the content and on the modalities such service is provided.

By law, at border crossing points information is mainly provided in writing in **Italy, Spain, Germany, Hungary and Portugal** through leaflets that are handed over to individuals. According to the **Italian** legislation, police authorities have the duty to inform the asylum seeker on the asylum procedure, rights and duties, the indication of the timeframe and it means to lodge his/her application. According to the law this information is provided through the distribution of leaflets in ten languages and not orally.<sup>681</sup>

In **Malta**, by law, asylum seekers have to be informed in a language that they may reasonably be supposed to understand on the asylum procedure as well as on their rights and obligations during such procedure. However, the provision does not clarify whether information must be guaranteed in writing and/or orally. In practice, border guards provide information through a booklet available only in English handed to asylum seekers upon arrival in Malta or upon disembarkation. It should be also noted that the **Office of the Refugee Commissioner is actively engaged in providing information on the possibility to apply for asylum from an early stage**. Representatives of this office, in fact, within few days of migrants' arrival deliver relevant information on the asylum procedure in detention centres with the support of interpreters. This is done per group of persons arriving prior to the lodging of asylum applications. Following the introductory speech, an audiovisual presentation is also available in the 11 most commonly used languages by asylum applicants in Malta. A transcript of the presentation in 11 languages is also provided. The same type of information sessions is provided also to asylum applicants who apply for asylum directly at the Refugee Commissioner's Office.

In **Greece** written leaflets are available in Evros Region and in some islands only to asylum seekers. These pamphlets are distributed to asylum seekers in 20 languages (Greek language included).

While national authorities remain primarily responsible for providing information, **specialised NGOs, lawyers, International organisations** are involved in providing information and counselling services. Their involvement, however, may depend

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681 Epim Italian Country Report.



on the will of public authorities to involve them, and on the financial resources available through public or private sector funds.

In Italy, by law, “information portals” have been set up at main crossing border points.<sup>682</sup> These portals, although not providing services specifically addressed to migrants *tout court*, provide information and assistance to third-country nationals who intend to stay in Italy for over three months and to those who intend to lodge an asylum application. As clarified by a subsequent circular, beneficiaries of these services are also those third-country nationals who may benefit from humanitarian and temporary protection (*protezione a titolo umanitario e/o temporaneo*), unaccompanied minors, women victim of violence or torture victims or, in general foreigners in need.<sup>683</sup>

The right to information must be ensured regardless of a formal asylum application.

Moreover, the law provides that **these information portals are placed, “in the transit area, where possible.”**<sup>684</sup> This gave way to a conflictive interpretation due to the fact that in seaports a transit area is hard to identify and the law does not give indication on whether the service is to be established before entry points checks or not. Only at Fiumicino airport in Rome, the information portal is located in the transit area, before border checks so that asylum applicants can have direct access to them. However, in practice border police may always stop the person before s(he) can contact autonomously the information portal, when for example controls are conducted right under the plane during the disembarking process.

At seaports the situation is even more problematic, considering that the socio-legal operators are in general not allowed access to arriving vessels unless they are called and authorized by police officers. In absence of clear instructions from the Ministry of Interior, the effectiveness of the services provided much depend on the discretion of local border police officers.<sup>685</sup> Moreover, the quality of the services provided through these information portals much depend on the resources allocated from public authorities who tend to assign them, on the basis of yearly call for tender, to those entities that offer the best economic offer. As a consequence, the quality of services may significantly decrease and differ from one crossing border point to another.

In line with the **multi-agency approach promoted in the UNHCR’s 10 Point Plan of Action**<sup>686</sup> and in order to extend the services at border points to actual

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682 *Ibidem*.

683 *Ibidem*.

684 *Ibidem*.

685 *Ibidem*.

686 This Plan provides a framework for UNHCR, States and other key actors to respond to the phenomenon of mixed movements in an organised manner in ten areas. The 10 Point Plan is on-line at: <http://www.unhcr.org/4742a30b4.pdf>.

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arrival areas, the “Praesidium project” was initiated in 2006 by the Italian Interior Ministry, bringing together UNHCR, IOM, the Italian Red Cross and, since 2008, Save The Children- Italy. This project, not embedded in law, is yearly renewed through a Memorandum of Understanding and covers Sicily, Puglia, Calabria, Campania and Marche regions, even though not all agencies are present everywhere.

The Italian Red Cross monitors and provides first aid assistance and emergency health services.

UNHCR monitor and provide information to asylum applicants at point of arrival and in reception centers for asylum seekers and assist in identifying vulnerable persons.

IOM identifies trafficking victims, monitoring and providing counseling and assistance to migrants placed in detention centers and to trafficked persons.

Save the Children monitor the identification procedure and the conditions of reception of unaccompanied minors and ascertain that family unity is maintained.

Due to the complexity of the disembarkation operations subsequent to “*Mare Nostrum*” rescue operations, “Praesidium” staff is largely insufficient to absolve its task the way it wishes and has no time to conduct interviews with all migrants and not always in an adequate manner.

Leaflets produced in the frame of the “Praesidium” project in Italian, English, French, Tigrinya and Farsi are distributed to boat people who, when making an asylum request, are in general admitted to the relevant procedure. Moreover, considering the different emergency type reception places (including unused barracks, school gyms, etc..) information and counseling services are not always ensured, and if provided, the quality of such services may vary significantly from one centre to another.

Those migrants who do not want to make an asylum request or are notified with an expulsion order before having the possibility to lodge an asylum request, are placed in administrative detention facilities (CIE- Centri di identificazione ed espulsione) to be returned to their countries. These centers are generally managed by private entities with the presence of both the police and sometimes the militaries to ensure the security of these centers. Regrettably, free legal portals are not provided in all CIE's and legal assistance is not systematic and very often the quality of such service is scarce. Although the existence and the standards of the services available in the CIEs are planned according to the national regulation on management of the centers, these services are inexistent in practice or, where provided, are insufficient and inadequate, in particular for vulnerable persons.

In order to ensure access to the territory and to asylum procedures, **UNHCR has established border management projects in six countries of Central Europe:**

Bulgaria, Hungary, Poland, Romania, Slovakia and Slovenia.<sup>687</sup> These projects are based on tripartite agreements between the countries' government authorities, NGOs and UNHCR. In **Hungary**, NGOs, as the Hungarian Helsinki Committee regularly visit border crossing points and detention centres for monitoring activities. Information dispensers are placed at key locations at external borders in various languages in order to inform new asylum applicants on their rights and provide them with local contacts for legal counselling. During the initial interview the asylum applicant is not asked whether s(he) wishes to ask for asylum, considering that they are not obliged to inform applicants about the possibility to seek asylum. Border guards provide relevant information of asylum procedure and their rights in Hungarian, that are translated by an interpreter. However, it happens in practice that the quality of interpretation raises concerns. It should be also considered that sometimes the difficulty to find interpreters of certain rare languages may lead to the non admittance of the alien concerned to the asylum procedure.

The Hungarian Helsinki Committee with the support of UNHCR and the European Refugee Fund, has published leaflets for adults in 10 languages, providing information regarding the asylum procedure and on asylum applicants' rights and obligations. Another leaflet in 9 languages adapted to minors has been also published. These leaflets are distributed at border crossing borders and are available also in detention centres however they may not always be available in all languages and in all times.

In practice leaflets are not systematically handed to asylum seekers in **Italy** and **Greece**. In **Hungary** NGOs are present in detention centres or during visits to detainees usually hand over leaflets to those people who request them. However, this service is not systematically guaranteed.

In **Malta**, all newly arrived migrants, upon registration by the police authorities, are sent to administrative detention facilities where many of them remain for lengthy period of time. NGOs have unlimited access to detention and offer a variety of services, even though not sufficient to meet all requests of assistance. The Jesuit Refugee Service-Malta provides information to boat people who, whereas come to the attention of the organisation, receive, when available, informative booklets in English, French, Tigrinya and Somali. Considering the scarce information on the possibility to challenge detention and removal order within three days, JRS try to provide relevant information on the possibility and on means of challenging detention and removal orders. Information on asylum procedure as well on rights and obligations of asylum applicants is also provided. However, due to the high

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687 Bulgaria, Hungary, Poland, Romania, Slovakia and Slovenia. Additional information is available at: <http://www.unhcr-centraleurope.org/en/what-we-do/monitoring-theborder/border-management.html>.

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number of detainees, the short timeframe to challenge removal orders, the lack of sufficient financial resources and of personnel, the lack of appropriate space in detention centres are all factors that highly limit the right of being (properly) informed.

According to CEAR, in **Spain**, at borders asylum seekers are handed over a leaflet (in Spanish, English, French, and Arabic) about the asylum procedure and the deadlines, their rights and their duties during the whole asylum procedure. Moreover, during the personal interview, asylum seekers are also informed orally in their language through the assistance of interpreters, about the asylum procedure, deadlines, their rights and duties as well as the right to contact UNHCR and specialised NGOs. They are also informed on the possible consequences about not fulfilling their obligations and not being cooperative with national authorities.

According to the Spanish Asylum Law, this information has to be ensured to asylum seekers when they apply for asylum, even though access to the asylum procedure is difficult, considering that migrants are not aware about the right to seek asylum. For instance, in the **Spanish enclave Melilla**, foreigners are generally subjected to expulsion procedures before being addressed to the Accommodation facility (CETI). Migrants do not obtain any information about the possibility to apply for international protection till they are admitted in the CETI.

The Foreign Regulation establishes that any unaccompanied minors has to be informed at the moment of their admission to the Child Protection System about his/her right to seek asylum and the relevant procedures.

All migrants irregularly entering Spain are sent to detention centres (CIE-Centros de Internamiento de Extranjeros), with the exception of minors and pregnant women. Migrants are supposed to be given leaflet regarding their rights, including the right to seek asylum. The leaflets are available in Spanish, French, English and Arabic. Recently, the Surveillance Courts of CIE located in Madrid and Barcelona have ordered to include a paragraph in the leaflets about international protection procedure in a language the migrant can understand. In case of illiteracy the information will be provided orally, "with calm, no hurry and in an understandable way".

In **Portugal**, asylum seekers at the Lisbon airport border are systematically informed orally and in writing about the asylum procedure, deadlines, their rights and duties during the whole procedure, the possible consequences about not fulfilling their obligations and not being cooperative with national authorities as well as available organisations providing legal and social support. Leaflets handed out by the authorities to asylum seekers are available in Portuguese, French, English, Spanish, German, Russian and Arabic. Furthermore the **Portuguese Refugee Council has unrestricted the access to the border and provides information**

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**orally to detained asylum seekers** with the support of interpreters in a systematic way.

With regards to information on the Dublin procedure, common leaflets drawn up by the European Commission are not yet used in practice since the authorities of **Italy, Hungary, Portugal, Spain** and **Greece** are still complementing them with particular information regarding these countries.

In **Germany**, asylum seekers besides obtaining leaflets, are submitted to a personal interview that contributes to clarify too complex and technical language. The applicant has to sign an acknowledgement of the receipt of the information leaflets.

However, the written correspondence between the Dublin Unit and the asylum applicant is in German and is practically incomprehensible for the vast majority of asylum seekers. Additional information are available in the reception centres thanks to NGOs and other institutional bodies, but in practice this is not done systematically.

**NGOs and lawyers have strongly criticised that the information provided are too abstract and standardised and are difficult to be understood by asylum applicants.**

In **Greece**, the new Asylum Service provides information on Dublin system and procedure through the distribution of a specific leaflet available also on Internet.<sup>688</sup>

In **Malta** immigration authorities provide information on Dublin procedure through a very short document written in English without containing any information on the consequences of continuing to travel to another EU Member State.

With regard to the information provided to migrants intercepted or rescued at sea, in **Italy, Greece, Malta, Portugal** and **Spain** there are no specific provisions concerning the duty for the officers who first come into contact with migrants to provide information on their rights and on how and where to make the asylum request.

**National Guidelines should be addressed to Border guards, Coastguards, Custom officers, Navy officials to be effectively properly informed and trained on the content and the interviews techniques to early identify asylum seekers, victims of trafficking, unaccompanied minors and disabled.**

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688 See: [http://www.minocp.gov.gr/images/stories//2013/dublin\\_20\\_languages\\_finial\\_new.pdf](http://www.minocp.gov.gr/images/stories//2013/dublin_20_languages_finial_new.pdf).

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## VII.2 Right to Interpretation

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### *Foreigners should be assisted by interpreters*

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Interpreters play a key role in establishing communication between third-country nationals and border guards and officials who first come into contact with them such as Coastguards, Custom guards, Army and Navy.

Member States must ensure interpretation support to competent authorities who carry out activities related to the identification, profiling, referral of migrants to relevant procedures. These services are fundamental to assess the personal circumstances of each individual and the situation in the third-country in order to avoid the violation of the *non-refoulement* principle.

**Border guards must be assisted by interpreters not only to identify and assess migrants and asylum applicants' personal circumstances and needs, but also to inform them on the relevant procedure** that applies to them, considering that migrants are generally not aware of national legislation. Considering the fact that third-country nationals may be removed at the border crossing points if not fulfilling the entry requirements, adequate opportunity and the necessary support to enable them to set out the reasons militating against their return should be ensured.<sup>689</sup>

In this respect, **Member States should make every effort to ensure that a sufficient number of qualified interpreters** is available to guarantee proper communication and provide to each individual adequate and friendly use information on his/her rights as well as on relevant procedures s(he) might be admitted to.

**Adequate funds must be made available to ensure qualified and professional interpreters.**

Interpreters and linguistic mediators **should receive appropriate training in dealing with migrants and in particular with unaccompanied minors, victims of torture, disabled and victims of trafficking.**

They should **follow a code of conduct**, complying in particular with the principles of linguistic accuracy and neutrality, impartiality, confidentiality, demeanour and avoiding activities that can lead to a conflict of interests. The role of such professionals, in fact, is crucial for the establishment of a relationship of trust between migrants and asylum seekers and immigration and determining authorities<sup>690</sup>.

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689 Columbia Law School Human Rights Clinic's position, European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, application n. 27765/09, 23 February 2012, para. 195.

690 *Ibidem*, page 109.

The **Schengen Borders Code**, initially has not provided any legal provision ensuring the right to interpreting services before migrants being notified with a removal order. A new provision has been introduced in the Code providing that during border controls third-country nationals shall be given **written information** on the purpose and the procedure of such controls, **in a language which they understand or in another effective way**<sup>691</sup> without specifying, however, whether that meaning can be traced to the use of an interpreter or not.

With regard to **asylum**, the non legally binding **Practical Handbook for Border Guards** provides that “*in order to avoid misunderstandings, and to be sure that applicants are adequately informed of their rights and obligations, as well as of the procedure, if an applicant for international protection does not have sufficient knowledge of the language spoken in the Member State concerned, the services of an interpreter must be called upon where necessary.*”<sup>692</sup>

The **Procedures Directive**<sup>693</sup> provides that at border crossing points competent authorities should benefit from interpretation arrangements to be able to understand whether a person declare his/her wish to apply for international protection. Moreover, Member States shall make arrangements for interpretation where there are indications that third-country nationals or stateless at border may wish to make an asylum application.<sup>694</sup> The norm does not specify which are the indications that should be taken into account.

The Procedures Directive<sup>695</sup> provides also that an applicant should at least have access to the services of an interpreter for submitting his or her case if interviewed by the authorities. Moreover, the same provision states that applicants have the right to be informed on his/her legal position at decisive stages of the procedure in a language which s(he) understands or is reasonably supposed to understand.

As provided by the Procedures Directive, interpreting services shall be ensured during personal interviews conducted by determining authorities.<sup>696</sup>

The Epim research activities showed that the right to interpreting services and its quality varies from one country to another.

In **Germany**, the law does not provide the right to interpreting services for

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691 Article 7(5) Regulation N. 610/2013 of the European Parliament and of the Council.

692 Section I.10.2 of the Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States’ competent authorities when carrying out the border control of persons. Established on 6 November 2006 with Commission Recommendation, Asylum-seekers/applicants for international protection.

693 Recital 28 of the Procedures Directive 2013/32/EU.

694 *Ibidem*, Article 8.

695 *Ibidem*, Recital 25.

696 Article 12 (1) (b) of the Procedures Directive 2013/32/EU.

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migrants crossing the border irregularly. Actually, the removal order is presented only in German.

However, in practice border guards are often accompanied by interpreters since they are also interested in obtaining information related to smugglers networks. Border guards are not allowed to take negative decision. Following apprehension at border, migrants may be conducted to detention centres: in such case they have the right to interpretation service before the Court<sup>697</sup>.

In **Hungary**, by law the migrant has the **right to use his/her native language** in public administrative procedures. Interpreting services are funded by the State.

According to the experience acquired by HHC during its border monitoring activities, foreigners who speak widely-used foreign languages, in general they do not experience problems in communicating with border guards. The ability to exercise the right to use one's native language becomes difficult when border guards deal with foreigners who speak languages that are not commonly spoken in Hungary (e.g. in the cases of Singhalese, Somali, Tamil languages).

According to HHC, the admission to the asylum procedure is in practice only possible when the migrant is able to express his/her wish to seek asylum in a way that is clear and comprehensible for border guards. The interpreter plays a key role during the first interview between the foreigner and the border guards, and when s(he) translates all relevant information that are recorded by border guards. These information will be examined together with those information provided to determining authorities. Problems may arise when the translation is not conducted by professionals and in the language the migrant really understands.

Border police always use an interpreter when apprehending a foreigner. A list of interpreters is available through the police intranet. Interpreters can sign up for the list based on their language knowledge, previous work experience and by passing a public security test. Since rare languages are only available in some locations, in 2013, border police started building up a network of 28 locations equipped with web cameras and microphones for remote interpretation.

In Menedék's and UNHCR's experience, financial constraints faced by police authorities often prevent quality interpretations, since priority is given to interpreters working for lower fees. Access to asylum procedure much depend on the quality of interpreting services, therefore all stakeholders interviewed suggest **to introduce a quality control mechanism**.

The asylum application is first considered in the admissibility procedure, which starts out with an interview by an asylum officer and an interpreter, usually within a few days after migrant's arrival<sup>698</sup>.

Asylum seekers may use their mother tongue or the language they understand

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697 Epim German Country Report.

698 AIDA – Hungarian National Country Report, December 2013, page 11.

orally and in writing during the asylum procedure. If the asylum application is submitted orally and the asylum seeker does not speak Hungarian, the asylum authority shall provide an interpreter speaking his/her mother tongue or another language understood by the concerned person. There may be no need for using an interpreter if the asylum officer speaks the mother tongue of the persons concerned or another language understood by them. In such case asylum seekers must give their consent in writing for not having an interpreter<sup>699</sup>.

Many interpreters are not professionally trained, which causes particular problems with regard to languages which are not widely spoken in Hungary. Interpreters are contracted by police authorities and it may happen that they pass judgements on the credibility of migrants' statements, negatively influencing police authorities' point of view.

In **Portugal** interpreters are available at Lisbon airport and are employed to notify only the refusal of entry order. Interpreting services are funded by State. The law does not provide any clarification regarding the responsibility for ensuring interpreting service in relation to free legal aid and communication with appointed lawyers when challenging the mentioned order.

Written notification of removal orders are provided in Portuguese, English, French and Spanish and interpreters are employed when migrants do not know the four mentioned languages.

Police authorities have a list of qualified interpreters who are referred to them by courts and these services are funded by State while those provided by the Portuguese Council for Refugees is funded on the basis of specific projects (ERF, etc..).

In line with the Schengen Borders Code which provides that **Member States shall encourage border guards to learn the languages necessary for the carrying out their tasks**<sup>700</sup>, it is reported that Portuguese guards possess sufficient linguistic knowledge of French, English, Spanish and Russian.

In **Italy**, interpreting services are provided by law through "**information portals**" that have been set up at main crossing border points<sup>701</sup> as widely described in the section Right to Information. Interpreters are also employed during activities carried out by "Praesidium" staff, however due to lack of sufficient resources and the emergency situation Italy is facing, the number and/or the quality of interpreting services are not systematically ensured.

Member States must ensure that arrangements for interpreting services are in place to facilitate all tasks that border guards and other officials must perform in relation to border control and surveillance activities as well interceptions and rescue operations that may negatively affect the respect of the *non-refoulement* principle.

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699 *Ibidem*, page 15.

700 Article 1(13) of the Regulation 610/2013.

701 Epim Italian Country Report.

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### VII.3 Positive Obligation when adopting Removal Measures

When removing an alien, Member States must verify the risks of ill-treatment s(he )would face in third country. The existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. States cannot evade their own responsibility by relying on their obligations arising out of bilateral agreements they are part to.<sup>702</sup>

In the *Hirsi* decision, the Court has confirmed the State's obligation deriving from the *Non-refoulement* principle to assess the risk of ill-treatment the alien would face when forcibly removed to third-countries.

In compliance with the general principles of EU law, **decisions shall be taken on an individual basis** in the respect of the principle of *non-refoulement* and fundamental rights.<sup>703</sup>

The Return Directive provides that return decisions should be adopted **on a case-by-case basis, based on objective criteria** through a fair and transparent procedure.<sup>704</sup>

Generally speaking, in national legislations there is a general reference to the respect of the principle of *non-refoulement*, however **specific provisions or guidelines should clarify the content of the principle**, which implies the assessment by border guards and other competent authorities of the personal circumstances of each individual and the situation in the country of origin or the country to which the return is envisaged.

**In Spain**, the legislation envisages an identification process for victims of trafficking and specific procedures for unaccompanied minors. With regard to the assessment of the risk in case of return, there is just a generic reference to a "treatment compatible with the respect of human rights". The Spanish authorities, however, rarely carry out this assessment. The Spanish Ombudsman has recommended border police authorities to conduct in case of removal, an individual assessment of the risk of *refoulement* by contacting UNHCR to obtain reliable information of the human rights situation in the country where the person concerned may be returned to.

**In Portugal**, while expressly prohibiting *refoulement* in removal procedures at the borders, **the Law also determines the sole responsibility of the migrant to**

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702 *Hirsi* decision, para 128-129.

703 Article 1(3), Article 3a "Fundamental Rights" of the Regulation (EU) 610/2013.

704 Recital 6 of the Return Directive 2008/115/EC.

**claim and prove the risk of *refoulement*.** With this regard, however, it should be considered that the respect of direct and indirect *non-refoulement* principle already implies a case-by-case evaluation to assess whether the concerned person would be at risk of ill-treatment or of violation of fundamental rights if returned to his/her country of origin or of previous transit or stay.

Border guards are in general responsible for the identification of migrants, even though the first information gathering can be conducted by other authorities who may first come into contact with migrants and asylum applicants during interception and search and rescue operations, like for instance the Navy, Custom officers, Coastguards and the Army. Member States must identify and examine the personal circumstances and the reasons that have motivated the person concerned to leave his/her country of origin or of habitual residence, the current general situation in the country of origin or of previous transit or stay where the migrant can be returned to.

Generally speaking, border guards soon after interception and disembarkation process, gather information on migrants identity, age, sex, travel routes, traffickers involved and the reasons that have pushed them to leave their countries of origin or of previous transit. However, the interviews are conducted without following a common interview format and interview techniques that can be used when interviewing vulnerable persons such as unaccompanied minors, torture victims, disabled persons and victims of trafficking.

**Common national Guidelines on interviews to be conducted with migrants and asylum seekers would help in preventing the adoption of different decisions for similar cases,** mainly due to lack of (clear) guidance to police authorities who, despite good intentions, may take wrong decisions in violation of *non-refoulement* principle.

The Strasbourg Court, in the *Hirsi* decision, has also stated that even when the migrant does not expressly requests asylum, authorities are not absolved from verifying whether the concerned person would be exposed to ill-treatment in case of return to third countries in violation of the direct or indirect *non-refoulement* principle.<sup>705</sup> In this regard, the non binding Schengen Handbook highlights that *"A third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence."* The wish to apply for asylum does not need to be expressed in any particular form. *"The word "asylum" does not need to be used expressly; the defining element is the expression of fear of what might happen upon return."* In addition, the Handbook stresses that *"in case of doubt on whether a certain declaration can be construed as a wish to apply for asylum or for another form of international protection, the border guards must consult the national authority(-ies) responsible for the examination of applications for international*

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<sup>705</sup> *Ibidem*, para 133.

protection.<sup>706</sup> In this respect, border guards interviewed in **Italy, Portugal, Hungary, Spain**, in the frame of the Epim project, have stressed that they generally take into consideration the individual's statements, his/her attitude and body-language even in the absence of an explicit asylum request. However, in practice this much depend on the single police officer's attitude and skills.

Before adopting removal decisions, border guards are required to interview each migrant to acknowledge not only his/her personal circumstances but also to assess the general human rights situation in the third-country where the person concerned risk to be removed to as well as whether the international and national human rights instruments eventually ratified are implemented in practice and the existence of independent police and judicial systems ensuring security and effective protection to the migrant concerned.

Border guards, however, tend not using Country Information because they are not systematically and uniformly available or they may use unreliable and not systematically updated Wikipedia and Google information. It may happen that police authorities may obtain such information through the services set up at border crossing points, like in Italy, depending, however, on the type of agreement signed between the local Prefectures and the body managing such services. However, in practice this information is rarely provided.

**The correct use of COI could, instead, help border guards to take correct decisions and avoid the risk of violation of *non-refoulement* principle.** In this regard, it is worth noting that the Procedures Directive provides that in determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise, objective, reliable and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations.<sup>707</sup>

In addition, the Procedures Directive highlights that Member States are legitimated to return illegally staying third-country nationals, *"provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement."*<sup>708</sup>

Moreover, with regard to the safe country concepts, the same Directive provides that Member States where applying these concepts on a case-by-case basis or designating countries as safe by adopting lists to that effect, *"should take into account, inter alia, the guidelines and operating manuals, and the information on countries of origin and activities, including EASO Country of Origin Information"* as well as *"relevant UNHCR Guidelines."*<sup>709</sup> In addition, States should conduct

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706 Schengen Handbook, page 54 and 55.

707 Recital 39 of the Procedures Directive 2013/32/EU.

708 Recital 8 of the Directive 2008/115/EC .

709 Recital 46 and Article 37(3) of the Procedures Directive 2013/32/EU.

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regular reviews of the situation in those countries based on a range of sources of information, including those from Member States, EASO, UNHCR, the Council of Europe and other relevant international organizations.<sup>710</sup> The Directive stresses also that when States “become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe”<sup>711</sup> This norm, however, leaves too much discretionary power to Member States with the result that a third-country can be considered as safe in one Member State and not safe in another.

**Border guards and officials carrying out the surveillance of land and maritime borders, interception and rescuing activities should have effective access to up-dated on line COI,** considering the short timeframe provided to determine whether a migrant must be removed, disembarked in a place of safety or admitted to the relevant procedures.

#### **VII.4 Right to Legal Assistance and to Effective Remedy**

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*The notion of “effective remedy” requires, firstly, “independent and rigorous scrutiny” of any complaint made by a person in such a situation where there exist substantial grounds for fearing a real risk of treatment contrary to the principle of non-refoulement and, secondly, “the possibility of suspending the implementation of the measure impugned”.*<sup>712</sup>

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In the *Hirsi* decision, the Court, based on its case-law, has clarified that an applicant’s complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention, “*must imperatively be subject to close scrutiny by a ‘national authority’*”. Moreover, the Court ruled out that the notion of “effective remedy” within the meaning of Article 13 taken in conjunction with Article 3 requires independent and rigorous scrutiny of any complaint made by a person in such a situation. Whereas exist substantial grounds for fearing a real risk of ill-treatment contrary to Article 3, the Court requires “*the possibility of suspending the implementation of the measure impugned.*”<sup>713</sup>

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710 *Ibidem*, Recital 48.

711 *Ibidem*.

712 *Hirsi* decision, para 198.

713 *Ibidem*.

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The respect of the *non-refoulement* principle implies the adoption and the implementation of procedural safeguards as the right to provide proper information and the obligation to ensure a fair and effective procedure to assess the real risk of ill-treatment of the person concerned before any removal decision is taken.

According to the **Schengen Borders Code**, every third-country national *"refused entry shall have the right to appeal."*<sup>714</sup> Obviously, this right can be exercised whereas the migrant concerned is correctly informed on the possibility and on the modalities to challenge the removal decision, considering that Borders Code provides that appeals are regulated by Member States domestic legislations. To this end, *"a written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national"* shall also be given to the person concerned in accordance with national law.<sup>715</sup>

The **Return Directive** states that decisions on return, entry-ban and removal shall be issued in writing and give reasons in fact and in law and, as ruled out by Schengen Borders Code<sup>716</sup>, contain information about legal remedies available at national level.<sup>717</sup>

In addition, this Directive states that Member States shall provide, upon request of the concerned person, a written or oral translation of the main elements of decisions related to return.<sup>718</sup>

Derogations to this rule are admitted to third-country nationals who have illegally entered the territory of a State without subsequently having obtained an authorisation or a right to stay in that country. In such cases, return decisions *"shall be given by means of a standard form as set out under national legislation."*<sup>719</sup>

Moreover, **the effectiveness of the remedy must be ensured both in law and in practice.**

Third-country nationals *"shall be afforded an effective remedy"* to challenge such decisions before a *"competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence."*<sup>720</sup>

The same provision states that these authorities shall have the power to review return decisions and eventually to temporarily suspend their enforcement, unless

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<sup>714</sup> Article 13 (3) of the Regulation 562/2006.

<sup>715</sup> *Ibidem*.

<sup>716</sup> *Ibidem*, Article 13 (2).

<sup>717</sup> Article 12 (1) of the Return Directive 2008/115/EC.

<sup>718</sup> *Ibidem*, Article 12 (2).

<sup>719</sup> *Ibidem*, Article 12 (3).

<sup>720</sup> *Ibidem*, Article 13 (1).

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this is already applicable under domestic law.<sup>721</sup>

In addition, to effectively guarantee the individual's interests during the return procedure, the Return Directive adjusts that a common minimum set of legal safeguards should be established, among them the necessary legal aid available to those lacking sufficient resources. To this end, Member States should establish in their legislation for which cases legal aid is to be considered necessary.<sup>722</sup>

In this respect, in fact, they shall ensure that the necessary legal assistance and/or representation is granted, upon request, *"free of charge in accordance with relevant national legislation or rules regarding legal aid,"* and may provide that such free legal assistance and/or representation is subject to conditions as set out in the Procedures Directive.<sup>723</sup>

The migrant concerned shall have the possibility to obtain legal advice and representation and, whereas necessary, linguistic assistance.<sup>724</sup>

Regrettably, the Schengen Borders Code clearly establishes that *"lodging such an appeal shall not have suspensive effects on a decision to refuse entry."*<sup>725</sup> This norm contrasts with the principles set out in the *Hirsi* decision to suspend the implementation of the removal decision where there is a risk of violating the *non-refoulement* principle. National legislations in EU Member States equally deny **automatic suspensive effect of remedies against the removal at borders, and require, upon request** of the person, a judicial decision on an interim measure.

The fact that removal orders are often immediately carried out, leaves in practice no time to request the presence of a lawyer and to lodge an appeal.

With regard to **asylum**, the "Procedures Directive" provides that in order to facilitate the access to the asylum procedure at border crossing points information should be made available on the possibility to make an asylum application.<sup>726</sup> Moreover, considering that this Directive provides that Member States should examine all applications on the substance,<sup>727</sup> it is also in their interest to ensure proper information to allow *"a correct recognition of international protection needs already at first instance,"*<sup>728</sup> enabling applicants to better understand the different stages of the asylum procedure and to comply with their obligations. Since this norm states that the information *"should be provided"* to applicants, it

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721 *Ibidem*, Article 13 (2).

722 *Ibidem*, Recital 11.

723 *Ibidem*, Article 13 (4).

724 *Ibidem*, Article 13 (3).

725 Article 13 (3) of the Regulation (EC) No 562/2006.

726 Recital 28 and Article 8 (1) of the Procedures Directive 2013/32/EU.

727 *Ibidem*, Recital 43.

728 *Ibidem*, Recital 22.

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does not envisage a State obligation to ensure **free of charge counselling at first instance**. In this regard, as established by the Court in the *Hirsi* decision<sup>729</sup>, it would be worthwhile to envisage an obligation to provide information at first instance, allowing *inter alia* a decrease of appeals against erroneous decisions. Every asylum seeker should have an effective access to the asylum procedure as well as the opportunity to cooperate and properly communicate with competent authorities so as to present the relevant facts of his/her claim and benefit from procedural safeguards throughout the whole asylum procedure.<sup>730</sup>

Asylum applicants should have the possibility to consult a legal advisor or other counsellor, to be informed on their *"legal positions at decisive moments in the course of the procedure"*, and to communicate with representatives of UNHCR and with specialised organisations providing proper counselling on relevant law provisions and procedural safeguards.<sup>731</sup> In this regard, Member States shall ensure that these organisations *"have effective access to applicants present at border crossing points, including transit zones, at external borders."*<sup>732</sup> Asylum applicants shall have the opportunity to communicate with UNHCR or other organisation providing legal counselling.<sup>733</sup>

Moreover, the Procedures Directive provides that asylum applicants are informed in a language which they understand or are reasonably supposed to understand and, whenever necessary, with the assistance of an interpreter.<sup>734</sup>

Member States shall also ensure that asylum applications be lodged as soon as possible.<sup>735</sup> Whereas the application is received by authorities not competent for the registration of the asylum request, States shall ensure that the registration takes place no later than 6 working days after the request is made.<sup>736</sup> The asylum applications must be examined and the decisions are taken individually, objectively and impartially.<sup>737</sup> In this respect it should be noted that States shall ensure that the reasons in fact and in law are stated in the decisions rejecting the asylum requests. *"Information on how to challenge a negative decision is given in writing."*<sup>738</sup>

To ensure the respect of *non-refoulement* principle, asylum applicants shall be allowed to remain in the Member State for the sole purpose of the procedure until the issuance of a decision by determining authorities during first instance procedure, even though *"that right to remain shall not constitute an entitlement to*

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729 *Hirsi* decision, para 204.

730 Recital 25 of the Procedures Directive 2013/32/EU.

731 *Ibidem*.

732 *Ibidem*, Article 8 (2) and Recital 25.

733 *Ibidem*, Article 12 (1) (c).

734 *Ibidem*, Article 12 (1) (a) (b).

735 *Ibidem*, Article 6 (2).

736 *Ibidem*, Article 6 (1).

737 *Ibidem*, Article 10 (3) (a).

738 *Ibidem*, Article 11 (2).

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*a residence permit.*"<sup>739</sup>

Although this norm guarantees the right to remain until the decision is taken at first instance procedure, the Directive allows applicants to remain in the territory *"until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy."*<sup>740</sup>

In this respect, it is worth noting that the recent decision taken by the ECtHR, has stated that Spain should have suspended the procedure for removal of international protection seekers until their allegations about the risks they faced in the country of origin had been thoroughly examined, until the final decision is taken.<sup>741</sup>

**During the asylum procedure, States shall ensure, upon request, that applicants are provided with legal and procedural information free of charge.**<sup>742</sup> However, the Procedures Directive does not provide that legal assistance and representation shall be provided at first instance, but it is envisaged as a mere possibility.<sup>743</sup> However, asylum applicants shall be given the opportunity to consult at their own costs legal advisors admitted or permitted under national law at all stages of the asylum procedure.<sup>744</sup>

States shall ensure that an effective remedy, before a competent court or tribunal providing for a full and *ex nunc* examination of both facts and points of law.<sup>745</sup> They shall ensure free legal assistance and representation upon request in the appeals procedure free of charge<sup>746</sup> according to national rules, except in those cases where appeals *"have no tangible prospect of success."*<sup>747</sup> During all phases of the asylum procedure, applicants should have the right to consult, at their own costs, legal advisors or counsellors to obtain any needed clarifications.<sup>748</sup>

With regard to the competence of the Court or the Tribunal in adopting decisions on removal at borders, Schengen Borders Code provides that **appeals** are regulated by Member States domestic legislations. In **Italy**, due to a legal lacuna, the legislation does not indicate the competent authority before which lodging the appeal against the removal orders adopted by border guards. For several years administrative and civil judges have denied their competence provoking in practice

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<sup>739</sup> *Ibidem*, Article 9 (1) and Recital 25.

<sup>740</sup> *Ibidem*, Article 46 (5). The combined reading of Article 9 (1) and 46 (5) of the Directive.

<sup>741</sup> A.C. and Others v. Spain, 22 April 2014 Application n. 6528/11.

<sup>742</sup> Article 19 (1) of the Procedures Directive 2013/32/EU.

<sup>743</sup> *Ibidem*, Article 20 (2).

<sup>744</sup> *Ibidem*, Article 22 (1).

<sup>745</sup> *Ibidem*, Article 46 (3).

<sup>746</sup> *Ibidem*, Article 20 (1).

<sup>747</sup> *Ibidem*, Article 20 (3).

<sup>748</sup> *Ibidem*, Recital 23.

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a lack of legal protection for concerned individuals.

Following divergent decisions issued by both administrative and civil courts on the nature of situations considered either as substantive rights or as legitimate interests, in June 2013, the Cassation Court<sup>749</sup> has assigned the competence to the civil judge clarifying that the removal order issued by an administrative authority (police authority) directly affects subjective situations and rights. Moreover, the court clarifies that, in the absence of a specific norm derogating this general principle by assigning such competence to the administrative court, the civil court is to be considered as the natural competent tribunal before lodging appeals against removal orders at borders.

Research under the Epim project reveals that in all partner countries, **free legal counselling and assistance is not always provided to migrants before a removal decision is taken by border guards**. Legal assistance is provided by law to challenge removal decisions although in practice, this right is not always respected for a number of reasons such as the lack of services set up at border crossing points where staff can be timely deployed to provide legal counselling and assistance, time constraints given that the carriers leave airports and ports within few hours or days, language barriers, migrants' lack of knowledge and understanding about how to access legal aid, lack of adequate training and refreshing courses to border guards.

In some countries this service is provided by law and financially sustained by public authorities or is ensured on voluntary basis by specialised organisations and lawyers. In this latter case, legal assistance is not provided systematically to all migrants, mainly due to the insufficient financial resources at the disposal of such organisations.

As already amply illustrated in the previous chapter related to the right to information, in **Italy legal counselling is generally provided by law through "information portals" at crossing border points**, even though the quality of the legal support may differ on the basis of the available financial resources allocated by each Prefecture and consequently by the management body. Access to legal counselling much depends in practice on the attitude and discretionary power of single border guard in allowing the legal advisor or the representative of specialised organisation to meet the migrant concerned.

According to CEAR<sup>750</sup>, in **Spain**, third-country nationals have the right to an effective free legal assistance during the administrative and judicial procedures in relation to refusal of entry, removal at the border and expulsion orders as well as in all procedures related to the international protection applications. Free legal

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749 Decision n. 15115 issued by the Cassation Court on 17 June 2013.

750 Epim Spanish Country Report.

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aid is ensured in case of the lack of economic resources by migrants at the same conditions of Spanish citizens.

Third-country nationals not authorised to enter Spain are notified with a motivated order indicating the reasons of non-admission and the information concerning the modalities to lodge an appeal before competent authorities. Legal assistance is provided free of charge at borders by the Bar Association of lawyers funded by State. In some crossing border points specialised NGOs as CEAR provide legal assistance free of charge for those asylum applicants who choose to be assisted by them, depending however on the CEAR financial and human resources.

Migrants may have not access at all to legal counselling for instance during sea operations or when a stowaway remains on the ship or, after being temporarily disembarked for the identification purposes they are re-embarked on the same vessel to be removed without having the possibility to contact a legal counsellor.

In **Spain**, as in **Italy**, legal counselling and assistance is not ensured during the interviews between border guards and stowaways, except in the case the migrant manifest his/her intention to seek for asylum, even though this is not ensured in practice. In **Spain**, when a migrant expresses the will to make an asylum request, the presence of the lawyer is allowed. However, it should be noted that given that migrants do not have any knowledge on their rights to seek asylum and to benefit from the presence of the lawyer, they are in practice refused entry on the grounds that, according to border guards, they want “to proceed their journey.”

In addition, with regard to the *de facto* removals mainly conducted in **Italy at the internal border with Greece**, in **Spain towards Morocco** and **Greece towards Turkey**, third-country nationals are removed without benefitting of any (or benefit reduced) procedural guarantees.

**National legislations should clearly state that even in such cases all procedural safeguards provided when adopting removal orders at the physical borders must be applied.**

Legal counselling and assistance may be difficult to be ensured during or soon after the disembarkation operations, as is the case of **Italy**, where hundreds of people, already traumatised for the dangerous journeys at sea, following disembarkation are immediately conducted to emergency reception centres where legal counselling is inexistent or, whereas provided, may be inadequate. In fact, even though asylum seekers are generally admitted to the asylum procedures, the quality of legal counselling and assistance is not always appropriate mainly due to the “emergency-like situation” Italy is currently facing.

By law, in **Greece**, all third-country nationals accommodated in (the only) First

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Reception Centre (FRC) in Thrace, a sort of screening centre, should have access to '*guidance and legal advice*' in relation to their personal situation. These services are provided by the management centre. NGOs are not allowed to enter such centers, like the FRC in Thrace. In Samos, Chios and Lesbos also called Mytilene islands there are mobile units of the First Reception Service providing "guidance and legal advice."

As previously described and denounced by Pro Asyl, in **Germany**<sup>751</sup> there is a total lack of legal information and serious difficulties in accessing legal aid for persons at borders, mainly due not only to practical obstacles, such as language barriers, very short timeframe, lack of financial resources and knowledge about how to access legal aid by migrants, but also due to the absence of a help-desk or other forms of institutionalised, independent legal aid services at border crossing points.

In **Portugal**, migrants at border points do not benefit from legal counselling before the issuance of their refusal order. Where no asylum application is registered, **the lack of implementation of a Protocol creating a pool of lawyers to be appointed freely and in a timely manner to challenge the refusal of entry order and to request the suspension of the implementation of the removal order, in practice hamper the right to an effective remedy.** Migrants can appoint a lawyer at their own expenses generally with the support of friends, family and in some cases also of border guards who attempt to reach their respective Consulates in trying to obtain legal representation.

In accordance to Asylum law, the Portuguese Refugee Council provides proper legal assistance at first instance to asylum applicants at Lisbon airport, the main border entry point in the Portuguese territory. It also insures access to free legal representation at appeal stage funded by social security services. However, it does not provide legal assistance systematically to all migrants in need of legal counselling and assistance at borders, but only to asylum seekers.

In the framework of maritime interceptions or extraterritorial access controls no legal assistance is specifically provided by law.

In **Malta**,<sup>752</sup> an asylum applicant may be assisted by a legal representative at all stages of the asylum procedure. At first instance, this is at the applicant's own expense whilst at appeal stage legal aid is available on the same conditions as Maltese nationals.

**Access to legal aid at the preliminary stages of the asylum procedure is difficult considering that most migrants rescued and intercepted at sea are detained immediately upon arrival in Malta.** Some NGOs offer legal counselling and assistance to detainees, but it is not ensured systematically to all foreigners.<sup>753</sup>

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751 Epim German Country Report.

752 Epim Maltese Country Report.

753 Epim Maltese Country Report.

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In **Hungary**, when a foreigner is apprehended at the Hungarian border crossing points s(h) has no right to legal assistance<sup>754</sup>. Free legal aid is provided only when the migrant is notified with a removal order or when s(he) is transferred to detention centres. The Hungarian Helsinki Committee lawyers visit all closed alien policing facilities (Nyírbátor, Kiskunhalas, Győr) every week. In principle State-funded legal aid is provided, but in practice the presence of State funded lawyers is not ensured on a regular basis. In addition, as pointed out by HHC, it should be also considered that migrants benefit from legal assistance at the border mainly when border guards notify lawyers about their apprehension and removal order issued against them. The exercise of this right in practice depends on the police's will and initiative.

HHC has been carrying out for seven years the border monitoring activities at the Serbian border area on bi-weekly basis. However, in practice rarely happened that the organisation met irregular migrants intercepted at the border. In addition, due to the specificities of readmission agreements, foreigners spend little time at the borders before being forcibly returned. Consequently, during that short timeframe they rarely have access to legal assistance.

Both UNHCR and HHC believe that to ensure effective access to legal assistance at border crossing points, **a referral mechanism should be put in place whereby border guards must inform lawyers about the apprehension of third country nationals requiring legal assistance**. Menedék Association recommends the **set up of a legal assistance service provided by phone at border areas**. The immigration authorities (OIN), however, stressed that lawyers providing **legal advice should better advertise their services and be more visible to foreigners**.<sup>755</sup>

## VII.5 Training Obligations

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*Member States shall ensure that border guards participating in the surveillance operation are trained with regard to relevant provisions of human rights and refugee law [...].*<sup>756</sup>

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As stressed by the ECtHR in the *Hirsi* decision, **any personnel engaged in border activities has to be provided with proper training**: it is indeed during such operations that the respect of the principle of *non-refoulement* expressed in art. 3 of the ECHR is at stake.

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754 Epim Hungarian Country Report.

755 *Ibidem*.

756 Case of *Hirsi Jamaa and Others v. Italy*.

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According to the EU legislation, Member States have the obligation to ensure that national border **guards are “specialised and properly trained” professionals**. The same norm provides that the training curricula shall take into account Frontex Common Core Curricula (hereafter “CCC”) and shall include specialised training for properly detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking. Moreover, Member States should encourage personnel deployed at the border to learn the languages for the fulfilment of their duties.<sup>757</sup>

With regard to **asylum**, the Procedures Directive states that officials who *first* come into contact with asylum seekers, in particular those conducting border checks and surveillance at land or sea borders **should receive the necessary training and the relevant information on how to recognise and deal with applications for international protection taking into account the relevant guidelines developed by EASO**.<sup>758</sup>

Moreover, also at a later stage, Member States have the duty to assure a proper training also to those authorities likely to receive applications for international protection such as police, border guards, immigration authorities and personnel of detention facilities.<sup>759</sup>

According to the **Frontex Regulation**, both Frontex and the Member States have to ensure that the 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”* have to be assured before border guards are deployed.<sup>760</sup> In this regard, the EU Fundamental Rights Agency during its monitoring activities has stressed that in some joint border operations a lack of uniformity in understanding the core fundamental rights as well as gaps in providing proper training in a pre-deployment phase among different Member State officials was found.<sup>761</sup>

The Parliamentary Assembly of the Council of Europe<sup>762</sup> has stressed that officers deployed at the borders should not only have the required knowledge of their human rights obligations during joint operations, but also be aware of their duty to report issues relating to protection and potential human rights violations to Frontex and the relevant national authorities. The PACE suggests that automatic debriefing of intercepted migrants has to be standardised in different languages and relevant

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757 Art. 1 (13) of the Regulation 610/2013 amending the Schengen Borders Code.

758 Recital 26 of the Directive 2013/32/EU.

759 *Ibidem*, Article 6 (1).

760 Art. 5 Regulation 1168/2011.

761 FRA, *Fundamental Rights at Europe’s southern sea borders*, 2013.

762 Parliamentary Assembly Resolution 1932 (2013) Final version *Frontex: human rights responsibilities*.

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and clear instructions/guidelines must be provided as well as integrated into each operational plan. This would avoid situations where migrants may be removed without being heard and that the decision on forwarding this information to the relevant immigration authorities is left at the discretion of border guards.

### The Common Core Curriculum

Frontex is also in charge of providing training for instructors of the national border guards on fundamental rights, access to international protection and access to asylum procedure. The Agency may also organise training activities, including an exchange programme, in cooperation with Member States on their territory. In addition, Member States should integrate in the national training programmes of their border guards the results of the Agency's work<sup>763</sup>.

In order to provide Member States with common rules and criteria for establishing national-based border guards training, Frontex has established and developed a Common Core Curriculum ("CCC") consisting in a minimum standard of knowledge and skills, which has to be integrated in the border guards training put in place in each Member State at a national level.

The curriculum is in line with the EU Bologna system, designed to introduce a system of academic degrees at the EU level which are easily recognisable and comparable, to promote the mobility of students, teachers and researchers. In fact, the CCC provides measurable and common standards for institutions training national border guards, trainers and students; it also promotes "*Frontex Partnership Academies*"<sup>764</sup> by encouraging mobility and exchange programs.

The first version of the CCC has been launched in 2007 and, as mentioned above, it contains the skill set and knowledge criteria for training basic-level border-guards in the EU. It has been conceived by Member States by sharing their best practices and common goals and values. The CCC, however, is not especially focused on fundamental rights training, since it includes a full range of border-related topics (detection of false documents and stolen cars, international law and leadership, etc.).

The CCC is often revised and reviewed according to the latest technical developments and the most recent updates in fundamental rights law. The last version of the curriculum has been finalized in 2012<sup>765</sup> and it has benefited from the cooperation and support of over 40 experts from Universities and international organizations such as UNHCR, IOM and CPT (Committee for the Prevention of Torture)<sup>766</sup> and it encompasses modules on fundamental rights.

This new curriculum has therefore been transposed by Member States in their

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763 Recital 18, Regulation (EU) No 1168/2011.

764 Frontex Partnership Academies are 19: <http://frontex.europa.eu/training/partnership-academies/>.

765 Frontex (2012d), Common Training Standards For The Eu Border Guard Services, <http://www.frontex.europa.eu/news/common-training-standards-for-the-eu-border-guard-services-1NyLhR>.

766 <http://frontex.europa.eu/news/common-training-standards-for-the-eu-border-guard-services-1NyLhR>.

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national training programs for border guards in the academic year 2013/2014: however, as it will be further illustrated, the implementation of the training duty is not uniform among the different training systems of EU Member States.

**Frontex offers training exercises on a regular basis, and the CCC is implemented through the European Training Scheme, which include several institutions:** the National Training Coordinators, a network of Member States national experts and training actors; Frontex Partnership Academies, a network of national border guard academies from Member States which support Frontex training which are more and more involved in training activities<sup>767</sup>, and the Frontex Virtual Aula, a web-based platform on training including relevant information on Frontex projects and activities.

**For the year 2014, the budget for the Agency's training activities is 4,050,000.**<sup>768</sup>

Generally speaking, training for border guards mostly looks at technical aspects and only relatively few notions and practise on fundamental rights are provided. However, over the last years, a number of human rights-oriented elements in the CCC were introduced and the role of the EU Fundamental Rights Agency (FRA), which played an important part in introducing fundamental rights in the border guard training program, was enhanced.

In 2012, Frontex developed a Fundamental Rights Manual to be implemented by Members States. Within the same context, the **Agency developed a "Trafficking in Human Beings Training Tool"** with a budget of EUR 200.000 with other EU agencies, NGOs and international organisations. The tool provides a common basis for the provision of training in dealing with victims with respect to their dignity and fundamental rights.<sup>769</sup>

### The cooperation between Frontex, FRA and EASO

The amended Frontex Regulation widened the range of partners with which Frontex may cooperate for border guards training activities and suggests that Frontex may cooperate with EASO and the Fundamental Rights Agency (FRA) in addition to Europol.<sup>770</sup>

In the Action Plan implementing the Stockholm Programme, engaged in delegating the European Asylum Support Office (EASO) *"To develop methods to better identify those who are in need of international protection in mixed flows, and to cooperate with Frontex whenever possible"*.

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<sup>767</sup> <http://frontex.europa.eu/training/partnership-academies/>.

<sup>768</sup> [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Budget/Budget\\_2014.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2014.pdf).

<sup>769</sup> [http://frontex.europa.eu/assets/Publications/General/Frontex\\_Fundamental\\_Rights\\_Strategy.pdf](http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf).

<sup>770</sup> Article 13 of the Regulation 1168/2011.

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If present in the operational areas, EASO should provide training and guidance to debriefing officers to enable them to recognize asylum requests and to refer these persons to the appropriate authorities.<sup>771</sup>

The Fundamental Rights Agency, founded in 2007, has *inter alia* the task to provide the EU institutions and Member States with independent advice on fundamental rights issues.

With regard to border guards training, **the role of the FRA Agency encompasses the monitoring of the adequacy of training curricula of national border academies and the direct participation to some Frontex training.**<sup>772</sup>

Moreover, it also participates and monitors existing national border guard trainings. In relation to such activities, the FRA expressed its opinion with regard to the implementation of Frontex joint operations, in particular the ones deployed in August 2011 in Greece ("Poseidon Sea Operations") and Spain ("EPN Indalo operation"), in which staff members were performing surveillance and patrolling tasks and interviewing newly arrived migrants.

As stressed by FRA, the officials deployed from different Member States (the host and the sending State) did not necessarily have a "*common understanding of the meaning of fundamental rights in practise*", even if they were aware of key fundamental rights. In general, the Agency stressed the presence of training gaps with reference to timing of the common briefing, often not provided before the deployment of the officials involved in border activities: such gaps are due to the fact that briefings are too short. Moreover, not all of the personnel which will be further involved in the operations are there from the beginning.<sup>773</sup>

#### The training in partner countries

In all partner countries border guards receive training even though it is not systematic and it does not properly include topics related to human rights and international protection. Police authorities, Custom guards, Coastguards, Navy and the Army provide for their own training and fresh courses in academies and training centres. However, these are not always addressed to those border guards who effectively conduct border control and surveillance activities and deal directly with migrants, asylum seekers and vulnerable persons such as unaccompanied minors, torture victims, disabled and victims of trafficking.

In **Portugal**, by law training on asylum law and international protection is mandatory only for those border guards who work at border crossing points dealing with asylum seekers.

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771 FRA, *Fundamental Rights at Europe's southern sea borders*, 2013, page 17

772 *Ibidem*.

773 *Ibidem*.

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According to the Portuguese Council for Refugees, the training on human rights and asylum law and on human trafficking victims is part of the program of every initial training and refreshing courses provided to border guards. Besides, Frontex is also in charge of training on Fundamental Rights to national experts engaged in the Agency's operations.

Training of border officials shows some gaps, firstly because the subject of international protection is not covered in a sufficient way, secondly because the training on the ECHR is not regularly updated<sup>774</sup>.

In **Germany**, the training on asylum law is not explicitly provided by law which states however that the curriculum has to include public law and constitutional law (asylum law is part of this).

Border guards receive at least to some extent training on the legal basis of asylum law.<sup>775</sup>

According to Pro Asyl, border guards at the airport are trained in the city of Lubeck, at the Federal Police Academy. The academy is certified to implement the first EU Mid-Level Course for junior supervisory staff of border. Such training is carried out involving many EU Member States and lies on the principle of cooperation between Member States, which *"shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border control"*.<sup>776</sup>

The training tools are developed by Frontex in cooperation with several other EU Member States. The course includes a theoretical part on tactics, procedures and operational structures and some practical modules on activities to be carried out at the external EU borders. However, fundamental rights issues are not even mentioned.<sup>777</sup>

In Germany NGOs are not involved in training to border guards.

In **Greece**, border guard training is conducted at national level. Separate training modules are provided to the Hellenic Coast Guards conducting operations at sea and to national police staff trained at the Hellenic Academy of Police, located near Athens.

According to the Greek Council for Refugees there are no specific partnership agreements between Frontex and training academies. **EASO conducted more than 15 training sessions in Greece in 2012. However, such trainings did not target specifically border guards, being mostly addressed to administrative authorities and judges.**

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774 Epim Portuguese Country Report.

775 For additional details please see: <http://www.gesetze-im-internet.de/bundesrecht/ap-mdbgsv/gesamt.pdf>.

776 Article 16 of the Regulation 562/2006.

777 See also <http://frontex.europa.eu/news/frontex-mid-level-course-for-border-guard-officers-started-in-lubeck-germany-MI42Xc>

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In 2007, Police authorities tried to shape the national training on the common EU and Frontex training standard. However, notwithstanding the dense nature of the programme<sup>778</sup>, which was rather technically oriented, the training modules lack of fundamental rights issues, including the principle of *non-refoulement* for maritime border guards, and the identification of persons with special needs. This shows that in such trainings a particular emphasis is put in identifying “illegal migrants” rather than “persons seeking protection”, in contrast to what stressed in Frontex Regulation.<sup>779</sup>

**In Greece border guards can be deployed without having received specific border training other than the general police training.** Besides, officers “may” also attend re-fresher courses organised by national training institutions, including border management issues.<sup>780</sup>

In **Malta**, a national Police Academy provides training to border guards and to police in general. The Armed Forces conducting maritime border surveillance receive a different training. The offered training is focused more on technical issues than on human rights standards and migrants’ rights.

In March 2011 Frontex and the University of Malta signed the Framework Training Agreement aiming at organising common training activities.

**In 2012, the European Asylum Support Office gave 16 training sessions in Malta: however, as previously said for Greece, such trainings were not targeting Maltese border guards specifically**, since they address administrative and judicial actors for asylum matters, rather than police staff and border guards.

In **Italy**, border control and surveillance activities are carried out by five different authorities, namely border police, Custom Guards, Navy, Coastguards and Carabinieri. Each body provides for its own training and refresh courses in academies and training centres.

The border police personnel is bound to participate to a two-months mandatory course focusing on border management. As stressed by the Fundamental Rights Agency,<sup>781</sup> however, even if in principle such courses include in their schedules some

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778 Community Law - especially Schengen Borders Code training; “training on searches at transportation means for the location of hidden illegal immigrants”; inspections on ships/craft in the context of actions against illegal immigration; detecting forged/falsified documents and training of Special Units of the Hellenic Coast Guards, aiming to the provision of basic knowledge on the self-protection of the trainees against (illegal) “immigrants or facilitators having a dangerous behaviour”; tactics for interrogation. Source: Hellenic Police 2010. See “*Border Guard Training on Human Rights – A mapping paper focusing on selected EU Member State’s practises*”, Hungarian Helsinki Committee, December 2013, page 11.

779 Regulation 1168/2011/EU, 25 October 2011.

780 “*Border Guard Training on Human Rights – A mapping paper focusing on selected EU Member State’s practises*”, Hungarian Helsinki Committee, December 2013, page 11.

781 Fundamental Rights Agency report, *Fundamental Rights at Europe’s southern sea borders*, August 2013, page 108.

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modules on human rights and migration, only 8% of the training foresees topics related to human rights, with a relevant focus on anti-discrimination.<sup>782</sup>

More specific and advanced courses are offered to higher officials, thus excluding personnel effectively dealing with migrants in border control activities.

As with regard to the training under the Frontex mandate, the Agency has signed a partnership agreement with the Police Academy in Cesena aiming at organising training courses based on the Common Core Curriculum which include modules on human rights and access to international protection.

Such training is carried out by Frontex personnel as well as judges and academics. UNHCR is not involved in such courses, but in those provided to Custom Guards.

Since October 2013, **the Border Police of Fiumicino Airport (Rome) has inserted in their regular training courses specific modules on asylum law, namely on the identification of vulnerable groups and victims of torture.** Such trainings have been provided by the Italian Council for Refugees psychologists and legal advisors deployed by this NGO.<sup>783</sup>

As reported by the Fundamental Rights Agency, **Spain** was one of the few Mediterranean country which, according to Frontex, participated in the 2012 Frontex workshop to present the revised Common Core Curriculum to translators and trainers.<sup>784</sup>

In Spain, two police forces deal with irregular migration, the National Police Force (Cuerpo Nacional de Policía), and the Guardia Civil, both operating under the Ministry of Interior.

Moreover, specialised Port Police bodies are operating in specific ports and cooperating on security issues at sea borders. Each force trains its own personnel on the basis of their training programs.<sup>785</sup>

Before being deployed at the border, police authorities must undergo a complete and specialised border management course in Madrid.<sup>786</sup>

**The training includes modules on human rights and the teaching method includes practical activities and interactive knowledge (videos, study of press reports and disciplinary records, analysis on specific actions.).**<sup>787</sup>

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<sup>782</sup> Epim Italian Country Report, page 49.

<sup>783</sup> *Ibidem*.

<sup>784</sup> Fundamental Rights Agency report, *Fundamental Rights at Europe's southern sea borders*, August 2013, page 108.

<sup>785</sup> 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 the Training and Improvement Division of the National Police Corps. See *"Border Guard Training on Human Rights – A mapping paper focusing on selected EU Member State's practises"*, Hungarian Helsinki Committee, December 2013, page 11.

<sup>786</sup> *Ibidem*.

<sup>787</sup> *Ibidem*.



The training for the Guardia Civil officers and the National Police also involves external actors such as NGOs. The Guardia Civil also started to use **quality assessment surveys on its training** programmes.<sup>788</sup> However, such surveys do not cover human rights issues.

The Spanish Ombudsman in his report of 2012 pointed out the fact that police officers at border did not receive any training regarding the identification of (potential) asylum seekers. According to the Spanish Ombudsman this is affecting the access to international protection procedures.<sup>789</sup>

In **Hungary**, border management and irregular migration are under the responsibility of the Police since the beginning of 2008, when the Border Guard has been merged with the Police.

The academic curriculum for mid and high-ranking border police provides a mandatory one semester course on human rights. Moreover, police officers have to undergo an 8-hour compulsory training every month.

These compulsory trainings focus on various subjects relevant to the work of the police and topics covered can include human rights as well. As stressed by the Hungarian Helsinki Committee, *"the Police explained that trainings take place on different levels and on different themes involving county training departments of the police and the alien policing departments."*<sup>790</sup>

In addition to making use of their internal resources, **the Hungarian police authorities also invite UNHCR and NGOs as the Cordelia Foundation, the Menedék Association and the HHC**<sup>791</sup> **to their training activities.**

The HHC organized trainings within the framework of mandatory trainings on the subject of 'Human rights and international migration', while the **Cordelia Foundation introduced alien policing officers to a method for the early identification of vulnerable asylum seekers.**<sup>792</sup>

In addition, Frontex is also involved in training with regard to the Common Core Curriculum, to which police officers regularly attend. As reported by the Hungarian Helsinki Committee, in 2013 local teachers trained by Frontex have organized a short course on interviewing techniques for 45 police staff involved in alien policing work.

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788 Eg. the Institute for Women provides training on gender issues and the Red Cross on international humanitarian law. Cfr. *Border Guard Training on Human Rights – A mapping paper focusing on selected EU Member State's practises*", Hungarian Helsinki Committee, December 2013, page 12

789 Defensor del Pueblo: Informe Anual 2012. For additional information see [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/anual/Documentos/Informe\\_2012.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/anual/Documentos/Informe_2012.pdf), page 171.

790 Epim Hungarian Country Report. See also *"Border Guard Training on Human Rights – A mapping paper focusing on selected EU Member State's practises"*, Hungarian Helsinki Committee, December 2013.

791 *Ibidem*.

792 <http://protect-able.eu/country/hungary/>.

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## CONCLUSION

The publication reflects the results of a study made in 2013/14 in the frame of the project “Access to Protection – a Human Right” and led by the Italian Council for Refugees (CIR) jointly with partner organizations in other six countries in the European Union.

Starting point of the study and of the whole project is the Judgement of the European Court for Human Rights in the case *Hirsi Jamaa* and others v. Italy of February 2012. In this Judgement, the Court not only condemns the push-back of the Eritrean and Somali claimants from the high seas to Libya and the whole Italian push-back policy as a violation of the European Convention on Human Rights but provides also a number of principles that should guide the treatment of aliens at Europeans borders, in particular those arriving in an irregular manner. The study aims at investigating whether and to which extent these principles are observed in practice in a number of Member States of the European Union, namely Germany, Greece, Hungary, Italy, Malta, Portugal and Spain as well as by laws and policies of the Union. Following the terms of the sentence of the Strasbourg Court, in the study particular emphasis is made on measures that could reduce the risk of *refoulement*.

The adoption of the “second generation” legal instruments on asylum by the European Union in June 2013 marks, undoubtedly, a historical step towards the creation of a Common European Asylum System (CEAS) and includes a number of important additional guarantees and safeguards regarding the reception of asylum seekers, the asylum procedure and, in particular, the special needs of persons belonging to the most vulnerable groups including unaccompanied minors. However, the actual situation in Europe at the moment of presenting this publication provides alarming evidence that we are far away from a true common European response to the protection needs raised by the old and new conflicts around the continent and the mass exodus created by these conflicts. Almost all persons in need of international protection continue to arrive in the territory of the Union by irregular and extremely dangerous means and routes in absence of avenues for legal entry. And once arrived at the shores of the external borders they continue to travel irregularly from one country to another in order to reach their destination where, in approximately 70 per cent of all cases relatives are waiting for them. The rigid and inhuman “Dublin System” creates unavoidably secondary illegal movements within the Union territory and frequently the need to pay, again, for the services of smugglers.

A number of legislative instruments of the European Union regarding, *inter alia*, visa policies, border control and surveillance, the mandate of the border agency Frontex, the return policies and instruments creating financial programmes have been substantially amended after the *Hirsi* Judgement and actually demonstrate the attempt to bring these policies and legal acts in line with the principles and guidelines established by the Strasbourg Court. However, the report provides evidence that, for example, the Regulation, adopted in spring 2014, on sea border operations coordinated by Frontex leaves fundamental questions on protection of persons unanswered; further legislation is required but unfortunately not foreseen in the Strategic Guidelines that will determine the policies of the Union in the fields of Home Affairs and Migration for the next 5 years. It is further stressed in the report that Frontex has been and continues to be involved in border operations where un-discriminated and unlawful rejections and push backs are testified. The Commission and Frontex should use their prerogatives to request Member States violating EU law to terminate illegal practices and promptly, effectively and impartially investigate into all allegations of collective expulsions and ill-treatment of migrants and asylum seekers. The Frontex Fundamental Rights Officer and the Frontex Consultative Forum should play a more active role in carrying out proper human rights monitoring at the main border crossing points.

At the level of individual countries, severe shortcomings in respect of the principles of the *Hirsi* Judgement are documented in this report, as a result of the field research carried out by all partner organizations as well as through desk research regarding other countries. Ill treatment and abuses occur in particular at the Greek-Turkish border, the Bulgarian-Turkish border, the Spanish enclaves in Morocco, Ceuta and Melilla. In all the countries examined, in spite of the progress made over the past years, the right of aliens at border points to receive information in a language they understand, to have access to interpretation services, to have access to independent legal counselling and to legal assistance is not sufficiently guaranteed in practice and not sufficiently monitored, in particular during the period prior to the issuance of a deportation order and prior to filing a protection request. An effective remedy, i.e. an immediate suspensive effect of an appeal against removal from the border and from the territory, as outlined by the Strasbourg Court, is, as a rule, not guaranteed by national laws. On the other hand, considerable efforts are documented and progress has been made with respect to training of border guards, the inclusion of fundamental rights in the training curricula, the harmonisation of training methodologies between the Member States. This is also a result of the work of the recently created Agencies for Fundamental Rights (FRA) and for Asylum Support (EASO) as well as a result of closer collaboration with UNHCR. However, training is not systematic and it is not always addressed to those border guards who effectively conduct border control

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## CONCLUSION

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activities and deal directly with migrants and asylum seekers.

The report does not focus on search and rescue at sea since this is not a subject of the ruling of the Strasbourg Court. But being intimately linked to “access to protection” and to the closed borders policy of the European Union, these conclusions cannot but highlight that the first right to protection is the right to life, a right which is under constant threat for people obliged to cross the Mediterranean in unseaworthy boats, being in need of international refugee protection or not. Under this aspect, the author of this report firmly believe that an efficient search and rescue mechanism, following the example of the Italian “*Mare Nostrum*” operation, should be ensured and extended to the whole of the sea areas under the political, operational and financial responsibility of the European Union.









## Access to Protection: a Human Right

The project “Access to Protection: a Human Right” is financed by the Network of European Foundations through the European Programme for Integration and Migration (EPIM).

The objective of the project is to promote conformity of national and European Union policies and practices with the obligations required by European international human rights treaties and laws, especially those established by the European Court of Human Rights (ECtHR) in the case of *Hirsi Jamaa and Others* vs. Italy regarding access to Europe and to protection.

The project is coordinated by the Consiglio Italiano per i Rifugiati (Italy). The partnership includes: the Hungarian Helsinki Committee (Hungary), Pro-Asyl Foundation (Germany), The People for Change Foundation (Malta), the Greek Council for Refugees (Greece), the Spanish Commission for Refugee Aid - CEAR (Spain) and the Portuguese Council for Refugees (Portugal).

con la collaborazione di

