

FOCUS



# Asylum and migration into the EU in 2015



EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



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# Introduction

Over a million people sought refuge in EU Member States in 2015, confronting the EU with an unprecedented challenge. Although this represents only about 0.2 % of the overall population, the number was far larger than in previous years. Moreover, with about 60 million people in the world forcibly displaced as a result of persecution, conflict, generalised violence or human rights violations, the scale of these movements is likely to continue for some time. FRA looks at the effectiveness of measures taken or proposed by the EU and its Member States to manage this situation, with particular reference to their fundamental rights compliance.

This FRA *Fundamental Rights Report 2016* focus looks at four different areas. It first illustrates the risks that refugees and migrants face to reach safety. A second section examines new challenges with regard to *non-refoulement* and the prohibition of collective expulsion. This is followed by a section describing selected developments and possible solutions in the field of asylum. Finally, a fourth section deals with fundamental rights issues in the context of returns of migrants in an irregular situation. The description of developments is complemented by an analysis of selected aspects that raise particular fundamental rights challenges, looking also at the impact of policies on people. Chapter 3 of FRA's *Fundamental Rights Report 2016* complements this focus chapter with information on racism and xenophobia.

## Significant arrivals strain domestic asylum systems

According to Frontex, in 2015, over one million refugees and migrants – compared with about 200,000 in 2014 – reached Europe by sea in an unauthorised manner, mainly arriving in **Greece** and **Italy**.<sup>3</sup> Many moved onwards – initially spontaneously and later in an increasingly coordinated manner. Travelling through the western Balkan countries, they headed primarily to **Austria**, **Germany** and **Sweden** but also to other EU Member States. This put a significant strain on domestic asylum systems in the countries of first arrival, transit and destination. [Figure 1](#) provides a comparative overview of monthly arrivals by sea in 2014 and 2015.

The increase in refugees arriving in Europe mirrors global developments. Worldwide, at the beginning of 2015, almost 60 million people – the highest number ever – were forcibly displaced as a result of persecution, conflict, generalised violence or other human rights violations. Some 20 million among them were displaced as refugees outside their country of origin. Leaving aside the 5.1 million Palestinian refugees in the Middle East, Syrians constituted the largest refugee group: almost

4 million people. Turkey hosted the most refugees in the world. Lebanon hosted the largest number of refugees in relation to its national population, with 232 refugees per 1,000 inhabitants, followed by Jordan (87/1,000).<sup>4</sup>

People moving through the Mediterranean are mainly refugees, many of whom moved on from first countries of asylum after failing to obtain effective protection. More than four out of five people who crossed the Mediterranean Sea to reach Europe came from the top 10 refugee-producing countries, including Syria, Afghanistan, Iraq and Eritrea.<sup>5</sup>

As [Figure 2](#) illustrates, 31 % of new arrivals were children. The increasing number of arriving children – both unaccompanied and travelling with families – strained national child protection capacities. Children are at severe risk of enduring violence along the migration route, as well as sexual violence, exploitation and going missing.

According to Frontex, some 885,000 people first arrived in **Greece**,<sup>6</sup> of whom many moved northwards. The former Yugoslav Republic of Macedonia initially attempted to stop people at the Greek land border by using force,<sup>7</sup> but in August people were allowed to cross the western Balkans. They re-entered the EU in **Hungary** and subsequently gathered outside Budapest's Keleti train station, waiting for opportunities to reach western Europe. With no trains available, in early September, over 1,000 people set off on foot along the highway to Vienna in Austria. An agreement was made to allow them to enter **Austria** and transit to **Germany**. People continued to follow this route from **Greece** until the end of 2015. Initially, the route passed through **Hungary**; after the country finished setting up a razor-wire fence along the borders with Serbia and **Croatia** on 16 October, it passed through **Croatia**. An average of between 2,000 and 5,000 people reached **Germany** every day. By the year's end, over half a million people had crossed **Croatia** to reach western Europe.

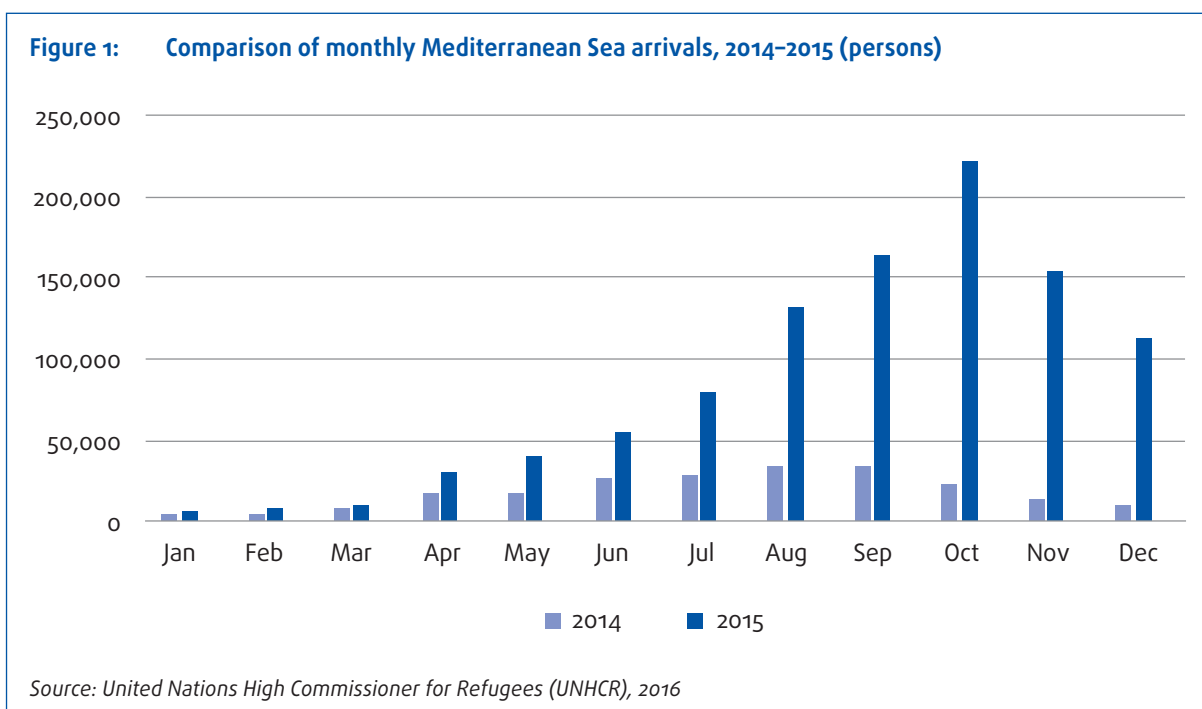
**Germany** registered over one million arrivals, the majority of whom remained in the country, although some moved on – primarily to northern Europe. By the end of the year, **Sweden** became the EU Member State with the highest number of asylum applications per capita, with some 11.5 applicants per 1,000 inhabitants.<sup>8</sup>

With over one million people requesting asylum in the EU, numbers in 2015 exceeded those during the conflict in the former Yugoslavia.<sup>9</sup> The visible presence of refugees in need of help triggered an unprecedented response by the population. A large number of volunteers – often self-organised – provided food, clothing and other support to new arrivals at points

Terminology	
Refugee	A person who fulfils the criteria of Article 1 of the 1951 Convention relating to the Status of Refugees (1951 Geneva Refugee Convention or Geneva Convention), namely a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality (or stateless person outside his/her country of habitual residence) and is unable or, owing to such fear, unwilling to avail him/herself of the protection of that country.  This chapter often uses the term refugees to refer to the people who arrived in 2015, even though not all of them are refugees.
Beneficiary of subsidiary protection	A third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, (or in the case of a stateless person, to his or her country of former habitual residence) would face a real risk of suffering serious harm and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country (Qualification Directive (2011/95/EU); Article 2 (f)).
Asylum seeker	In EU law referred to as “applicant of international protection”. A third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken (Asylum Procedures Directive (2013/32/EU), <sup>2</sup> Article 2 (c)).
Migrant	A broader term, referring to a person who leaves one country or region to settle in another.

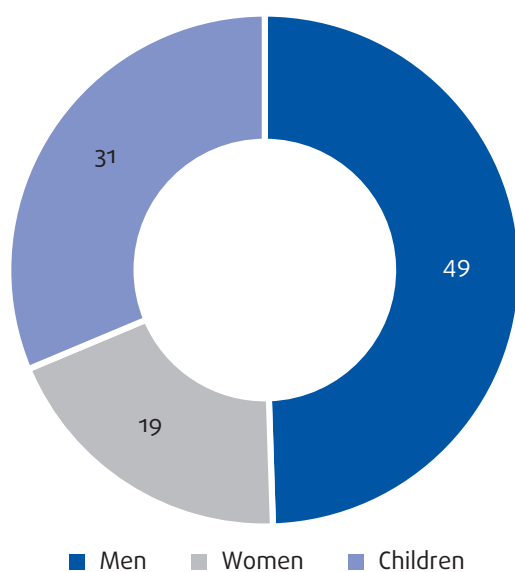
of entry and transit. At the same time, however, anti-refugee attitudes increased significantly, sometimes prompting violent xenophobic outbursts in some EU Member States. For example, the German Federal Criminal Police Office registered nearly 1,000 offences

against accommodation centres for refugees in 2015, including around 150 violent attacks – over five times as many as in 2014, when 28 violent attacks were registered.<sup>10</sup> Chapter 3 provides further details on similar trends in other EU Member States.





**Figure 2: Demographic breakdown of sea arrivals, 2015 (%)**



Source: UNHCR, 2016

## EU and Member States' activities touching on fundamental rights

National governments reacted to the new situation in various ways. Some Member States announced or implemented restrictive asylum and family reunification laws. **Hungary** and **Slovenia** erected fences on borders with countries outside the Schengen area, and **Bulgaria** extended the existing fence along Turkey's borders. Eight countries introduced temporary border controls inside the Schengen area.

At the EU level, heads of government met six times in an attempt to agree on a common approach to the new situation.<sup>11</sup> The European Commission published the European Agenda for Migration, a strategic document, which was followed up by two specific action plans: the first to fight migrant smuggling and the second to ensure effective returns.<sup>12</sup> For the first time ever, the Commission

triggered the emergency response mechanism under Article 78 (3) of the Treaty on the Functioning of the European Union (TFEU), resulting in a plan to relocate 160,000 people from **Greece** and **Italy**, with the first ones relocated towards the end of the year.<sup>13</sup> Although the number of relocated people remains low, it will be an important element of the substantial rethink of the rules for distributing asylum applicants in the EU, set out in the Dublin Regulation ((EU) No. 604/2013).<sup>14</sup> The EU also significantly enhanced its operational dimension. It supported the setting up of 'hotspots' in **Italy** and **Greece** to support frontline Member States. These hotspots are centres where relevant justice and home affairs agencies and the European Commission coordinate their operational work. In addition, it proposed replacing Frontex with a European Border and Coast Guard Agency with a strengthened role.<sup>15</sup>

These EU- and Member State-level policy measures and operational activities in the field of asylum, border management, combating and preventing migrant smuggling, and return, are significant and touch upon issues that are very sensitive from a fundamental rights perspective. They involve actions that – if carried out inadequately – may result in serious violations of fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union (EU Charter).

This FRA *Fundamental Rights Report 2016* Focus touches on many rights and principles set forth in the Charter of Fundamental Rights of the European Union (EU Charter). At its core is the right to asylum under Article 18 and the prohibition of *refoulement* and collective expulsion under Article 19. Measures taken by EU Member States to address migrant smuggling may affect the rights to life and to the integrity of the person, protected by Articles 2 and 3 of the EU Charter, respectively. The non-discrimination rules in Article 21 guide Member States in ensuring that asylum seekers are treated equally. Article 24 of the EU Charter, which outlines the rights of the child, and the social rights set forth in European and international human rights and refugee law frameworks are considered in the focus' description of how refugees and migrants were received by Member States. Other EU Charter rights, such as the right to respect for private and family life (Article 7) and the right to an effective remedy (Article 47), are also used as yardsticks for the analysis presented. The right to liberty, enshrined in Article 6, is addressed in the section on returns.



# 1

## Reducing risk: strengthening safety and fundamental rights compliance



This section discusses three issues. First, FRA points out that legal avenues for refugees seeking to reach the EU are limited. Second, it looks at policies against smuggling of migrants and the risk of criminalising humanitarian actions. The third part reviews the temporary reintroduction of border controls within the Schengen area, briefly describing the effects of asylum and border management policies on intra-EU free movement rules.

According to the International Organisation for Migration (IOM), some 3,771 people died in 2015 while crossing the Mediterranean Sea on unseaworthy and often overcrowded boats provided by smugglers. [Figure 3](#) shows the trend in fatalities over the past three years.

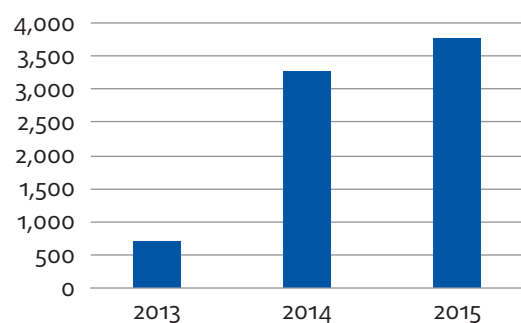
Children made up about 30 % of recent deaths in the eastern Mediterranean ([Figure 4](#)).<sup>16</sup> In early 2016, international organisations reported that an average of two children have drowned every day since September 2015.<sup>17</sup> The vast majority of men, women and children attempting this dangerous journey were Syrian nationals.<sup>18</sup>

Article 2 of the EU Charter guarantees everyone the right to life. It is one of the core human rights protected at the international and European levels. The International Covenant on Civil and Political Rights (ICCPR) stipulates that every human being has an inherent right to life (Article 6). As early as 1982, the Human Rights Committee, the covenant's supervisory body, stressed that protecting this right also "requires that States adopt positive measures".<sup>19</sup> A state may therefore have a duty to act when loss of life is foreseeable and the state can prevent the loss. Under the European Convention on Human Rights (ECHR), responsibility may be triggered if a state avoids taking preventative measures within the scope of its powers in a situation where it knew or ought to have known of real or immediate risks to individuals.<sup>20</sup>

The absolute number of fatalities in 2015 was higher than in 2014.<sup>21</sup> Effective action by the EU and concerned Member States has reduced the number of deaths relative to the total number of people crossing the Mediterranean but not the absolute number.

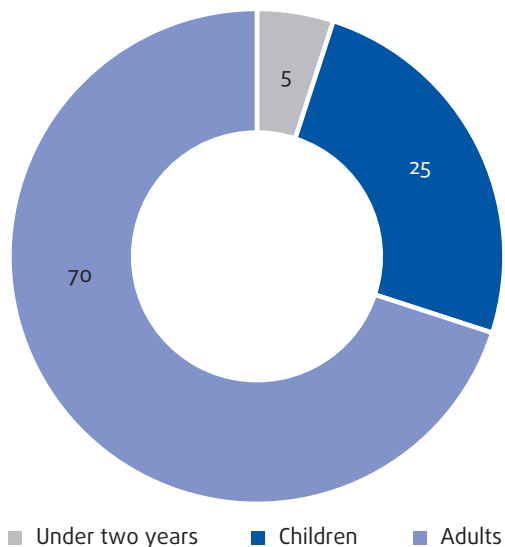
In 2015, 21 % of deaths along the Mediterranean route occurred in the eastern Mediterranean, particularly in a small strip of sea separating the Turkish coast from the Greek islands and islets. By contrast, only 1% did so in 2014.<sup>22</sup> With the support of Frontex, the Hellenic Coast Guard increased its efforts and commitment to rescue people in distress at sea. According to Amnesty International and Human Rights Watch, in the recent past, the Hellenic Coast Guard implemented deterrent measures that increased the risk of boats sinking, such as stopping overcrowded boats at the outer edge of the Greek territorial sea or towing them away until Turkish rescue boats arrived.<sup>23</sup> Information provided by Frontex indicates that in 2015 criminal networks in

**Figure 3: Estimated fatalities in the Mediterranean, 2013-2015**



Sources: IOM (2015), *Missing migrants project*; Brian, T. and Laczko, F., (2014), *Fatal journeys: Tracking lives lost during migration*, IOM.

**Figure 4: Deaths in the eastern Mediterranean Sea, by age group, 1 September to 27 November 2015 (%)**



Source: IOM and UNICEF (2015), IOM and UNICEF data brief: Migration of children to Europe, 30 November 2015.

Turkey instructed migrants heading to Greece by sea to destroy their boats once on Greek territorial waters and detected by the Hellenic Coast Guard.

In the central Mediterranean, according to IOM, the number of fatalities – mainly from Libyan shores – decreased, from about 3,170 fatalities to 2,892. The operational plan of Operation Triton, coordinated by Frontex, included a strong rescue-at-sea component. In addition, the increased maritime surveillance activities were extended to the sea near the Libyan coast and

allowed for the early identification of unseaworthy boats. This substantially contributed to the rescue of persons in distress found at sea.<sup>24</sup>

In addition to the conflict in Syria, other realities pushed people to embark on the dangerous sea crossing. These include serious problems with security, healthcare and insufficient food in Syrian refugee camps in Lebanon and Jordan, as well as protection gaps – including the lack of livelihood prospects in Turkey, where, in 2015, refugees did not enjoy the right to work.<sup>25</sup> For example, more than two-thirds of men individually surveyed in Jordanian refugee camps reported experiencing threats to their safety, and some 17.74 % recounted concrete incidents of abuse and/or exploitation. Male refugees reported not seeking help from authorities because they lacked access to justice and/or lacked confidence in the justice system.<sup>26</sup>

## Opening legal avenues for reaching the EU

Most people crossed the sea in overcrowded and unseaworthy boats, usually provided to them by often ruthless smugglers. In the absence of legal channels to reach the EU, smugglers are the only option for refugees who seek safety. This dependence on smugglers exposes migrants and refugees to a heightened risk of abuse, violence and exploitation.

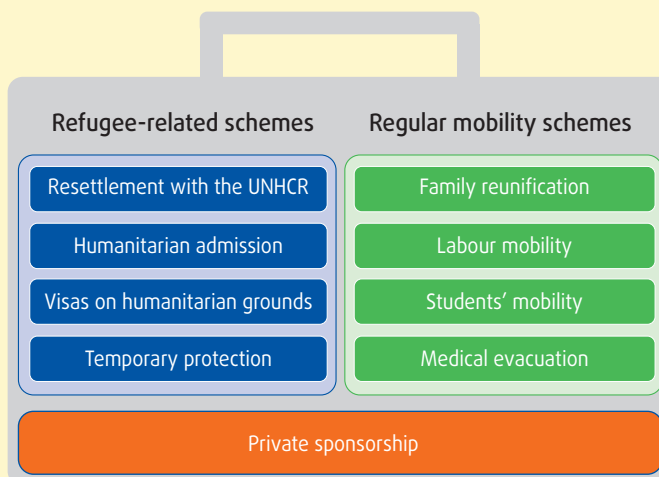
In the absence of alternatives, many people in need of protection resort to smuggling networks to reach safety or join their families, putting at risk their lives and physical integrity. Increasing the availability of legal avenues to reach the EU would allow at least some of those refugees who do not enjoy effective protection in the country where they are staying to reach safety without incurring risks of abuse and exploitation while

### FRA ACTIVITY

#### FRA toolbox: Operationalising legal entry options

FRA has outlined possible ways to increase the number of persons in need of international protection, staying outside the EU, who are legally admitted into the EU. Its toolbox lists refugee-related schemes as well as regular mobility schemes that Member States could use to increase the possibilities of legal entry, making it a viable alternative to risky irregular entry.

FRA (2015), Legal entry channels to the EU for persons in need of international protection: a toolbox, Luxembourg, Publications Office, p. 5



on the way. Legal ways to reach the EU – such as resettlement or humanitarian admission programmes – can also target those refugees most in need of protection, such as victims of torture, single heads of households, or women and children at risk. The European Agenda for Migration calls for more action in this regard,<sup>27</sup> reflecting a similar call by FRA in March 2015.

At the policy level, some progress occurred. As a first concrete measure, in July 2015, the Council of the European Union adopted conclusions on resettlement, inviting EU Member States (plus Schengen Associated Countries) to pledge 20,000 resettlement places over a two-year period (2015–2017). Ultimately, 27 Member States and Iceland, Liechtenstein, Norway and Switzerland pledged some 22,500 resettlement places, with refugees to be selected by the United Nations High Commissioner for Refugees (UNHCR) according to its global resettlement criteria.<sup>28</sup> In December, the European Commission proposed complementing this programme, issuing a recommendation for a Voluntary Humanitarian Admission Scheme (VHAS) for Syrian refugees registered in Turkey before 29 November 2015.<sup>29</sup> That all EU Member States agreed to accept resettled refugees and to pledge a specific quota is an important step forward, even though the quota is zero for Hungary and even if, for the time being, it is a one-off quota. – This is particularly true given that, in recent years, about half of all EU Member States had a resettlement programme. UNHCR-assisted resettlements took place in 14 Member States in 2012 and in 12 Member States in 2013.<sup>30</sup>

From 2015 to 2017, as per EU recommendation, 27 EU Member States will accept resettled refugees; by contrast, only 16 Member States received resettled persons in 2014. In terms of concrete numbers, however, refugee resettlement to the EU remains – and will remain – limited based on current commitments. For example, in 2015, some 8,622 UNHCR-referred persons arrived in EU Member States,<sup>31</sup> whereas globally over 1.15 million people need resettlement.<sup>32</sup> Moreover, some Member States in central Europe indicated that they prefer to accept only Christian refugees, arguing that an absence of pre-existing Muslim communities would make it difficult to integrate persons of Muslim faith. This may not be compatible with the non-discrimination provision of Article 21 of the EU Charter and other human rights standards.<sup>33</sup>

Next to resettlement, family reunification is another important legal avenue for family members of persons found to be in need of international protection in the EU. Restrictions on family reunifications announced by some EU Member States towards the end of the year may, however, offset the small progress made on resettlement. Some of the most affected destination countries, including **Austria, Denmark, Finland, Germany** and **Sweden**, announced changes to their national laws that would delay family reunification or make it more

difficult for refugees and/or people granted subsidiary protection.<sup>34</sup> **Denmark** already adopted the announced changes in January 2016,<sup>35</sup> and the German parliament approved the so-called asylum package II (*Asylpaket II*) on 25 February 2016.<sup>36</sup> It remains to be seen how Member States will implement these restrictions in 2016. They may have considerable impact on people, given that in some of these Member States family reunification is already an administratively complex process. In addition, its duration is subject to the processing capacities of the competent authorities, including the consular authorities in countries such as Jordan, Lebanon and Turkey, which are currently under strain. Further requirements could prolong the procedure to such an extent that the right to family reunification would no longer be effectively safeguarded, raising issues under Article 7 of the EU Charter.

In 2014, a study commissioned by the European Parliament<sup>37</sup> proposed introducing common rules for issuing humanitarian visas in the EU Visa Code – a matter FRA also suggested exploring, together with the idea of ‘mobile’ Schengen Visa Centres to ease refugees’ access to visa applications.<sup>38</sup> This would allow EU Member States to take a more harmonised approach to issuing visas to people fleeing war or persecution. Although the legislation of many EU Member States allows the issuance of humanitarian visas, the discussions on the revision of the Visa Code did not seriously consider this issue.

## Combating smuggling without criminalising migrants and those who help them

Most people fleeing across the Mediterranean Sea take to sea in unseaworthy boats. Signatories to the UN International Convention for the Safety of Life at Sea (SOLAS Convention) – which include all Mediterranean coastal states except Bosnia and Herzegovina – are required to prevent the departure of such boats, as laid down by Regulation 13 of Chapter 5. This regulation includes a general obligation for governments to ensure that all ships be sufficiently and efficiently manned from a safety point of view.<sup>39</sup>

### Smuggling and trafficking

Trafficking in human beings is different from the smuggling of irregular migrants. Trafficked migrants are further exploited in coercive or inhuman conditions after having crossed the border. People are trafficked for the purpose of sexual and labour exploitation, the removal of organs or other exploitative purposes. Women and children are particularly affected. Children are also trafficked to be exploited for begging or illegal activities, such as petty theft.

Migrants who are smuggled to the EU are at risk of becoming victims of exploitation or abuse. As documented in FRA's report on the situation at Europe's southern sea borders, refugees and migrants are already exposed to serious risks of abuse and exploitation by smugglers before the sea crossings, with women and children facing heightened risks of sexual and gender-based violence.<sup>40</sup> Effective action to combat migrant smuggling not only serves to improve the security of maritime traffic and to curb irregular migration; it is also important for addressing impunity for crimes against migrants and refugees, and could be seen as a positive obligation by states to protect the right to the integrity of the person set out in Article 3 of the EU Charter.

Several incidents that occurred in August 2015 exemplify smugglers' ruthlessness. On 15 August, 49 migrants crossing to **Italy** died from inhaling fumes in the hold of a boat, into which smugglers had put them.<sup>41</sup> On 27 August, the Austrian authorities found a truck – parked along the highway from **Hungary** – that contained 71 people who had suffocated.<sup>42</sup> On 29 August, a 17-year-old Iraqi boy was shot during an operation to arrest smugglers on board of a yacht near the **Greek** island of Symi, underscoring the risks associated with law enforcement efforts to stop smugglers.<sup>43</sup>

Soon after the adoption of the European Agenda for Migration, the European Commission issued an Action Plan against Migrant Smuggling (2015–2020).<sup>44</sup> It aims to improve the collection, sharing and analysis of information; to strengthen the police and judicial response to migrant smuggling; lists preventative actions to take; and promotes stronger cooperation with third countries. The document identifies several actions that may help reduce the risks migrants face, including opening more safe and legal ways to reach the EU, as well as evaluating and improving relevant EU legislation (Directive 2002/90/EC<sup>45</sup> and Council Framework Decision 2002/946/JHA<sup>46</sup>) to avoid the risk of criminalising those who provide humanitarian assistance – an issue regarding which FRA has expressed concerns in the past.<sup>47</sup> However, implementing some of the proposed actions may raise issues under the EU Charter of Fundamental Rights, including the plan to capture and dispose of boats used or intended to be used by smugglers, particularly given that boats may often be used for multiple purposes.

Authorities' efforts to fight the smuggling of people sometimes involved excessive reactions. After an increase in arrivals, many people decided to help refugees reach a shelter or get closer to their destinations – for example, by buying them train tickets or transporting them in their cars. In Lesbos, the police threatened to arrest local volunteers for providing lifts to refugees found walking along the 70-kilometre road to the island's capital, Mytilini; a UNHCR intervention resolved this issue.<sup>48</sup> In **Germany**, a number of Syrians

who picked up relatives and friends in **Austria** and brought them to **Germany** had to pay fines for assisting unauthorised entry (on the basis of Sections 14 and 95 of the German Residence Act (*Aufenthaltsgesetz*)).<sup>49</sup> A **Danish** court imposed a fine of DKK 5,000 (some €700) on a man who gave a family with children a lift in his car from Germany to Denmark without taking any money for it.<sup>50</sup>

Measures taken also resulted in the punishment of refugees themselves, raising issues under the non-penalisation provision in Article 31 of the UN Convention relating to the Status of Refugees (1951 Geneva Refugee Convention). Notably, **Hungary** in September amended its criminal code to punish the crossing of the border fence. By 31 January 2016, criminal proceedings were initiated against more than 800 people for irregularly crossing the border by evading, destroying or committing some other form of abuse of the fence guarding the state border.<sup>51</sup> As individuals usually admitted having crossed the border irregularly, they were processed quickly. Those convicted received an expulsion order – the implementation of which was suspended if the individual requested asylum<sup>52</sup> – and a one- or two-year entry ban. Furthermore, some 10 people were charged with the aggravated form of irregular border crossing, which is punishable by one to five or, in some cases, even two to eight years of imprisonment.<sup>53</sup> In January 2016, the first convictions were imposed, with the highest sanction amounting to 18 months' imprisonment.<sup>54</sup>

## Controlling onward travel without excessively limiting free movement in the EU

Most of the people who crossed the Mediterranean Sea moved on through the Balkans to **Germany** and northern Europe. The movement was spontaneous and initially uncontrolled. This resulted in risks for the people concerned, but also prompted fears that free movement within the Schengen area would allow potential criminals – including terrorists – to move around uncontrolled, particularly after the Paris attacks in November 2015.

EU Member States took several measures to ensure that those who cross their borders are registered and move onwards in an organised manner. Along the main route in **Croatia, Slovenia, Hungary, Austria, Germany** and **Sweden**, they set up transit or distribution facilities from which people moved onwards to the neighbouring Member State or to a reception facility by bus or train. Efforts were made to channel the movement across borders through specific border crossing points and to equip these to handle the flow and register new arrivals. To ensure that all new arrivals are effectively registered, uncontrolled movements through the



borders had to be prevented. To do this, in the second half of the year, eight Schengen states made use of the option to reintroduce temporary intra-Schengen border controls, as illustrated in Table 1. Previously, this measure was primarily used in connection with large sporting events or high-level meetings. In 2015, it became a tool to better control and manage refugee movements across Europe.

In exceptional circumstances – such as in the event of a serious threat to public policy or internal security – Regulation (EU) No. 1051/2013,<sup>55</sup> which amended the Schengen Borders Code, allows the temporary reintroduction of intra-Schengen border controls. It is a measure of last resort that can normally be extended up to a maximum of six months. In exceptional circumstances, where the overall functioning of Schengen is put at risk as a result of persistent serious deficiencies relating to external border controls, it can be extended for up to two years (Article 26). The European Commission and neighbouring Member States must be informed before the controls are activated, except in cases of imminent threats.

The free movement of persons is a basic pillar of EU integration and a citizens' right protected by Article 45 of the EU Charter. The absence of border controls at most intra-EU borders is an important component of the right. Reintroducing border controls at crossing points that had been open for many years affected

many people, including cross-border workers, transport companies, etc., who were otherwise not touched by the refugee situation.

## Fundamental rights to guide the way forward

Although the absolute number of fatalities in the Mediterranean Sea rose in 2015, EU and Member State measures to bolster the rescue element of border management, and thus protect the right to life set out in Article 2 of the EU Charter, prevented an even greater increase. FRA's 2013 report on the situation at Europe's southern sea borders outlines additional suggestions on how to uphold the right to life in the maritime context, such as ensuring that patrol boats are adequately equipped with water, blankets and other first aid equipment.<sup>56</sup> Only a global approach, however, involving all relevant states and actors, and building on the conclusions of the World Humanitarian Summit to be held in Istanbul on 23 and 24 May 2016, may succeed in the longer term in putting to an end the high death toll at sea.

To guarantee the right to asylum in Article 18 of the EU Charter, EU Member States should, with the support of the European Commission, offer more possibilities for persons in need of protection to enter the EU legally, through resettlement, humanitarian admission or other

**Table 1: Temporary reintroduction of border controls within Schengen in 2015**

State	Start date	End date	Reason
AT	16 September	–	Large influx of asylum seekers
DE	16 May	15 June	G7 summit
DE	13 September	–	Large influx of asylum seekers
FR	13 November	–	21 <sup>st</sup> UN Conference on Climate Change (until 13 December), and then emergency situation after Paris attacks
HU	17 October	26 October	Large influx of asylum seekers
MT	9 November	31 December	Valletta Conference on Migration; terrorist and irregular migrant threats
SE	12 November	–	Large influx of asylum seekers
SI	17 September	16 October	Large influx of asylum seekers
NO	26 November	–	Large influx of asylum seekers

Note: – means still in place at end of year. Denmark reintroduced temporary controls on 4 January 2016. Belgium did the same on 23 February 2016.

Source: European Commission, DG Home, list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq. of the Schengen Borders Code, 2016

schemes, so that these can constitute a viable alternative to risky irregular entry – particularly for vulnerable people. Member States should work to overcome practical and legal obstacles preventing or significantly delaying reunification with family members and refrain from imposing new ones. Doing so would both respect the right to family life enshrined in Article 7 of the EU Charter and help prevent irregular entries by people who want to join their families.

In the EU Action Plan against Migrant Smuggling, the European Commission announced an evaluation and a review of the relevant EU legislation. This presents an opportunity to address the risk of criminalising humanitarian assistance as well as the provision of support – for example, by renting accommodation – to migrants in an irregular situation, as outlined in FRA’s March 2014 paper on criminalisation of migrants in an irregular situation and of persons engaging with them.<sup>57</sup>





# 2

## Preventing *refoulement* and collective expulsion



The principle of *non-refoulement* is the cornerstone of the international legal regime for the protection of refugees. Article 33 of the Convention relating to the Status of Refugees enshrines the prohibition against returning (*refouler*) a refugee – and hence also a person seeking asylum – to a risk of persecution. The prohibition of *refoulement* is also reflected in primary EU law, specifically in Articles 18 and 19 of the EU Charter and Article 78 of the Treaty on the Functioning of the EU (TFEU). The 28 EU Member States accepted this obligation when ratifying the EU treaties.

Secondary EU law relating to borders, asylum, migration and return also prohibits *refoulement*. Article 3 of the ECHR, as interpreted by the European Court of Human Rights (ECtHR), and the EU asylum *acquis* have expanded the type of harm to which a person cannot be returned, to include a prohibition against returning someone to torture, inhuman or degrading treatment or punishment, and other serious harm.

The prohibition of *refoulement* is absolute – it does not allow any derogation or exception. The principle of *non-refoulement* bans not only a return to the country of origin (direct *refoulement*) but also a transfer to countries where individuals are exposed to the risk of onward removal to the country of origin (indirect or onward *refoulement*).<sup>58</sup> This means, for example, that returning an asylum seeker to a country neighbouring the EU in which he or she previously stayed (for example, Serbia or Turkey) is only possible if – after assessing the individual's personal circumstances – the authorities are satisfied that he or she will be readmitted by the third country and protected from unsafe onward removal. Return to a third country is not allowed if there is a real risk that the individual would be subjected to inhuman or degrading treatment<sup>59</sup>, including, for example, in detention facilities. International refugee law further requires that the person concerned be allowed to

access asylum procedures in the third country.<sup>60</sup> There is a general consensus that international refugee law also requires that the asylum seeker has access to sufficient means of subsistence to maintain an adequate standard of living in the third country, and that the third country takes into account any special vulnerabilities of the person concerned.<sup>61</sup> EU law also reflects this requirement: Article 38 (1) (e) of the Asylum Procedures Directive (2013/32/EU) requires that, if found to be a refugee, the individual must have access to protection in accordance with the Geneva Convention.

Any form of removal or any interception activity that prevents entry may result in collective expulsion if the removal or interception is not based on an individual assessment and if effective remedies against the decision are unavailable. Collective expulsion is prohibited by Article 19 of the EU Charter and Article 4 of Protocol 4 to the ECHR. The ECtHR has made clear that this prohibition also applies on the high seas.<sup>62</sup>

This section first describes the different types of actions that may give rise to a risk of *refoulement* or collective expulsion. The second part deals with the increasing presence of fences at Europe's borders – a development that may raise questions under Articles 18 and 19 of the EU Charter.

### Addressing the fundamental rights impact of new migration management measures

Last year, FRA reported an increase in cases of persons allegedly being pushed back at the EU's external border, particularly in **Bulgaria**, **Greece** and **Spain**. In 2015,

this extended to **Hungary**. Conduct raising questions regarding the prohibition of *refoulement* and collective expulsion became more frequent.

In **Bulgaria** and **Greece**, people were reportedly physically turned back at the land or sea borders, sometimes with force. At the Greek land border with Turkey, Amnesty International reported incidents of people being brought back to the other side of the border without their protection needs first being assessed.<sup>63</sup> In March, UNHCR reported that a group of Yazidis from Iraq were pushed back to Turkey from **Bulgaria** after being beaten and having their belongings seized. Two men, suffering from severe injuries, later died of hypothermia on the Turkish side of the border.<sup>64</sup> These do not appear to be isolated incidents in **Bulgaria**, where refugees reported having been forced to return to the Turkish side of the land border,<sup>65</sup> sometimes allegedly threatened by unleashed dogs.<sup>66</sup>

In **Spain**, an amendment to the Aliens Law entered into force on 1 April 2015, allowing third-country nationals to be rejected if they are detected trying to irregularly cross the border into the enclaves of Ceuta and Melilla.<sup>67</sup> The law contains a safeguard specifying that rejection at the border is allowed only if it is in compliance with international human rights law and international protection standards; however, no protocol on how the Guardia Civil should act in these cases is in place yet. Applications for international protection are to be lodged at special offices set up at the border crossing points. In 2015, some 6,000 people, mainly Syrian nationals, requested asylum at such offices.<sup>68</sup>

**Hungary** implemented new legislation that resulted in summary rejections of asylum claims submitted by applicants who entered through Serbia, based on the rationale that they could have found protection in Serbia. This goes against UNHCR's advice not to consider Serbia a safe third country.<sup>69</sup> In July 2015, amendments to the Hungarian asylum rules declared Serbia a safe third country and established two transit zones at the land border in Röszke and in Tompa, where asylum applications, except those submitted by vulnerable people, were processed through a border procedure.<sup>70</sup> A total of 579 asylum seekers were registered in the two transit zones along the Serbian border in 2015, the majority of whom (510 people) were deemed vulnerable and channelled into the normal asylum procedures. The remaining 69 applicants were processed in the border procedure.<sup>71</sup> Non-governmental organisations (NGOs) have reported that this fast-track procedure fell short of basic fair trial standards set out in EU law.<sup>72</sup> Access to legal assistance was limited in practice, as legal aid officers were not regularly present in the transit facilities and lawyers of the Hungarian Helsinki Committee did not have full and unimpeded access. Asylum interviews were reported to be extremely

short, and it was claimed that some asylum seekers were processed in less than a day, according to the Council of Europe's Commissioner for Human Rights. The right to an effective remedy against a rejection of their asylum application was substantially curtailed. Even though the deadline to submit an appeal was increased from three to seven days,<sup>73</sup> limited access to legal counselling and information, practical difficulties in getting qualified legal aid and courts not being allowed to examine new facts made it difficult for applicants to access an effective remedy in practice. While at the border, asylum seekers were held in containers installed in the transit zone. In an *amicus curiae* submission to the ECtHR, the Council of Europe's Commissioner for Human Rights concluded that Hungary's rules expose asylum seekers to a very high risk of being subject to deportation to Serbia and to onward chain *refoulement*, with the corresponding risk of treatment contrary to Article 3 of the ECHR.<sup>74</sup>

Profiling based on nationality emerged as a new pattern in late 2015. Only some nationalities were allowed admission to the territory or access to asylum procedures. This raises questions under the non-discrimination provision in Article 21 of the EU Charter. In November 2015, only certain nationalities – namely Afghans, Iraqis and Syrians – were allowed to transit from **Greece** through the western Balkans following a policy change in the former Yugoslav Republic of Macedonia.<sup>75</sup> Nationals of other countries remained stuck in **Greece**. UNHCR supported the authorities in transporting many of them to temporary reception facilities set up in the country. In **Italy**, towards the end of the year, UNHCR and civil society organisations reported that many nationals of sub-Saharan African countries, particularly from West Africa, were not given a real chance to register their asylum claims, but received expulsion orders to leave the country within 30 days.<sup>76</sup> In an effort to address the matter, the Italian Ministry of the Interior issued internal instructions on 8 January 2016, reminding all first line officials to provide information about access to international protection procedures to newly arriving persons.

Violations of the principle of *non-refoulement* and collective expulsion may occur in different ways. In addition to returns or push-backs at borders, measures taken to manage or channel migration flows – even if well-intended – can result in people being sent back to risks of serious harm, if there is no procedure to assess the individual situation of each migrant or refugee. In light of evolving law, this risk increases when Member States or Frontex engage in operational cooperation with third countries on border controls, as envisaged by the concept of Integrated Border Management.<sup>77</sup> In these situations, it often remains unclear what measures are allowed and what measures may not be possible under EU law or international human rights law.<sup>78</sup>

## Operationalising *non-refoulement* in the presence of fences

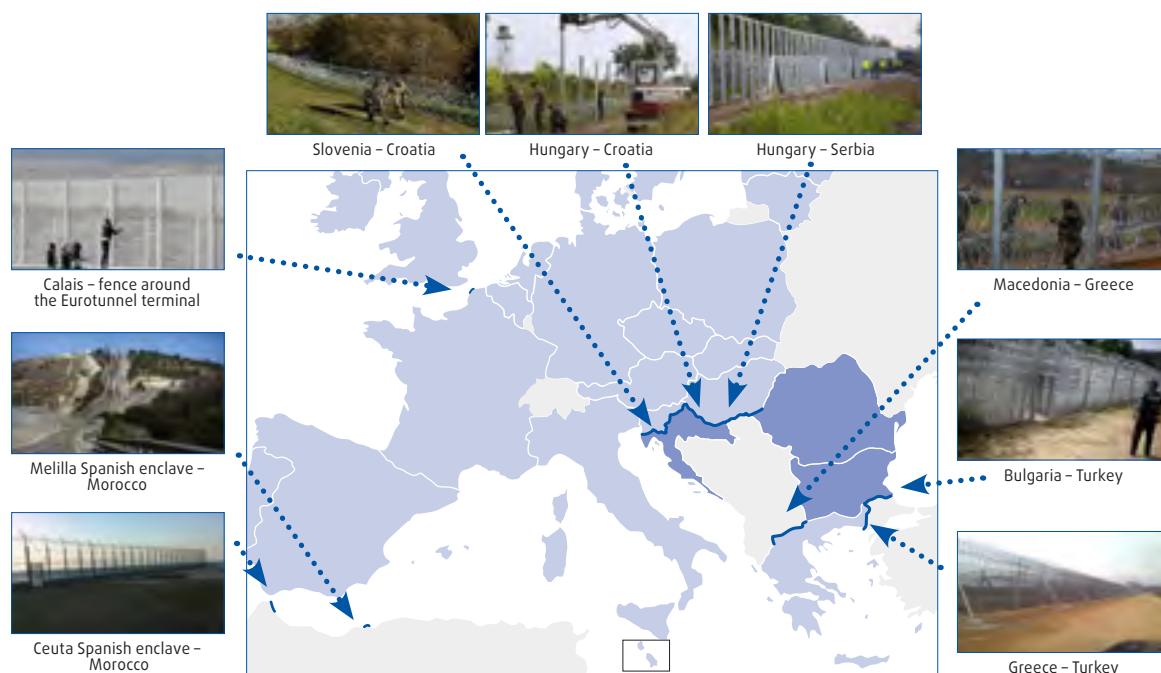
The installation of fences at the EU's external land borders to curb irregular migration and limit irregular movements to other EU Member States continued in 2015. By the end of the year, a significant part of the land border with Turkey was fenced off (along the Evros river, surveillance was strengthened but no fence built), as was most of the Schengen border with the western Balkans. **Bulgaria** extended its three-metre high fence to the land border with Turkey, and **Greece** completed its electronic surveillance installations along the Evros river.<sup>79</sup> **Hungary** completed a 175-kilometre long razor-wire fence on its Serbian border and subsequently extended it to the border with **Croatia**.<sup>80</sup> **Slovenia** followed by extending the razor wire to most of its land border with **Croatia**, except Istria.<sup>81</sup> In addition, the Former Yugoslav Republic of Macedonia installed a fence at parts of its border with **Greece** in November 2015.<sup>82</sup> In July 2015, in agreement with France, the **United Kingdom** decided to bolster physical security in Nord-Pas-de-Calais, increasing security at the waiting area for boarding the ferry and in the Channel Tunnel, after migrants repeatedly attempted to enter the tunnel from the French side.<sup>83</sup> Figure 5 illustrates the current state of fences at the EU's borders.

FRA's 2013 Annual report noted that the construction of border fences may limit the ability of persons in need of international protection to seek safety. If there are no places along the border that asylum seekers can reasonably reach to request asylum, the presence of a fence might violate the obligation of EU Member States, under Article 3a of the Schengen Borders Code, to apply the code in full compliance with the EU Charter and with obligations related to access to international protection.<sup>84</sup> At the end of 2015, the European Commission stressed that, although installing fences for the purposes of border control is not in itself contrary to EU law, it will monitor the installation to see that it does not impinge upon the right to have effective access to the asylum procedure at the border crossing points.<sup>85</sup>

## Fundamental rights to guide the way forward

With Europe facing increased migratory pressure in 2015, it is particularly important for the EU and its Member States to remain vigilant and ensure that their border and migration management policies do not violate the principle of *non-refoulement* or the prohibition of collective expulsion. There is a general understanding in the EU that the prohibition of *refoulement* should be respected, but law evolving in this field causes legal uncertainties, as pointed out at the 2014 FRA Fundamental Rights Conference in Rome. The absolute nature of the prohibition of *refoulement*

Figure 5: Fences at borders, end of 2015



Source: FRA, 2016 (Photos from © Reuters)

needs to be respected both when devising legislative or policy measures and during their implementation by the authorities. More specific guidance on how to mitigate the risk of violations of the principle of *non-refoulement* would be needed when dealing with new situations, such as those emerging as a result of the installation of fences or the enhanced cooperation with third countries on border management. FRA stands ready to provide its fundamental rights expertise on this issue.



# 3

## Building a rights-compliant asylum system



In last year's Annual report, FRA already noted the unequal distribution of asylum seekers in the EU, with about half of the applications being lodged in **Germany** and **Sweden**. This pattern continued in 2015. Due to the scale of movements, delays in registration and double-counting, no exact statistics are available. Of the 1.25 million new asylum applicants in the EU reported by Eurostat,<sup>86</sup> at least half applied for asylum in **Germany** and **Sweden**. The proportion may be much higher given that over one million asylum seekers were initially recorded in Germany on arrival.<sup>87</sup> Some of them, however, moved on or do not intend to lodge an asylum claim. At the same time, many were still queuing to have their asylum application registered at the end of the year. Some 85,000 people applied for asylum in **Austria**. **Hungary**, the only other Member State with over 100,000 new asylum applications in 2015, mainly experienced transit movements, as most of the applicants moved on to **Austria**, **Germany** and other EU Member States. Other Member States were also affected: based on Eurostat data in 2015, the numbers of first-time asylum seekers more than doubled in nine EU Member States, with serious practical consequences for the domestic asylum systems and the asylum applicants concerned. In **Finland**, the number of asylum seekers rose almost tenfold – from 3,000 in 2014 to 32,000 in 2015.<sup>88</sup>

The increased number of arrivals put a significant strain on domestic asylum systems in countries of first arrival (mainly **Greece** and **Italy**), transit countries (**Croatia**, **Hungary**, **Slovenia** and to some extent **Austria**) and countries of destination (**Austria**, **Germany** and **Sweden**, as well as to a lesser extent other Member States). Among the last group, **Sweden** recorded the highest number of applications per capita in the EU (some 11.5 applicants per 1,000 inhabitants). As **Sweden's** asylum and reception system was no longer able to cope with

the arrivals, a proposal to suspend relocation to the country was tabled in December.<sup>89</sup>

Ineffective early warning and preparedness mechanisms prevented EU Member States from predicting the large influx of people and starting contingency planning. Partly taken by surprise, countries of first arrival, countries of transit, as well as the main countries of destination faced serious difficulties in responding adequately to the flow. Refugees and migrants moving spontaneously faced high risks while travelling through Europe. Initially, civil society – including many individual volunteers – took care of them, offering them food, clothing, healthcare and other emergency assistance. In September, UNHCR launched an emergency operation in Europe, appealing for USD 83.2 million. This appeal was complemented by a USD 96.15 million appeal for the Winterization Plan for the Refugee Crisis in Europe and a revised appeal for USD 128 million for the Special Mediterranean Initiative (SMI).<sup>90</sup> UNHCR tents were set up in several locations to host refugees, a significant number of UNHCR staff were deployed and relief items were distributed.<sup>91</sup> Transit through the **Balkans** and **Austria** became increasingly organised towards the end of the year, with authorities providing buses and trains, setting up transit centres and registering people crossing the border.

In January 2016, the European Committee of Social Rights issued a Statement of Interpretation, highlighting the challenges that refugees continue to face – for example, regarding access to education and restrictions on employment. It also stressed the importance of states adopting an integration-based approach to ensure that refugees enjoy basic social rights not only once they are formally recognised, but starting from the moment they enter a state's territory and throughout the entire process of seeking asylum.<sup>92</sup>



## FRA ACTIVITY

### Providing regular updates on fundamental rights in Member States most affected by new arrivals

In view of the increasing numbers of refugees, asylum seekers and migrants entering the EU, the European Commission asked FRA to collect data about the fundamental rights situation of people arriving in EU Member States that have been particularly affected by large migration movements. In October 2015, FRA started to publish regular overviews of migration-related fundamental rights issues in Austria, Bulgaria, Croatia, Germany, Greece, Hungary, Italy, Slovenia and Sweden. Initially issued every week, the regular overviews continue on a monthly basis since December 2015. The updates cover the following issues:

- initial registration and asylum applications, with particular attention to the situation of vulnerable people;
- criminal proceedings initiated for offences related to irregular border crossings;
- child protection;
- reception conditions for new arrivals, focusing on the situation of children and other vulnerable people;
- access to healthcare;
- public response such as rallies of support, humanitarian assistance or voluntary work;
- racist incidents, such as demonstrations, online hate speech or hate crime.

*The updates are available on FRA's website.*

## Finding adequate housing

According to Article 18 of the Reception Conditions Directive (2013/33/EU),<sup>93</sup> asylum seekers must be provided with an adequate standard of living during the time required to examine their application for international protection. The directive formally applies only from the moment an individual has made an application for international protection, but many of its provisions reflect international human rights and refugee law standards that are binding on EU Member States as soon as a refugee is within a state's jurisdiction.

Although Member States made efforts to give new arrivals a dignified reception, some remained homeless and many others were hosted in overcrowded temporary facilities or placed in detention centres, exposing them to protection risks. Because reception and transit centres were overcrowded, some asylum seekers were forced to sleep on the floor, on blankets in the corridors

of reception centres, or out in the open. In addition to the limited space in first arrival and transit facilities, rain and winter temperatures created serious health risks, particularly for children and the more vulnerable. Many protection concerns typically arising in refugee emergencies emerged inside the EU.

On various occasions, refugees were stranded in desperate and deteriorating conditions at the border. In mid-September, the **Hungarian** authorities reduced the number of people allowed to enter the country to 100 a day, and some 2,000 people gathered at the outer side of the newly built fence at the Serbian border. The situation escalated. After repeated calls in Arabic and English, the Hungarian authorities used tear gas and water cannons to disperse people, who were throwing objects and trying to force themselves through the cordon to enter Hungary. The police used batons against a UNHCR staff member and a father who was seeking help to find his two young children.<sup>94</sup> In October, thousands of migrants walked from **Croatia** to **Slovenia** through difficult terrain in the cold and rain, as they were not allowed to cross the border-crossing point, adding further health and protection risks to the journey.<sup>95</sup> Another several thousand people had to wait for admission to **Austria** out in the open overnight at the border with **Slovenia**.<sup>96</sup>

UNHCR issued an alert indicating that in **Greece**, throughout the islands, thousands of refugee women and children had to stay out in the open at night, or in overcrowded and inadequate reception facilities.<sup>97</sup> On Leros and Kos, adults and children were reportedly sleeping in police station cells while waiting to be registered because there were no reception centres.<sup>98</sup> The situation was also critical in Athens, where two centres – Elliniko and Elaionas – were established for people who were brought back from the northern Greek border because they were not allowed to move onwards. Because space was limited, people were sent away from these centres if they did not comply with certain criteria: only nationalities qualifying for relocation and people who intended to apply for asylum, as well as those who met certain vulnerability criteria, were allowed to stay. As a result, many people gathered in the informal open-air site at Victoria Square or squatted in abandoned buildings.

In November 2015, *Médecins Sans Frontières* (MSF) criticised the conditions of the first aid and reception centre in Pozzallo in Sicily (**Italy**), stating that the often overcrowded facility did not meet minimum standards of hygiene and exposed inhabitants to protection risks.<sup>99</sup> Hygiene and general conditions became so dire that MSF decided to leave by the end of the year.<sup>100</sup>

Overcrowding in reception facilities was also common in other Member States. In **Slovenia**, for example, the Brežice registration centre – which can normally accommodate up to 450 people – registered 1,500 to 4,300

people daily during October. In **Bulgaria**, the Special Home for Temporary Accommodation of Foreigners in Lyubimet hosted 43 % more people than its capacity.<sup>101</sup>

Struggling to ensure that nobody remained without a roof over their heads, countries of destination often had to host new asylum seekers in temporary mass accommodation facilities, where basic safety, sanitation and privacy standards could not be met. One of the largest temporary accommodation facilities was set up in the former Berlin Tempelhof airport (**Germany**): over 2,000 people were staying in the three hangars in December 2015, and there were plans to double or triple its capacity.<sup>102</sup> Moving from temporary facilities intended for short-term stays to adequate reception centres was often difficult, partly because of delays in registering new asylum claims and partly because of limited space in mainstream reception centres. From 15 November 2015 to 11 December 2015, for example, on average, some 800–1,000 persons were staying for days in the Malmömassan conference hall in southern **Sweden**, where they shared eight toilets, until their asylum applications were registered.<sup>103</sup> In August 2015, Amnesty International and the **Austrian** Ombudsman raised concerns about the large number of asylum seekers, including unaccompanied children, without a bed in the Traiskirchen facility.<sup>104</sup>

Support came from volunteers, who offered help to understaffed reception centres. Many local citizens offered new arrivals a place to sleep in their homes until accommodation was organised.<sup>105</sup>

## Promising practice

### Hosting refugees at home

Hundreds of asylum seekers were able to avoid moving from shelter to shelter thanks to the help of volunteers who opened their doors to them in a number of Member States. In a year that saw large numbers of asylum seekers struggling to find emergency accommodation, local initiatives such as *Flüchtlinge Willkommen* (Refugees Welcome) helped match asylum seekers with host families. In 2015, 251 asylum seekers were welcomed into homes in Germany and 240 into homes in Austria. This initiative is also in place in Greece, Italy, the Netherlands, Poland, Portugal, Spain and Sweden.

Source: *Flüchtlinge Willkommen*



Twenty-four-year-old law student (foreground) who fled Aleppo in the Summer of 2015, enjoying student life in Berlin with his new German flatmates.

Photo: © UNHCR/Ivor Prickett, 2015

## Humanitarian situation in Calais

Over the past years, a mixed group of refugees and migrants has settled near Calais in northern **France**. In August, about 3,000 refugees and migrants were encamped there, hoping to reach the United Kingdom, where some of them had family or other links. From June to August 2015, at least 10 people died while attempting to pass through the Channel Tunnel.

Following an intervention by a coalition of NGOs, which pointed to the lack of adequate shelter, on 26 October 2015, the Administrative Tribunal of Lille ordered French authorities to take immediate measures to address the inhumane and degrading conditions affecting some 6,000 people in and around the Calais camp. The judge requested the French authorities to immediately install 10 additional water points and 50 latrines, implement a rubbish collection system, install mobile rubbish containers, clean the site and make one or more routes available for emergency access. On 29 February 2016, the French police took action to dismantle the camp, using tear gas and water cannons to disperse some 150 migrants and militants who resisted the police by throwing projectiles. Two bulldozers and twenty people from a private company were commissioned by the state to dismantle twenty shelters located in a 100-square-meter area.

In addition, at Grande-Synthe, a suburb of Dunkirk situated 35 km from Calais, some 3,000 people were reported to live in freezing and inhumane conditions towards the end of 2015.

Sources: ECRE (2016), 'From bad to worse: Dunkirk refugee camp makes Calais pale in comparison', 15 January 2016; ECRE (2015), 'Calais: Time to tackle a migratory dead-end, by Pierre Henry, General Director of France Terre d'asile', 9 October 2015; EDAL (2015), 'France: Administrative Tribunal of Lille ruling on conditions in Calais', 2 November 2015; Le Monde (2016), 'Violences en marge du démantèlement partiel de la « jungle » de Calais', 29 February 2016; UNHCR (2015), 'UNHCR calls for comprehensive response to the Calais situation', 7 August 2015.

## Preventing sexual and gender-based violence

Overcrowded reception centres, insufficient lighting and sanitary and sleeping facilities that have to be shared by men, women and children all expose refugees to risks of sexual or gender-based violence. UNHCR, the United Nations Population Fund (UNFPA) and the Women's Refugee Commission (WRC) carried out a joint assessment mission in **Greece** and in the Former Yugoslav Republic of Macedonia in November 2015, and concluded that female refugees and migrants face grave protection risks. The report noted, for example, that the overcrowded detention centre used to host new arrivals in Samos has "an insufficient number of beds, hygiene conditions in the latrines and showers are very poor, and there is no separation between men and women" – all conditions that increase the risk of sexual and gender-based violence.<sup>106</sup>

These findings are not limited to **Greece**. In December 2015, Amnesty International interviewed 40 refugee women and girls in northern Europe who had travelled from Turkey via **Greece** onwards. Many reported that they experienced physical abuse and exploitation in almost all countries they passed through. Women felt particularly under threat in transit areas and camps while traveling across the Balkan route, where they were forced to sleep alongside hundreds of refugee men; they also reported having to use the same bathroom and shower facilities as men.<sup>107</sup> An additional risk was the absence of vetting procedures for volunteers, particularly those working with children.

Article 18(4) of the Reception Conditions Directive (2013/33/EU) requires Member States to "take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment" in facilities used to host asylum seekers. This is part of a more general duty by Member States to prevent acts that could amount to torture, inhuman or degrading treatment or punishment against anyone who is staying within their territory. The ECtHR has stated on numerous occasions that states are obliged "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals" and "the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge".<sup>108</sup> The lack of standardised methodologies among Member States to identify vulnerable people results in victims of sexual and gender-based violence not being identified, preventing the implementation of support measures.

### Promising practice

#### Developing an online tool to identify vulnerable people

In 2015, the European Asylum Support Office (EASO) developed an online tool for identifying persons with special needs. If broadly disseminated and used, it could provide at least some basic guidance to officers and aid workers present on the ground, provided it is complemented by targeted training and the establishment of effective national referral mechanism for victims. The tool may help Member States comply with their duty, under Article 21 of the Reception Conditions Directive (2013/33/EU), to assess vulnerabilities within a reasonable period of time after an asylum application is made.



Source: EASO (2015), EASO tool for identification of persons with special needs (online)

## Addressing the specific needs of children

In 2015, one in four arrivals was a child, and this percentage is increasing in 2016. The EU Charter of Fundamental Rights requires that children receive the protection and care necessary for their well-being. Article 24 of the Charter applies to all children, regardless of their status or nationality. Migrant and refugee children were among those most subject to violations of their fundamental rights in several Member States, as reported by FRA in its regular updates published since October 2015.<sup>109</sup>

In the absence of specialised facilities, children were often accommodated in adult facilities, without appropriate safeguards and care.

The European Network of Ombudspersons for Children expressed its concern over the proportion of children going missing from reception centres.<sup>110</sup> Europol declared that, in 2015, some 10,000 unaccompanied children disappeared from reception facilities in countries of first arrival, transit countries and countries



of destination.<sup>111</sup> In **Greece**, for example, a significant number of unaccompanied children went missing from accommodation centres within a few days of their referral. METAction, an NGO, reported that, on average, children stay in the accommodation facilities for around two days. In **Hungary**, most leave for western Europe after spending an average of six to eight days in reception facilities.<sup>112</sup> But a significant number also disappeared in **Sweden**, a country of destination, where some 35,369 unaccompanied children sought asylum in 2015.<sup>113</sup> When they disappear, any follow-up is difficult. Such children are rarely registered in the Schengen Information System, the EU database used to record missing people. The system does not allow for sub-categories of missing children, such as missing unaccompanied children, to be registered.

Unaccompanied children continued to be detained, as the following examples illustrate. On the island of Kos in **Greece**, due to a lack of other facilities, unaccompanied children were temporarily placed in police custody, together with adults and criminal detainees.<sup>114</sup> On the **Italian** island of Lampedusa, unaccompanied children who refused to be fingerprinted were kept in the centre for several weeks. Children travelling alone may also end up in detention because they are perceived to be adults. For example, civil society organisations found some children hosted in **Hungarian** pre-removal detention facilities; they were moved to specialised facilities for children only after their intervention and an age assessment.<sup>115</sup>

Families were separated during chaotic transit or border crossings, particularly when entering **Slovenia** at the border with **Croatia**,<sup>116</sup> following registration at the Opatovac camp,<sup>117</sup> or at the Bapska Serbian-Croatian border crossing while entering buses. A tent was set up as an “inquiry service for missing and lost persons” in the Šentilj accommodation centre at the Slovenian exit point to the Austrian border,<sup>118</sup> and the Red Cross Slovenia (*Rdeči Križ Slovenije*) was given the task of organising family reunifications<sup>119</sup> at the border and at reception and accommodation centres.<sup>120</sup>

Appointing guardians to unaccompanied children is an important safeguard to ensure their best interests, as they should not be required to decide difficult legal matters on their own. Therefore, in many EU Member States, this is a precondition for an unaccompanied child to apply for asylum. Delays in appointing guardians – as FRA’s regular updates documented in some parts of **Germany**, for example – meant delaying the asylum procedures and thus durable solutions for the children. In **Italy**, the long waiting time for the appointment of guardians is one of the factors that have *de facto* excluded unaccompanied children from relocation.

## Promising practice

### Setting up child and family protection centres along the migration route

UNHCR and UNICEF are setting up 20 special support centres – to be known as “Blue Dots” – for children and families along Europe’s most frequently used migration routes in Greece, the former Yugoslav Republic of Macedonia, Serbia, Croatia and Slovenia. The hubs aim to support vulnerable families on the move, especially the many unaccompanied children at risk of sickness, trauma, violence, exploitation and trafficking. The hubs will play a key role in identifying these children, providing the protection they need, and reuniting them with family when in their best interests. In addition, the hubs, located in selected strategic sites – border entry/exit points, registration sites, and strategic urban centres – will provide child-friendly spaces and dedicated mother and baby/toddler spaces, private rooms for counselling, psychosocial first aid, legal counselling, safe spaces for women and children to sleep, and information desks with Wi-Fi connectivity.

*Source: UNHCR (2016), ‘UNHCR, UNICEF launch Blue Dot hubs to boost protection for children and families on the move across Europe’, Press release, 26 February 2016.*

## Taking fingerprints while complying with fundamental rights

The majority of asylum seekers reached Europe by crossing the Mediterranean Sea to **Greece** and **Italy**. Since 2014, at the point of entry, a significant number of them have not been fingerprinted for Eurodac, the database created by the EU for the smooth running of the Dublin system, a mechanism established by Regulation (EU) No. 604/2013 to determine the Member State responsible for examining an asylum application.<sup>121</sup> In some cases, this was because front-line states had limited capacity to deal with increased arrivals. **Greece** and **Italy** started to address this issue in 2015 with targeted support from Frontex, EASO and the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). In other cases, those arriving – including individuals from Eritrea or Syria likely to be in need of international protection – refused to give their fingerprints and some refused to apply for asylum altogether, as they intended to move on to their preferred country of destination. The sheer numbers of new arrivals and the absence of their systematic registration in Eurodac made it difficult to implement EU rules – set forth in the Dublin Regulation – for identifying the Member State responsible for examining an asylum application, as well as to implement relocation procedures.

Registration is a fundamental component of international refugee protection. It helps protect refugees against *refoulement*, arbitrary arrest and detention, is necessary to give access to services, and enables the identification of vulnerable people.<sup>122</sup> The absence of systematic registration at the point of entry makes it easier for those who have the means to reach their preferred country of destination, but also exposes those who are more vulnerable to protection risks. Systematic registration also helps address the host society's security concerns and helps authorities and the UNHCR find durable solutions for refugees.

Based on these considerations, steps were taken to promote systematic fingerprinting at points of entry. This also features prominently in the European Agenda for Migration. It also led to a discussion about the feasibility and appropriateness of using restrictive measures to force third-country nationals or stateless persons to give their fingerprints.<sup>123</sup> FRA contributed to the discussion with fundamental rights expertise.

## FRA ACTIVITY

In October 2015, FRA published a checklist to assist national authorities in complying with fundamental rights obligations when obtaining fingerprints for Eurodac. FRA notes that:

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

FRA (2015), *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, Luxembourg, Publications Office



## Sharing responsibility

In 2015, the EU took a new approach to sharing responsibility for asylum seekers among EU Member States. For the first time, it triggered the emergency solidarity measure envisaged in Article 78(3) of the TFEU to support Member States affected by a sudden inflow of third-country nationals. A relocation mechanism was set up to support **Greece** and **Italy**, aiming to transfer 160,000 asylum applicants to other EU Member States.<sup>124</sup>

According to a decision the Council of the European Union adopted in September 2015, all EU Member States – except the **United Kingdom**, which opted out – will admit an agreed number of asylum seekers who submitted an asylum claim in **Greece** or **Italy** and are likely to be in need of international protection. **Denmark** and **Ireland** declared their readiness to participate in meeting the relocation efforts. In October, Ireland notified the Council of the EU and the European Commission of its wish to opt-in to the two Council Decisions on Relocation, which will see approximately 2,600 persons relocated to Ireland.<sup>125</sup> The United Kingdom declared its preference to resettle refugees directly from conflict regions. Access to the relocation mechanism is limited to those applicants who originate from a country that, according to the latest available quarterly Eurostat data, has a Union-wide average recognition rate of 75 % or higher. By the year's end, these countries were, essentially, Iraq, Eritrea and Syria. Applicants' fingerprints need to be registered in Eurodac before they are eligible for relocation.

The relocation mechanism was subject to intense discussions within the Council. Some EU Member States that were not directly on the main migration route repeatedly expressed their scepticism about the future scope and sustainability of the mechanism. Eventually, the Council decision was adopted by a formal vote against the continued objections of several Member States. In December, **Slovakia**, followed by **Hungary**, filed an action for the annulment of the measure with the CJEU, citing, among other grounds, a breach of EU procedural rules, the division of competences within the EU and the principle of proportionality.<sup>126</sup>

In practice, relocation is meant to occur from the hotspots established in southern **Italy** and on selected **Greek** islands with the help of EASO. In 2015, the relocation scheme was still at a very early stage, with many aspects still to be resolved.<sup>127</sup> Logistical constraints and gaps in providing information and counselling, as well as lack of cooperation by some groups of asylum applicants, gave relocation a slow start. By the year's end, only 82 asylum seekers had departed from **Greece**, and 190 from **Italy**. However, with further counselling and trust-building measures, as well as streamlining and simplifying procedures at the sending and receiving ends, relocation has the potential to become an

important tool to address the protection gaps that asylum seekers face in countries of first arrival, and at the same time reduce unregulated refugee movements within the EU. However, it may also raise new fundamental rights challenges – for example, if relocation candidates object to moving to the respective relocation country because they have friends or relatives in another EU Member State.

The experience gained from the temporary relocation mechanism is likely to affect the revision of the Dublin Regulation ((EU) No. 604/2013), planned for 2016. In September, the European Commission tabled a proposal to complement the Dublin Regulation by establishing a permanent relocation mechanism, to be triggered at times of crisis, which entails a mandatory distribution key to determine the responsibility for examining applications.<sup>128</sup> Asylum seekers do not have a right to choose their country of asylum. Nonetheless, events in 2015 illustrated that any distribution criteria that does not at least to some degree take into account people's preferences – which often derive from family links, presence of diaspora and integration prospects – is likely to fail and lead to undesired secondary movements within the EU and the Schengen area.

## Addressing unfounded applications without undermining fairness

In 2014, one in six asylum applications in the EU were lodged by applicants from the western Balkans, who had little chance of success. This phenomenon continued in 2015: some 200,000 applicants were from the western Balkans, of whom some 27,000 people submitted repeat applications.<sup>129</sup> This contributed to the congestion of national asylum systems, resulting in longer procedures for all asylum applicants. For example, more than 470,000 asylum applications were pending in **Germany** at the end of December 2015, around 144,000 of which were from western Balkan countries, including over 23,000 repeat applications.<sup>130</sup>

This meant reception capacities were partly occupied by people who were largely not in need of international protection, particularly in Member States with backlogs of unprocessed asylum applications or in which processing takes a long time. This further exacerbates the shortage of adequate reception facilities for those who arrive in Europe after crossing the Mediterranean.

One of the ways Member States dealt with applications that are likely unfounded is the creation of 'safe country of origin' lists. An application submitted by an individual coming from a country on the list is presumed to be manifestly unfounded. Unless he or she can rebut the assumption of safety, the application

is processed in an accelerated manner, with reduced procedural safeguards. According to the European Commission, the 'safe country of origin' concept features in the legislation of 22 Member States, but only 15 Member States apply the concept in practice and ten have established lists.<sup>131</sup> They differ substantially. Whereas the **United Kingdom's** list contains 26 third countries, **Bulgaria's** has 17, and Ireland's only one. In an effort to increase the efficiency of national asylum systems in dealing with significant numbers of largely unfounded asylum applications, many of them repeat applications, the European Commission in September proposed to set up a common EU-level 'safe country of origin' list.<sup>132</sup> The proposal suggests designating Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey as safe countries of origin in all EU Member States. In addition, it allows Member States to maintain their national lists of safe countries.

The use of 'safe country of origin' lists is not in itself incompatible with the EU Charter, as long as applicants have an effective way to rebut the presumption of safety. This requires that each asylum applicant be heard in an individual eligibility interview, in which he or she can put forward his or her personal circumstances. Legal assistance and the possibility to stay in the country while a court reviews a rejected application are other important safeguards.<sup>133</sup> Moreover, in light of continuing human rights violations against specific groups, such as LGBTI persons or members of national minorities in parts of the western Balkans, measures are required to ensure that the proposal does not result in indirect discrimination against groups at risk and lead to their *refoulement*. Finally, the rationale for including Turkey on the list requires convincing justification in light of Article 18 of the Charter; approximately one in four applicants from Turkey were granted international protection in 2014, and one out of five received such protection in 2015.<sup>134</sup>

## Fundamental rights to guide the way forward

The current patchwork approach to fundamental rights at hotspots should be revised. The European Union's and its Member States' responses need a comprehensive fundamental rights assessment, covering first disembarkation, reception, humanitarian assistance and identification of vulnerable people, registration, screening, relocation, asylum procedures, protection standards and return. That would help avoid protection gaps that can create fundamental rights risks, particularly for the most vulnerable.

Many of the challenges that emerged in 2015 – the difficulties concerning registration and fingerprinting, the uncoordinated response to Syrian refugees, the

significant number of disappearing children and the different approaches taken by EU Member States to tackle manifestly unfounded applications – would be mitigated by a single EU asylum space, in which asylum applicants would be treated in a comparable manner and would have the same chances of receiving the same protection, regardless of where an asylum claim was lodged. As FRA noted at the end of 2013,<sup>135</sup> the EU could consider the risks and benefits of replacing, in the long term, national processing of requests for international protection with processing by an EU entity. As a first step, and together with measures to enforce European asylum standards throughout the EU and the effective use of available funding, forms of shared processing between the EU and its Member States could be explored to promote, across the EU, truly common procedures and protection standards that are anchored in the EU Charter for Fundamental Rights.



# 4

## Returning migrants in an irregular situation while fully respecting fundamental rights



According to the European Agenda on Migration, the EU return system's lack of effectiveness is one of the incentives for irregular migration.<sup>136</sup> The EU Action Plan on return, issued by the European Commission in September, makes the same argument, quoting estimates that fewer than 40 % of irregular migrants ordered to leave the EU departed effectively in 2014.<sup>137</sup> It outlines a series of initiatives to enhance both the effectiveness of the EU return system as well as cooperation with countries of origin or transit on readmission.

The effective return of migrants who are in an irregular situation and for whom there are no legal bars to removal is essential for upholding the credibility of the asylum system. When implemented speedily, effective returns also reduce the incentive for people without protection needs to put their lives at risk by crossing into the EU in an unauthorised manner.

However, assessing the overall effectiveness of the EU return policy is difficult. As figures are not yet fully reliable and are not comparable between Member States, it is difficult to conclude how many migrants who are issued return decisions leave the European Union. In particular, the number of voluntary departures is not sufficiently documented, as not all EU Member States have mechanisms in place to record these departures. Furthermore, Eurostat data show considerable differences between individual EU Member States in the rate of voluntary returns compared with forced returns.<sup>138</sup> The lack of complete and comparable data hampers the development of evidence-based responses to possible current deficiencies.

### Supporting fundamental rights compliance in practice

In 2015, application of the EU return *acquis* became part of the Schengen evaluations jointly conducted by

the European Commission and EU Member States. The evaluations focused on the practical application of the Return Directive (2008/115 EC),<sup>139</sup> including fundamental rights safeguards. Table 2 provides a snapshot of some of the fundamental rights considerations examined during the process. FRA was invited to support the evaluations with fundamental rights expertise, and participated as an observer in on-site visits to four EU Member States evaluated this year: **Austria, Belgium, Germany** and the **Netherlands**.

Promoting a uniform approach that would ensure effective but fundamental rights-compliant implementation of the return *acquis*, particularly the Return Directive (2008/115/EC), is also a key objective of the Return handbook, a comprehensive guidance document issued by the European Commission in October. It covers topics such as apprehension, alternatives to detention and procedural safeguards for persons in return proceedings.<sup>140</sup>

### Addressing the rights of persons who cannot be removed

Some persons who have not obtained a right to stay cannot be removed for practical or other reasons. Calls for more effective returns also need to take this into account, particularly if the persons cannot depart through no fault of their own. Obstacles can include lack of cooperation by the country of origin (such as the country of nationality's refusal to issue identity and travel documents) and statelessness. According to Article 14 (2) of the Return Directive (2008/115/ EC), these persons are entitled to receive written confirmation that their removal cannot currently be enforced, so that they can demonstrate their specific situation in the



**Table 2: Schengen evaluations, selected fundamental rights issues in return and readmission**

<input checked="" type="checkbox"/>	Organisation of the apprehension procedure of irregular migrants
<input checked="" type="checkbox"/>	Primacy of voluntary departure
<input checked="" type="checkbox"/>	Procedural safeguards for vulnerable persons
<input checked="" type="checkbox"/>	Alternatives to detention
<input checked="" type="checkbox"/>	Ensuring best interests of the child in case of return of unaccompanied children
<input checked="" type="checkbox"/>	Role of courts in imposing and reviewing detention orders
<input checked="" type="checkbox"/>	Detention conditions inside the territory and at the border
<input checked="" type="checkbox"/>	Maximum period of detention and possibility of re-detention
<input checked="" type="checkbox"/>	Immigration detention of children
<input checked="" type="checkbox"/>	Nature and independence of the forced return monitoring system
<input checked="" type="checkbox"/>	Arrangements for persons who cannot be removed

Source: European Commission (2014), Annex to the Commission Implementing Decision establishing a standard questionnaire in accordance with Article 9 of the Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis, C(2014) 4657 final, 11 July 2014

event of other controls or checks. As clarified by the CJEU in *Mahdi* (C146/14), EU Member States may also authorise these persons to stay, particularly for compassionate or humanitarian reasons. But Member States enjoy broad discretion in this regard,<sup>141</sup> which can leave these persons without any clarity about their rights and future. The current migration trend has the potential to further increase the proportion of such persons. In January 2016, the European Committee of Social Rights published a guidance document on the application of the rights of migrant workers and their families, warning against expelling migrants on grounds beyond those permitted by the European Social Charter.<sup>142</sup> A more systematic approach to determining their status at the EU level would be in the interest of both the persons themselves and of the host EU Member States.

## Responding to the healthcare needs of migrants in an irregular situation

The increased arrivals of refugees and migrants in 2015 put significant pressure on national health systems. With the support of the European Commission, IOM has carried out a one-year study that includes a component on healthcare provided to migrants in an irregular situation in reception and detention centres at borders.<sup>143</sup> Although a significant number of the people who arrived in 2015 are likely to be granted international protection – and,

with it, the same access to the national healthcare system as nationals – there are also individuals whose applications for asylum will be rejected. Not all of them will be immediately removed, given practical or other obstacles to returning them. It is likely that many will remain in the EU for at least some time, often in legal limbo.

EU law does not address access to healthcare for migrants in an irregular situation, except in situations involving individuals who have been given a period for voluntary departure and for those whose removal was formally postponed. On the basis of the Return Directive (2008/115/EC), these two categories of people are entitled to “emergency healthcare and essential treatment of illness”. This is the same level of healthcare accorded to asylum seekers.

Building on the international and European human rights law framework,<sup>144</sup> FRA has recommended that migrants in an irregular situation should, as a minimum, be entitled to necessary healthcare services, which should include the possibility of seeing a general practitioner and receiving necessary medicines.<sup>145</sup> Four years after FRA’s first reports covering access to healthcare by migrants in an irregular situation were published,<sup>146</sup> substantial differences between EU Member States remain.

This sub-section reviews the healthcare entitlements of migrants in an irregular situation across the EU. The following definitions of emergency, primary and secondary healthcare apply.

- *Emergency care* includes life-saving measures as well as medical treatment necessary to prevent serious damage to a person's health.
- *Primary care* includes essential treatment of relatively common minor illnesses provided on an outpatient or community basis (e.g. services by general practitioners).
- *Secondary care* comprises medical treatment provided by specialists and, in part, inpatient care.<sup>147</sup>

In all EU Member States, migrants in an irregular situation (and asylum seekers whose applications have been rejected) can access healthcare services in cases of emergency (some Member States provide 'treatment that cannot be deferred', which may be broader than emergency healthcare). As illustrated in the [table available online](#) on FRA's web page, nine Member States require migrants to pay for the cost of the emergency healthcare provided (compared with 11 in 2011). In a few of these (Cyprus and Sweden), fees are low and the same fees are charged to nationals when accessing emergency healthcare. For instance, in **Cyprus**, a standard fee of €10 is charged to all those accessing emergency healthcare, including migrants in an irregular situation.<sup>148</sup> In **Sweden**, migrants in an irregular situation must pay a patient fee of SEK 50 (approximately €5) to visit a doctor.<sup>149</sup> In the other seven Member States, access to emergency healthcare is provided against full payment. Although in most cases emergency treatment would not be denied, the sums charged may amount to thousands of euros.

Since FRA's 2011 report on the fundamental rights of migrants in an irregular situation was published,<sup>150</sup> the number of Member States providing cost-free emergency, primary and secondary healthcare has decreased from five to four (Belgium, France, the Netherlands and Portugal). In **Germany**, in principle, migrants in an irregular situation are entitled to healthcare beyond emergency services, but social welfare staff have a duty to report such migrants to the police if they receive non-emergency care.<sup>151</sup> Given the risk of being reported, the right to primary and secondary healthcare remains only on paper. In other EU Member States, access beyond emergency healthcare may be possible in some instances. For example, in **Denmark**, people without a registered residence who have received emergency healthcare enjoy the right to subsequent treatment when it is deemed unreasonable to refer them to their home country. The decisions are made by the healthcare professionals responsible for the treatment and are based on a medical assessment of the patient's condition.<sup>152</sup>

In its 2015 report *Cost of exclusion from healthcare: The case of irregular migrants*, FRA looked into the potential costs of providing migrants in an irregular situation

with timely access to health screening and treatment, compared with providing medical treatment in cases of emergency only.<sup>153</sup>

## FRA ACTIVITY

### Using economic considerations to support fundamental rights and public health care arguments

This report presents an economic model for analysing the costs of providing regular access to healthcare for individuals and compare these with the costs incurred if these persons are not provided with such access and, as a result, need to use more expensive emergency healthcare facilities.



It does so by analysing two medical conditions: hypertension and prenatal care. To better illustrate its application in practice, the model was applied to three EU Member States: Germany, Greece and Sweden. The results of applying the model show that providing regular preventative care saves costs for healthcare systems in comparison with providing emergency care only. This is true of hypertension as well as prenatal care. Providing access to prenatal care may, over the course of two years, generate savings of up to 48 % in Germany and Greece, and up to 69 % in Sweden. For hypertension, the results suggest that, after five years, the cost savings would be around 12 % in Germany, 13 % in Greece and 16 % in Sweden. These results are a powerful indication that governments would save money by providing access to preventative and primary healthcare to migrants in an irregular situation in the cases of hypertension and prenatal care.

FRA (2015), *Cost of exclusion from healthcare: The case of irregular migrants*, Luxembourg, Publications Office

## Avoiding unlawful or arbitrary immigration detention

The EU Action Plan on return highlights the need for compliance with international human rights standards and subscribes to increasing voluntary returns as the preferred option. At the same time, it emphasises the role of detention where necessary to prevent absconding and secondary movements of irregular migrants between EU Member States. To comply with Article 6 of the EU Charter, deprivation of liberty must be used only as a measure of last resort in immigration proceedings. Member States must provide for alternatives to detention in law, and must also apply these in practice.

## FRA ACTIVITY

## Promoting alternatives to detention



In October 2015, FRA published a compilation of instruments and existing standards related to alternatives to detention for asylum seekers and people in return procedures. It aims to provide guidance to policymakers and practitioners on the use of the most appropriate measures in various scenarios.

*FRA (2015), Alternatives to detention for asylum seekers and people in return procedures, Luxembourg, Publications Office*

## Monitoring of forced returns

According to Article 8(6) of the Return Directive (2008/115/EC), where forced returns take place, they need to be subject to effective monitoring. There is pressure to increase forced returns to match the number of migrants in an irregular situation who have been issued with return decisions. This creates the need to increase the capacity to monitor returns. However, some Member States do not yet have effective monitoring mechanisms in place, while mechanisms in some other Member States could be improved.

As illustrated in a table published on FRA's [website](#), five years after the transposition deadline of the Return Directive (2008/115/EC), appropriate mechanisms for monitoring forced returns are still not in place in seven of the 26 EU Member States bound by the directive.<sup>154</sup> In **Cyprus** and **Italy**, return monitoring is not yet carried out, even though bodies responsible for monitoring have been appointed in both Member States. In **Portugal**, a newly created forced return monitoring mechanism – located within the General Inspectorate of Internal Affairs – conducted monitoring operations on the ground, but monitors did not join flights. The monitoring carried out by the Lithuanian Red Cross, in **Lithuania** since 2010 was discontinued and the responsibility transferred

to the Ministry of the Interior, which has yet to start conducting monitoring in cooperation with civil society. In **Germany**, no mechanism exists at the federal level and the scope of existing partial monitoring activities at individual airports is limited. Furthermore, in **Slovakia** and **Sweden**, monitoring is conducted by an agency belonging to the same branch of government that is responsible for returns, which does not appear to satisfy the Return Directive's requirement of 'effective' – meaning independent – forced return monitoring. Finally, public reporting of findings made during the monitoring operations is also either not conducted or remains limited in some of the Member States where otherwise operational forced return monitoring mechanisms exist.

At the same time, in 2015, monitoring mechanisms became operational in **Bulgaria**, where several flights were monitored by the National Preventive Mechanism and a non-governmental organisation, and in **Greece**, where the office of the Ombudsman began conducting monitoring. In **Croatia**, a system based on monitoring by a non-governmental organisation was in place for a short period in 2015. Although this project was discontinued, a new system involving the National Preventive Mechanism became operational in 2016. In **Slovenia**, a non-governmental organisation was appointed to carry out monitoring, which became operational in October.

## Fundamental rights to guide the way forward

Developments in 2015 and the emphasis placed on increased effectiveness underline the need to fully integrate fundamental rights safeguards into return policies. As shown by practical tools such as the Schengen evaluations or the Return handbook, respect for fundamental rights does not pose an obstacle but can be an important building block of return policies. It can contribute to their effectiveness by making them more humane, by favouring less intrusive alternatives to detention; more predictable, by addressing the issue of non-removed persons; and also more sustainable, such as by further supporting voluntary returns as opposed to forced returns. Through effective return monitoring, removals can be made more transparent and more accepted by the population. Finally, FRA research in the field of healthcare indicates that fundamental rights-oriented policies can also be underpinned by economic logic.

The creation of a dedicated Return Office within the planned European Border and Coast Guard Agency should enhance the coordination of forced return operations, including forced return monitoring. The agency should also place additional emphasis on capacity building in the field of return, which entails increased responsibility for ensuring the proper implementation of fundamental rights safeguards. FRA can support this effort.<sup>155</sup>



## FRA opinions

In 2015, over one million refugees and migrants – compared with about 200,000 in 2014 – arrived in Europe by sea, mainly in Greece and Italy. Although rescue elements were strengthened in the management of maritime borders, the number of fatalities in the Mediterranean Sea increased further in 2015. According to the International Organisation for Migration (IOM), some 3,771 people died when crossing the Mediterranean Sea on unseaworthy and often overcrowded boats provided by smugglers.

### FRA opinion

*To ensure human dignity, the right to life and to the integrity of the person guaranteed by the EU Charter of Fundamental Rights, it is FRA's opinion that the EU and its Member States should address the threats to life at Europe's doorstep. To put an end to the high death toll at sea, they could consider working towards a global approach, involving all relevant states and actors, and building on the conclusions of the World Humanitarian Summit, held in Istanbul on 23 and 24 May 2016. They could also consider FRA's proposals, issued in its 2013 report on Europe's southern sea borders, on how to uphold the right to life in the maritime context, namely to ensure that patrol boats from all participant nations are adequately equipped with water, blankets and other first aid equipment.*

The EU continues to offer only limited avenues to enter its territory legally for persons in need of protection. This implies that their journey to Europe will be unauthorised and therefore unnecessarily risky, which applies especially to women, children and vulnerable people who should be protected. There is clear evidence of exploitation and mistreatment of these groups by smugglers.

### FRA opinion

*To address the risks of irregular migration to the EU, it is FRA's opinion that EU Member States should consider offering resettlement, humanitarian admission or other safe schemes to facilitate legal entry to the EU for persons in need of international protection. They should have the opportunity to participate in such schemes in places accessible to them. To respect the right to family life enshrined in Article 7 of the EU Charter of Fundamental Rights but also to prevent the risks of irregular entry for people who want to join their families, there is a need to overcome practical and legal obstacles preventing or significantly delaying family reunification and to refrain from imposing new ones.*

While effective action is required to fight people smuggling, there is a danger of putting at risk of criminal prosecution well-meaning individuals who help migrants. Where citizens seek to help refugees to reach a shelter or to move on to their place of destination, for example by buying train tickets or transporting them in their cars, they are to be considered part of the solution rather than part of the problem. Measures resulting in the punishment of refugees themselves may raise issues under the non-penalisation provision in Article 31 of the UN Convention relating to the Status of Refugees.

### FRA opinion

*To address the identified challenges, it is FRA's opinion that, as announced in the EU Action Plan against migrant smuggling, the relevant EU legislation should be evaluated and reviewed to address the risk of unintentionally criminalising humanitarian assistance or punishing the provision of appropriate support to migrants in an irregular situation.*

Increased migratory pressure on the EU led to new measures, including the building of fences at land borders, summary rejections, accelerated procedures or profiling by nationality. There is a general understanding in the EU that we should respect the prohibition of *refoulement*, but law evolving in this field causes legal uncertainties, as pointed out at the 2014 FRA Fundamental Rights Conference in Rome. Any form of group removal or interception activity at sea could effectively add up to collective expulsion, if the removal or interception is not based on an individual assessment and if effective remedies against the decision are unavailable. Both Article 19 of the EU Charter of Fundamental Rights and Article 4 of Protocol 4 to the European Convention on Human Rights (ECHR) prohibit such proceedings, with the European Court of Human Rights (ECtHR) upholding that such prohibition also applies on the high seas.

### FRA opinion

*To ensure that the right to asylum guaranteed by the EU Charter of Fundamental Rights is fully respected, it is FRA's opinion that the EU and its Member States should ensure that their border and migration management policies do not violate the principle of **non-refoulement** and the prohibition of collective expulsion. The absolute nature of the prohibition of **refoulement** needs to be respected both in legislative or policy measures and in their implementation. FRA considers that more specific guidance on how to mitigate the risk of violations of the principle of **non-refoulement** would be necessary to address new situations, such as those emerging as a result of the installation of fences or through interception at sea or enhanced cooperation with third countries on border management.*

On various occasions and across many Member States, refugees have been recorded as being in desperate and deteriorating conditions in 2015. According to Article 18 of the Reception Conditions Directive, asylum seekers must be provided with an adequate standard of living during the time required for the examination of their application for international protection. Although the directive formally applies only from the moment an individual has made an application for international protection, many of its provisions reflect international human rights and refugee law standards that are effectively binding on EU Member States from the moment a refugee is in a state's jurisdiction. Article 18 (4) of the directive requires Member States to "take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment" in the facilities used to host asylum seekers. 2015 witnessed many well documented reports about women who felt under threat in transit zones and camps. In the case of unaccompanied children, the EU Charter of Fundamental Rights requires that children receive the protection and care necessary for their well-being. Nonetheless, many thousands of unaccompanied children went missing from accommodation facilities in EU Member States, others were kept in detention and again others were separated from their families during chaotic transit or border crossings. Shortcomings like these are due to the high numbers of refugees and the current patchwork of inadequate asylum reception systems. It is not always clear which institutions within the EU and Member States share responsibility for this – a shortcoming the European Commission planned to address in early 2016 through a *Communication on the state of play of implementation of the priority actions under the European Agenda on migration*.

#### FRA opinion

*To address the identified shortcomings, it is FRA's opinion that the EU could consider the risks and benefits of replacing in the long term national processing of requests for international protection with processing by an EU entity. This could, in time, produce a system based on shared common standards. As a first step, and with the effective use of available EU funding, shared forms of processing between the EU and its Member States could be explored to promote common procedures and protection standards, anchored in the EU Charter of Fundamental Rights.*

*A comprehensive fundamental rights assessment at the hotspots in Greece and Italy, covering all phases from disembarkation, initial reception, screening, relocation to asylum and return, would contribute in closing protection gaps that particularly affect the most vulnerable.*

*Evidence shows that national child protection systems are not always integrated in asylum and migration processes and procedures involving children. More needs to be done to bridge resulting protection gaps and encourage all relevant actors to work together to protect refugee children and, in particular, address the phenomenon of unaccompanied children going missing.*

Statistics suggest that fewer than 40 % of irregular migrants ordered to leave the EU departed effectively in 2014. Some persons who have not obtained a right to stay cannot be removed for practical or other reasons. Obstacles can include lack of cooperation by the country of origin (such as refusal to issue identity and travel documents) or statelessness. The international and European human rights framework requires that these persons are provided with access to basic services, including healthcare. Making healthcare more accessible for irregular migrants is a good investment in the short and medium term in areas such as controlling communicable diseases, as FRA research indicates. Unlawful and arbitrary immigration detention has to be avoided, while the potential of returns remains underused. Respect for fundamental rights does not pose an obstacle; on the contrary, it can be an important building block towards the creation of return policies.

#### FRA opinion

*To prevent ill treatment of forcibly removed people, it is FRA's opinion that EU Member States should consider establishing effective monitoring mechanisms for the return of irregular migrants. Fundamental rights safeguards in return procedures contribute to their effectiveness and make them more humane, by favouring less intrusive alternatives to detention and by supporting more sustainable voluntary returns as opposed to forced returns. By addressing the issue of non-removable persons, fundamental rights can also make return procedures more predictable. For migrants in an irregular situation living in the EU, FRA in its past reports has called on Member States to respect fully the rights migrants are entitled to under international and European human rights law, be it the right to healthcare or other legal entitlements.*

A significant number of migrants and refugees who arrived in the EU are likely to stay, many of them as beneficiaries of international protection. Given the situation in their countries of origin, return is not a likely option in the near future. Their integration and participation in society through peaceful and



constructive community relations pose a major challenge to EU societies. Successful integration of newly arrived migrants and refugees potentially supports the inclusive growth and development of the EU's human capital and promotes the humanitarian values the EU stands for globally.

#### FRA opinion

*To facilitate the swift integration of migrants and refugees in host societies, it is FRA's opinion that the EU Member States should consider reviewing their integration strategies and measures based on the EU's Common Basic Principles for Immigrant Integration Policy in the EU. They should provide effective and tangible solutions, particularly at local level, to promote equal treatment and living together with respect for fundamental rights.*

# Endnotes

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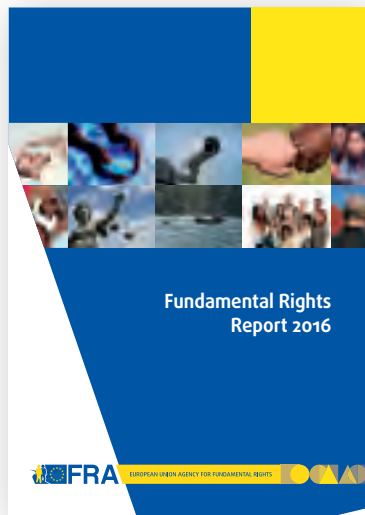
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## HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Various global developments in 2015 brought new – and exacerbated existing – challenges to protect, respect and fulfil fundamental rights. The arrival of over one million refugees and migrants strained domestic asylum systems and risked triggering rights violations, including by fuelling xenophobic reactions. But it also prompted considerable support from citizens and EU-level initiatives, including relocation and resettlement measures. This Focus takes a closer look at asylum and migration issues in the European Union (EU) in 2015. It looks at the effectiveness of measures taken or proposed by the EU and its Member States to manage this situation, with particular reference to their fundamental rights compliance. It explores the risks refugees and migrants face to reach safety; addresses challenges with regard to non-*refoulement* and the prohibition of collective expulsion; outlines developments and possible solutions in the field of asylum; and discusses developments on the issue of returns.

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