



PRAGUE PROCESS
ПРАЖСКИЙ ПРОЦЕСС

Prague Process Handbook on Identification of Irregular Migrants

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The Prague Process is a targeted migration dialogue promoting migration partnerships and information exchange among the countries of the European Union, Schengen Area, Eastern Partnership, Western Balkans, Central Asia, Russia and Turkey.

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The electronic version of this document is available at www.pragueprocess.eu

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Foreword

This publication aims to provide policy-makers and practitioners with an overview of the challenges faced in establishing the identity of migrants, as well as possible ways to tackle them. The document results from the fruitful cooperation among the 21 states that took part in PP5: Albania, Armenia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Georgia, Hungary, Kazakhstan, Kosovo¹, Kyrgyzstan, Former Yugoslav Republic of Macedonia, Moldova, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Turkey and Ukraine. PP5 was implemented in the framework of the Prague Process Targeted Initiative in 2014-2016.

The Handbook combines international practice with the national experience of the PP5 participating states, which have been facing different migration challenges. In view of their varying experience with regards to the identification of irregular migrants, the project provided a suitable platform to exchange know-how and discuss the national approaches and current practices in order to strengthen the common understanding.

It was a privilege to work with practitioners who are experts in their field. Their knowledge and dedication to the project contributed to its success. Special thanks goes to Ms. Marika Kosiel-Pająk, Mr. Octavian Predescu, Ms. Irina Lysak, Ms. Olena Silkina, Ms. Agnieszka Skiba, Ms. Raluca Videanu, Mr. Radim Zak and all others who contributed to the smooth implementation of PP5 and the good atmosphere throughout the entire project. Finally, the publication of this Handbook would not have been possible without the considerable efforts undertaken by Mr. Alexander Maleev (ICMPD).

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PP5 Project Officer

¹ UNSCR 1244/1999

List of Acronyms

BMP	“Building Migration Partnerships” project
EC	European Commission
EU	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court for Human Rights
EU MS	European Union Member State(s)
EURA	European Union Readmission Agreement
GAMM	Global Approach to Migration and Mobility
ICMPD	International Centre for Migration Policy Development
IOM	International Organisation for Migration
MFA	Ministry for Foreign Affairs
MOI	Ministry of Interior
NGO	Non-governmental organisation
PP	Prague Process
PP AP	Prague Process Action Plan 2012–2016
PP TI	Prague Process Targeted Initiative
RA	Readmission Agreement
TCNs	Third Country Nationals

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Introduction

The Prague Process

The Prague Process as a political initiative emerged from the “Building Migration Partnerships” (BMP) Ministerial Conference, which took place in Prague on 28 April 2009. The states² participating in this important event adopted the Joint Declaration on principles and initiatives for promoting close migration partnerships³ through a comprehensive, balanced and pragmatic approach that respects the human rights of migrants and refugees. This document, which was prepared by the participating states with the active participation of several EU bodies and international organisations, established the following five thematic areas as the basis for cooperation, with the sixth area being added when endorsing the Prague Process Action Plan 2012–2016 in Poznan in November 2011:

- ⇒ preventing and fighting illegal migration;
- ⇒ integration of legally residing migrants;
- ⇒ voluntary return, readmission and sustainable reintegration;
- ⇒ migration, mobility and development;
- ⇒ legal migration with a special emphasis on labour migration;
- ⇒ asylum and international protection.

The main aim of the Prague Process has been to promote migration partnerships between the states of the European Union/ Schengen area, Western Balkans, Eastern Partnership, Central Asia, Russia and Turkey. Its methodology is based on three pillars: it combines policy dialogue at ministerial level with policy development at expert level and

the implementation of concrete initiatives according to its Declaration and Action Plan. This approach has ensured that the political dialogue does not decouple from the practical experience gained on the ground. It shall also guarantee that the findings of the implemented projects are translated into concrete guidelines and concepts available to all Prague Process states.

The Prague Process is – with the exception of the important role of the European Union – a state-driven initiative. It is steered by ministries responsible for migration and led by Poland. The Core Group advises the Senior Officials’ Meetings, which constitute the decisive body of the Prague Process. The declared intention of the Prague Process is to enhance the cooperation on the six above-listed topics among the responsible state agencies. Since the dialogue emphasizes an operational approach, the development of practical know-how and joint standards are of key importance.

The Prague Process Targeted Initiative

The Prague Process Action Plan 2012–2016 outlines 22 concrete activities in the six mentioned thematic areas to be implemented during that period⁴. Since August 2012, Poland together with the Czech Republic, Germany, Hungary, Romania, Slovakia and Sweden, which also took the lead in the Pilot Projects of PP TI, have been implementing the EU-funded initiative „Support for the Implementation of the Prague Process and its Action Plan“, also known as the Prague Process Targeted Initiative (PP TI). The website www.pragueprocess.eu serves as the main source of information on the Prague Process and PP TI.

The PP TI has focused on three objectives: ensuring continued expert-level dialogue and targeted information exchange; maintaining, updating and improving of the Knowledge base through the gathering of information

2 Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Kazakhstan, Kosovo/ UNSCR 1244/1999, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, the Republic of Moldova, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, the United Kingdom, Uzbekistan and the European Commissioner responsible for Migration.

3 All documents referring to Prague Process are available at: <https://pragueprocess.eu/>.

4 The preparatory meetings for the Action Plan resulted in extending the thematic scope of the Process’s agenda to the area of asylum and international protection, which has evolved into an additional area of cooperation.

in the form of Migration Profiles (Light) for countries in Eastern Europe, Southern Caucasus, Central Asia and Russia; and the implementation of concrete (pilot) projects in the agreed thematic areas.

Pilot Project 5

The idea to implement Pilot Project 5 (PP5) was first welcomed during the Prague Process Senior Officials' Meeting (SOM) in Berlin on 28–29 October 2014. The concrete thematic focus of PP5 was set according to the priorities and national interests expressed by practitioners who took part in the previously concluded Pilot Project 1 (PP1). The objectives jointly identified included strengthening the capacity of participating states in establishing the identity and nationality of irregular migrants and to establish working contacts between the responsible national authorities and experts.

The setup and content of the project were thus rooted in the relevant political declarations and actual needs expressed by the targeted practitioners. PP5 represented a logical follow up to the discussions and findings generated within PP1, which also contributed to the structure and methodology of the Handbook in hand. Meanwhile, the exchange of views with academia and international organisations, as recommended in the PP evaluation of 2015, represented an important and enriching novelty⁵.

PP5 was implemented between November 2014 and March 2016. The project consisted of four thematic workshops, co-organized by the PP5 Leading States Poland (Ministry of the Interior and Administration) and Romania (Ministry of Internal Affairs). Gathering a total of approximately 90 representatives from 21 countries and receiving substantial support by the European Commission, FRONTEX, ICMPD and IOM, the organised workshops proved very successful. This was also confirmed by the interest and eventual involvement of Belgium and the Netherlands, which joined PP5 in the

course of its implementation. Especially non-EU countries attached great importance to the wider communication of the outcomes of each of the organised events.

Scope and structure of the document

This publication builds on the experience of the PP5 states, which either provided their valuable inputs in response to the established questionnaire or through statements during the workshops. The relevant information was first processed, analysed and structured by the project team. The draft version of the Handbook was then shared with the participating states for their comments and reactions. In this way, all states involved were provided with an opportunity to propose changes to the text of the first draft.

The content of the Handbook also builds upon extensive desk research and the due consideration of various important sources with regards to the identity determination of irregular migrants. The valuable work undertaken within the European Migration Network (EMN) and the so-called GDISC ERIT project are to be underlined in this respect.

The Handbook consists of three thematic sections: Following this introduction, Chapter 1 provides for a short overview on the recent migratory flows (up to 2015) towards the EU, including the respective numbers and routes used. This section also refers shortly to the problem of human smuggling Chapter 2 then briefly summarises the legal background to identification, paying special attention to the issue of birth certification, followed by a more thorough analysis of the role of readmission agreements. The final chapter is dedicated to some of the manifold operational aspects of identification, ranging from the national practices of EU Member States to the concrete methods applied. The experience of PP5 Participating States is exemplified along the entire document. The publication is complemented by a short bibliography, containing important reference documents for further reading.

⁵ Reflecting the results of the Prague Process Evaluation, the implemented activities featured representatives of non-governmental organizations, academia and other public institutions.

1. Illegal Migration to the EU

1.1. Scope of illegal migration flows

The number of reported detections of illegal border crossings at the EU borders reached unprecedented numbers in 2015. While “in 2014, more than 276 000 migrants irregularly entered the EU, which represents an increase of 155% compared to 2013”⁶, in 2015 “the total number of irregular migrants arriving in the EU was almost five times higher than in 2014”⁷. This means that “an estimated one million migrants arrived in Europe, accounting for the record number of 1.82 million detections of illegal border crossings reported by EU Member States. The number of detections was more than six times the previous record set in 2014”⁸.

Additionally, the number of third country nationals refused entry at the external EU border amounted to 118 495 in 2015⁹. A stable trend was observed compared with 2014, with the main reasons for refusal remaining similar ones¹⁰, namely “the lack of valid visa (25%) and the lack of appropriate documentation justifying the purpose of stay (28%). The number of persons refused entry due to an alert in the Schengen Information System represented only about 8.2% of the total, with 9 762 refusals issued in 2015”¹¹.

In recent years, the number of detections of illegal stays in the EU was on the rise: “In 2013, there were about 345 000 detections of illegal stay in the EU, which represented a generally

stable trend compared to the previous year”¹². In 2014, there were 441 780 detections of illegal stay in the EU¹³. A dramatic increase was observed in “2015 [when], Member States reported 701 625 detections of illegal stay”¹⁴ with Germany, Sweden and the United Kingdom being the preferred destinations¹⁵.

Bearing in mind these important migration trends, it should be underlined that “in 2015, [the EU] Member States reported 286 725 return decisions issued to third-country nationals as a result of an administrative or judicial decision, which was a 14% increase compared to 2014”¹⁶. Again, already in 2014 there was an increase of 12% compared to the number of return decisions issued in 2013¹⁷. The trend of increased illegal migration was also noticeable across the non-EU States, which participated in PP5. Nevertheless, not all countries were affected to the same extent.

A thorough analysis of illegal migration requires a reference to the nationality of the concerned migrants trying to cross borders illegally as well as those staying in the country without valid residence permits or other relevant documents. In 2014, “Syrians together with Eritreans were the largest group of persons apprehended at the EU external borders trying to enter the EU in an irregular manner. Other large groups included nationals from Afghanistan, Mali and Kosovo”¹⁸. In 2015, “irregular migrants travelling to the EU primarily originate from Syria, Pakistan, Afghanistan, Iraq as well as from Senegal, Somalia, Niger, Morocco and other African countries. In addition to these

6 European Commission, *Questions and Answers: Smuggling of Migrants in Europe and the EU response*, European Commission - Fact Sheet, doc. MEMO/15/3261, Brussels, 13 January 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-3261_en.htm, p. 1.

7 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 5.

8 FRONTEX, *FRONTEX PUBLISHES RISK ANALYSIS FOR 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>, p. 6.

9 Ibidem, p. 23.

10 Ibidem

11 Ibidem

12 FRONTEX, *Annual Risk Analysis 2014*, available at: http://FRONTEX.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf, p. 8.

13 FRONTEX, *Annual Risk Analysis 2015*, available at: http://FRONTEX.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, p. 8.

14 FRONTEX, *FRONTEX PUBLISHES RISK ANALYSIS FOR 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>, p. 30.

15 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 5.

16 FRONTEX, *FRONTEX PUBLISHES RISK ANALYSIS FOR 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>, p. 34.

17 FRONTEX, *Annual Risk Analysis 2015*, available at: http://FRONTEX.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, p. 32.

18 European Commission, *Questions and Answers: Smuggling of Migrants in Europe and the EU response*, European Commission - Fact Sheet, doc. MEMO/15/3261, Brussels, 13 January 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-3261_en.htm, p. 1.

nationalities, there is also a continuous flow of irregular migrants from Asian countries such as India, Bangladesh, China, and Vietnam, albeit to a lesser extent¹⁹.

1.2. Main illegal migration routes

The main migratory routes used in 2013 and 2014 continued representing the biggest challenge in 2015 as well, meaning that irregular migration by sea occurred in particular along the Central and Eastern Mediterranean routes. This trend increased dramatically in 2014 when almost 225 000 migrants (nearly three times as many as in 2013) were identified along the Central and Eastern Mediterranean routes²⁰. In 2015, irregular migrants entered the EU mainly through Greece ('Eastern Mediterranean route') and continued their travel "on one of three different routes: transiting through the Western Balkans to re-enter the EU in Croatia and, to a smaller extent, via Hungary, Bulgaria, and Romania, or by sea towards Italy"²¹.

While the 'Central Mediterranean route' (to Italy) also remained a frequently used option, the respective number "fell by about a tenth to 154 000, in large part due to the fact that Syrians had switched to using the Eastern Mediterranean route"²². This trend was of course reversed again with the signing of the EU-Turkey Agreement in March 2016, which turned the route via Italy once again into the most frequented one. Migrants arriving in the south of Italy "typically departed from Milan to reach destinations in Northern Europe via Switzerland, Austria and Germany. To reach destinations in Western Europe, migrants travelled via France"²³.

In 2015, the Western Mediterranean route was rarely used to enter the EU via Spain²⁴. Meanwhile, a so-called 'Northern route' was newly identified as irregular migrants transited through Russia to eventually reach Norway²⁵. At the same time, according to FRONTEX, "few migrants travel on the Eastern entry route, which leads them along the 'Via Baltica' entering the EU in one of the Member States on the Baltic Sea before travelling to destination countries via Poland"²⁶.

A continuous decrease in the number of persons using fraudulent documents could be noted. In 2014, 9 400 such cases were detected, representing a decrease by 3,9%²⁷. One year earlier "there were around 9 800 detections of migrants using document fraud to illegally enter the EU or Schengen area"²⁸. This trend continued in 2015 when the "Member States reported a total of 8 373 document fraudsters at border crossing points on entry from third countries to the EU"²⁹.

1.3. Smuggling of migrants

Recently, the European Commission addressed the problem of smuggling of migrants in a number of documents, including the European Agenda on Migration³⁰, adopted on 13 May 2015, and in the European Agenda on Security³¹, adopted on 28 April 2015. Both documents highlight the fight against migrant smuggling as a priority - to prevent the exploitation of migrants by criminal networks and to reduce the incentives for irregular migration. This is not surprising as "migrant smuggling is a highly profitable

19 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 5.

20 Ibidem, p. 5.

21 Ibidem, p. 5. Confront with: FRONTEX, *FRONTEX PUBLISHES RISK ANALYSIS FOR 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>.

22 FRONTEX, *FRONTEX PUBLISHES RISK ANALYSIS FOR 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>.

23 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 5.

24 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 5.

25 Ibidem.

26 Ibidem.

27 Ibidem, p. 6.

28 FRONTEX, *Annual Risk Analysis 2014*, available at: http://FRONTEX.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf, p. 7.

29 FRONTEX, *Annual Risk Analysis 2016*, available at: <http://FRONTEX.europa.eu/news/FRONTEX-publishes-risk-analysis-for-2016-NQuBFv>, p. 24.

30 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda On Migration*, COM(2015) 240 final, Brussels, 13.5.2015.

31 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Agenda On Security*, COM(2015) 185 final, Strasbourg, 28.4.2015.

business, with criminal networks thriving on the low risk of detection and punishment (...). In just one incident involving the cargo vessel *Ezadeen* intercepted on 1 January 2015 by the Joint Operation Triton with 360 migrants on board, smugglers are believed to have earned EUR 2,5 million³². According to EUROPOL estimates, the total turnover of smuggling networks for 2015 amounted to three to six billion EUR and is projected to further increase significantly if the observed migration pressure persists³³.

The EU has envisaged concrete actions in this priority area, including “cross-border cooperation on document fraud, sham marriages, and other forms of abuse of legal entry and residence procedures”³⁴. Important forthcoming initiatives include:

- ⇒ The revision of EU legislation on migrant smuggling by 2016;
- ⇒ Establishing a list of suspicious vessels and monitoring of these vessels;
- ⇒ Support to EU MS for towing to shore boats intended to be used by smugglers or disposing of them at sea;
- ⇒ Launching cooperation with financial institutions to step up financial investigations;
- ⇒ Establishing a single point of contact on migrant smuggling in each EU MS;
- ⇒ Setting up of a Contact Group of EU Agencies on migrant smuggling;
- ⇒ Creation of the Eurojust thematic group on migrant smuggling³⁵.

Furthermore, law enforcement operations are taking place both within and outside the EU. Among others, “in 2015 only, information

on more than 10 000 suspects was shared with Europol, resulting in 1 551 investigations targeting networks active in the EU. A significant share of these suspects operates as part of criminal networks”³⁶. New campaigns are under way in to prevent smuggling already in the source countries³⁷.

2. Legal Background on Identification

2.1. Introduction

There is no specific international treaty dedicated exclusively to the identification of (irregular) migrants. At national level, many countries have enshrined some basic principles in their legislation, such as for example the use of age assessment only as a last resort, the non-coercion of migrants, or to decide in favor of minors when doubts persist. Legal documents relating to the protection of human rights and the fundamental rights of migrants in particular play an important role in the identification of (undocumented) migrants, as do various other important aspects, ranging from civil registers to readmission agreements. This section aims to shortly elaborate on these issues.

The Universal Declaration of Human Rights guarantees the right to freedom of movement and residence within the borders of each State. It also confirms the right to leave any country and to return to the own country. Since sovereign states remain in charge of establishing and executing their own national admission rules, the latter rights do not provide migrants with a possibility to select their country of destination.

Certain limitations of course prevail in international law, especially the right to seek

32 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Action Plan against migrant smuggling (2015 - 2020)*, COM(2015) 285 final, Brussels, 27.5.2015, p. 1.

33 EUROPOL, *Migrant smuggling in the EU*, February 2016, p. 2, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf.

34 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Action Plan against migrant smuggling (2015 - 2020)*, COM(2015) 285 final, Brussels, 27.5.2015, p. 1.

35 Ibidem, p. 4.

36 EUROPOL, *Migrant smuggling in the EU*, February 2016, available at: https://www.europol.europa.eu/sites/default/files/publications/migrant_smuggling_europol_report_2016.pdf, p. 7.

37 European Commission, *Communication from the Commission to the European Parliament, the Council - Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, Brussels, 14.10.2015 COM(2015) 510 final, pp. 13-14.

asylum. The 1951 Geneva Convention relating to the Status of Refugees³⁸ remains “the only global legal instrument explicitly covering the most important aspects of a refugee’s life”³⁹. Inherent fundamental rules relate to the principle of non-refoulement, or the preconditions that have to be met in order to grant a refugee status or withdraw it⁴⁰. The Convention establishes universal standards applicable to all persons who have left their country of origin. Moreover, it is also applicable to cases involving persons who - after being identified as irregular migrants - have applied for asylum.

Regional organisations may also establish and implement more specific human rights standards⁴¹. Within the Prague Process region, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950⁴², and in particular the Fourth Protocol to it⁴³ constitute important regional mechanisms. At the same time, judgements issued by the European Court of Human Rights⁴⁴ play an important role in providing a possibility to clarify the interpretation of the Convention and to reflect changes in our society⁴⁵. Such ‘case law’ helps putting the Convention into practice. As Q.C. Goldsmith underlines:

“As the case law of the Strasbourg court shows, (...) [the Convention] is a ‘living document’ which is developed all the time by the Strasbourg court in the light of contemporary standards and to deal with modern issues. (...) Moreover, there are grave dangers in attempting to express the same idea in different words.”⁴⁶

In case of EU Member States (EU MS) and other countries adjusting their national legislation to EU standards, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)⁴⁷ provide a key legal basis regarding the fundamental rights of persons. A more detailed set of rights is included in the Charter of Fundamental Rights of the European Union, which – according to Article 6 (1) of the TEU – “shall have the same legal value as the Treaties”⁴⁸. Both the European Court of Human Rights and the Court of Justice of the European Union play a key role in ensuring the application and protection of these rights.

The extent to which national legislation addresses the issue of identification differs significantly. While most EU MS have established specific rules regarding the establishment of identity, they primarily reflect their obligations and duties laid down in the EU manifold legislation (e.g. Common European Asylum System, ‘Return Directive’). Other EU MS, featuring more detailed provisions, have elaborated various methods and in some cases a step-by-step process of identification. No EU MS has set a fixed term for the establishment of identity, and neither does the EU acquis⁴⁹.

In line with the EU’s Asylum Package⁵⁰, asylum seekers in all EU MS are obliged to submit all

38 English language version of the Convention is available at: <http://www.unhcr.org/3b66c2aa10.html>.

39 UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, September 2011, available at: <http://www.unhcr.org/4ec262df9.html>. All PP5 Participating States are Parties to this Convention. The Convention was amended by the Protocol relating to the Status of Refugees (available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>) that lifted geographic and temporary limitations. The list of Parties to the Protocol is available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-5&chapter=5&lang=en.

40 See: P. Sadowski, *Can Terrorists Be Denied Refugee Status?*, *The Polish Quarterly of International Affairs*, No. 4/2015, *passim*.

41 See: M. Lubiszewski, *Kodyfikacja międzynarodowej ochrony praw człowieka* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona*, Toruń 2010, p. 64.

42 The list of countries – signatories to the Convention (14 out of 17 PP5 Participating States are Party to the Convention) is available at: <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3>.

43 The list of the signatories to the Convention (10 out of 17 PP5 Participating States) is available at: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/046/signatures?p_auth=Z03ca3k6

44 Judgments of the Court are available at: <http://hudoc.echr.coe.int/sites/eng/> (English version) and <http://hudoc.echr.coe.int/rus#> (Russian version).

45 See: D. Thym, *EU migration policy and its constitutional rationale: A cosmopolitan outlook*, *Common Market Law Review* 2013, Vol. 50, No. 3, p. 719, A. Bisztyga, *Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – stan kompatybilności czy konkurencyjności?*, *Przegląd Prawa Konstytucyjnego* 2011, No. 3, p. 181, B. Gronowska, *Czas a zobowiązania materialne państw-stron EKPCz – zarys problemu*, *Europejski Przegląd Sądowy*, sierpień 2014, p. 17 and the following, T. Jasudowicz, *Zagadnienia wstępne* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona*, Toruń 2010, p. 28 and the following as well as Q. C. Goldsmith, *A Charter of Rights, Freedoms and Principles*, *Common Market Law Review* 2001, Vol. 38, Issue 5, p. 1210 and the following.

46 Q.C. Goldsmith, *A Charter of Rights, Freedoms and Principles*, *Common Market Law Review* 2001, Vol. 38, Issue 5, p. 1210.

47 Both amended by the Treaty of Lisbon of 2007.

48 According to the Article 53 of the Charter the EU MS should interpret it bearing in mind the minimum standard of protection ensured by the ECHR. Thus, a link between those two standards is ensured even though the EU has not become a party to the ECHR (an obligation is imposed by the Article 6(2) of the TEU). On that issue see e.g. B. Gronowska, *EU Charter on Fundamental Rights - Do We Really Need It?* [in:] Maliszewska-Nienartowicz (red.), *European Union at the Crossroads: the Need for Constitutional and Economic Changes*, TNOIK, Toruń 2007, p. 133

49 See: *Establishing Identity for International Protection: Challenges and Practices*, EMN, 2013.

50 i.e. the Asylum Procedures Directive, the Qualification Directive and the recast Qualification Directive.

relevant documentation (e.g. passports) for substantiating their application. According to the Asylum Procedures Directive, the competent authorities in most EU MS also have the right to search the applicant in order to obtain any information regarding his/her personal identity, nationality or journey to the EU. The same Directive also enables EU MS to prioritise or accelerate the asylum procedure, when the applicant has either presented false documents or information, not presented any information at all, or even destroyed his identity documents in order to mislead the authorities.

In accordance with Article 4 of the recast Qualification Directive, the national legislation in a number of EU MS provides for a possibility to establish a face-value identity of the applicant under certain conditions, especially when he/she has made every effort to substantiate his/her application. Needless to say, that the competent authorities are not allowed to contact their counterparts in the presumed country of origin during an asylum procedure. Instead, their diplomatic missions in the presumed country of origin may be consulted (e.g. regarding the authentication of documents). Any information concerning the individual asylum seeker has to remain strictly confidential⁵¹.

2.2. Significance of Birth Registration

Birth registrations or certificates play an important role for public administrations and even more so for the newly born citizens as they contribute to ensuring their various fundamental rights, enshrined in international treaties⁵². The UN underlines that birth registration “is the continuous, permanent and universal recording, within the civil registry, of the occurrence and characteristics of births in accordance with the legal requirements of

a country”⁵³. Moreover, there is no exclusion clause with regards to birth registration, meaning that under international law every child is entitled to registration of their birth, including children born to irregular migrants. The UN General Assembly in its resolution “A World Fit for Children” of 2002 reaffirmed the commitment to ensure the registration of all children at birth.

While most states have established mechanisms for registering births, turning them into a common practice, data on unregistered persons remains alarming at global level, with only about two thirds of children under the age of five registered. Significant regional differences persist, however⁵⁴, and it should be acknowledged that within Central and Eastern Europe and the Commonwealth of Independent States the registration rates belong to the highest worldwide (UNICEF estimates it at 98 per cent)⁵⁵.

The quality of the data compiled in registers may also raise various uncertainties. In case of outdated information it may be impossible to confirm the identity or nationality of a person. This is also linked to the organisation of civil registration systems. In some countries children are only registered when they enter an education institution or when girls and women give birth to their children (if they do so in hospitals). Against this background, one can hardly argue with U. Dow who noted that:

“a birth certificate is a ticket to citizenship. Without one, an individual does not officially exist and therefore lacks legal access to the privileges and protections of a nation. Civil registration is also the basic tool by which an efficient government counts its citizens and plans the schools, health centres and other services they need”⁵⁶.

51 EMN, 2013.

52 Among others, the United Nations Universal Declaration of Human Rights of 1948 states that “everyone has the right to a nationality” and that “no one shall be arbitrarily deprived of his nationality”. Article 7 of the Convention on the Rights of the Child, which has been in force since 1990 and has been ratified by 191 countries, states explicitly that “The child shall be registered immediately after birth and shall have the right from birth to a name [and] the right to acquire a nationality”.

53 United Nations Children's Fund, *Every Child's Birth Right: Inequities and trends in birth registration*, UNICEF, New York, 2013, p. 4.

54 According to UNICEF, 230 million children under the age of five have not been registered, with more than half of them living in Asia (59 per cent) and 37 per cent living in sub-Saharan Africa. Nearly one in three unregistered children lives in India. In 2012 alone, 57 million infants – four out of every ten babies delivered worldwide that year – were not registered with civil authorities.

55 All data in this paragraph are quoted after: *ibidem*.

56 U. Dow, *Birth registration: The first right* [in:] *The Progress of Nations*, UNICEF, 1998, p. 5.

In short, every person has to be registered and provided with a birth certificate. Moreover, such information should preferably also be stored in the civil registry of the country of origin and destination of a child. However, an important obstacle may appear when a child is born to migrants illegally staying in a foreign country. Afraid of the related consequences, the parents may abstain from registering the birth of their child in the country of destination. It may also be difficult for them to register the child at the diplomatic representation of their country of origin, especially if none is present in the respective country or when the national registration system imposes requirements which they are not able to meet. In case of non-registration of a child in the country of origin, the link between the parent and the child needs to be proven in another way.

The lack of reliable data affects transit countries in particular. In case of readmission agreements that contain a 'third country citizen clause', the responding authority may not be able to identify most of the transiting migrants. Again, the situation becomes even more difficult when no diplomatic representation of the supposed third country is present in the transit country.

The identification process may also prove demanding when civil registers have already been modernised. Due to historical developments (e.g. changes of borders) and other reasons, gaining access to some data may prove very difficult. In such cases, other available supporting databases have to be used (e.g. fingerprints from criminal records).

Difficulties in maintaining reliable civil registers expose the inability of countries of origin, transit and destination alike to ensure the proper documentation of their own citizens or immigrants. Moreover, even if a destination or transit country manages to establish the identity of an irregular migrant, this is only a deemed identity. The identity is only fully confirmed when the country of origin provides the migrant with the necessary identity documents.

Experience of PP5 Participating States

As already mentioned, the Prague Process states pay great attention to the organization of their civil registers⁵⁷, which also represent an important tool in confirming the identity or nationality of their citizens. Due to the differences in the availability of documents and their accuracy, the possible duration of the identification process can vary from a single day to an entire year. Some PP5 countries are indeed very efficient in this regard: In Georgia, for example, although no time limits are precluded by the law, the registry enables the authorities to respond within 2-10 days and issue travel documents within two weeks. If the information is not in the system, the request is transferred to the central authority for further proceedings. This good practice was made possible through a number of successful reforms and the creation of a civil registry system that simplifies the identification procedures significantly. Nonetheless, data protection is upheld, playing a key role in the system.

Citizenship certificates at birth can be issued by Embassies, which collect information and pass it to the central authority. However, countries of origin are rather reluctant to process cases when doubts exist regarding the actual relationship between the parents and children. It may sometimes indeed be difficult to prove these ties, especially when:

- ⇒ national law requires both parents to be present during registration or baptism;
- ⇒ no information about the parents is included in the birth certificate;
- ⇒ the names of the parents and child differ;
- ⇒ spelling mistakes occur or the transcription of the surname is incoherent⁵⁸.

Additional evidence on behalf of third persons or institutions can be used when these difficulties appear. In some cases, however, the questioning of the proofs or documents presented rather aims at rejecting to confirm the citizenship of children. If that is the case, the returning of an entire family may become impossible.

Double citizenship was also recollected as an issue that may create difficulties in establishing the identity of irregular migrants. This is why some PP5 countries concluded agreements to facilitate the process of taking responsibility in similar cases.

⁵⁷ United Nations Children's Fund, *Every Child's Birth Right: Inequities and trends in birth registration*, UNICEF, New York, 2013, p. 33.

⁵⁸ Some countries refuse to accept documents in which the spelling differs from the national databases. This may be the outcome of a spelling mistake or caused by changes in transcription.

The duration of the identification process may also depend on the type of return. PP5 states underlined that in cases of voluntary return it tends to be swifter than in cases of forced return. As already mentioned, the type of return should not represent an additional obstacle to cooperation. There may also be technical obstacles such as outdated or incomplete data or limited access to data. If there is no central register of nationals, the confirmation has to be received at local level.

2.3. Readmission Agreements

There is no doubt that overstaying the duration of a visa or residence permit or illegal border crossing are not in line with international law. This is also confirmed by the numerous return decisions issued on individual cases. When a migrant wants to return voluntarily to his country of origin, this right is most commonly conveyed to him, especially if a Readmission Agreement (RA) is in place between the countries of origin and destination. Furthermore, as outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the duty of a state to protect its own nationals does also include the responsibility to readmit them.

The process of identification of irregular migrants nevertheless shows that many countries of origin refuse to issue identity documents to persons who are deemed to be their citizens. This leads to serious difficulties for the concerned authorities in the countries of destination. In order to recognise the duty to readmit own nationals, interested countries have introduced facilitated modes of cooperation such as RAs. To ensure their efficiency, such agreements are frequently complemented by implementation protocols specifying the exact proceedings and practical cooperation. Countries may also further extend their liability to readmit through a 'third country nationals' clause⁵⁹, whereby the agreement applies not only to the readmission of own citizens but also to other nationals who

were transiting the given country or staying on its territory with a visa or residence permit. More often, however, and especially in cases of forced return, countries of origin often refrain from issuing the documents needed (i.e. travel documents) for their own nationals to return⁶⁰.

RAs thus prove the readiness of the Parties to cooperate on political level. However, a readmission clause can also be included in other forms of agreements. The Cotonou Agreement⁶¹ is a frequently quoted example in this regard⁶²: although its "main objectives are the reduction and eventual eradication of poverty and the gradual integration of African, Caribbean and Pacific States into the global economy, whilst adhering to the aims of sustainable development"⁶³, it also contains Article 13 point 5 that clearly states that:

"(c) The Parties further agree that:

- ⇒ each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities;
- ⇒ each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities.
- ⇒ The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes."

⁵⁹ See: Prague Process, *Prague Process Handbook and Guidelines on Concluding Readmission Agreements and Organising Returns*, July 2014, p. 25.

⁶⁰ Judgement of the Court of Justice of the European Union of 5 June 2014 in case C-146/14 of *Bashir Mohamed Ali Mahdi*.

⁶¹ Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, last revised in Ougadougou on 22 June 2010, OJ L 195, 1.8.2000, p. 46.

⁶² See: Prague Process, *Prague Process Handbook and Guidelines on Concluding Readmission Agreements and Organising Returns*, July 2014, p. 29.

⁶³ EUR-LEX, *Summaries of EU Legislation*, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:r12101&from=PL>.

The probably biggest challenge in establishing the identity of irregular migrants arises from the communication between the states involved. The long awaiting for a response or complete absence thereof on behalf of third countries can be a serious obstacle, even when readmission agreements were already concluded and ratified. Moreover, despite the potential existence of the mentioned Implementing Protocols, some issues are overly technical and may require further clarification. The requesting (host) country has only limited impact on the actual cooperation on behalf of countries of origin. Finally, some countries of origin request detailed information of the route by which the return would take place. In case of long preparations, this may hamper the return process as well.

Experience of PP5 Participating States

The national laws of most PP5 states contain specific provisions regulating the identification of irregular migrants. They still face the challenges that some countries tend to confirm the identity and nationality of their citizens without always issuing the requested travel documents⁶⁴. In other instances the validity of the travel documents may be very short, thus making the timely organisation of the return very challenging.

Establishing the nationality of migrants is of course much easier than confirming their individual identity. In many countries a prima facie nationality can be used in order to facilitate the further identification process. In this regard, testimonies of other migrants and persons who know the concerned individuals can be useful. Nevertheless, as it is the country of origin that specifies the extent of the data and the proofs needed for the identification process, such testimonies may be regarded as insufficient. Some countries of origin demand concrete types of documents to be attached to the issued request, which may of course hamper the identification process and eventually force the authorities in the country of destination to suspend or abandon it entirely.

The identification process can be carried out electronically or through face-to-face contact (e.g. when no photo recognition is possible). Some Embassies reject to confirm the citizenship of their nationals if not presented to them in person or if certain

original documents (or certified copies) have not been delivered. Consequently, PP5 countries struggle to convince diplomatic representations to identify persons without identity documents. Meanwhile, the common practice among the PP5 states has been to accept any document with a picture (e.g. passport, travel document or ID card) for identification purposes, including documents issued by private companies.

The PP5 states perceive RAs as a proof the political will to cooperate on returns and readmission. Furthermore, they also do foster the identification process. Preferably, they should clearly specify the responsibilities of the parties, including the timeframe for responses. As some grey areas may still remain, some countries also conclude written notices on the exact interpretation of RAs. Other measures can contribute to providing unified standards for the exchange of information. They may consist of specific IT software for various purposes: keeping record of foreign residents, monitoring and analysis of the migration situation (e.g. Azerbaijan); to establish direct communication between caseworkers in countries of origin and destination working on the same case; to enhance the issuance of travel documents; to facilitate the communication between the consul and detained migrant etc.

In the absence of a RA, the cooperation with a third country may prove difficult, although this is not always the case. The mutual acceptance of the migration policy carried out is crucial in order to ensure effective cooperation between countries of origin and destination. In this regard, the incentives deriving from Visa Liberalisation Action Plans can be useful. Meanwhile, problems may often arise with regards to countries with no diplomatic representation in the country of transit or destination. More generally, uncertainties regarding the legal foundations for readmission may persist. The organisation of study visits and task forces was considered useful in this regard (e.g. between Poland and Vietnam), as was the establishing of direct contacts between caseworkers in order to increase mutual trust (e.g. between EU MS and Azerbaijan).

Involving facilitators in the return process was also recommended by several PP5 states. IOM was the organization most frequently mentioned in this respect, able to provide support in obtaining or legalizing documents, among others. In the framework of assisted voluntary return projects (AVR), more favourable conditions for return of vulnerable persons may be established. Most importantly, initiatives addressed at persons wishing to return voluntarily facilitate returns and contribute to their sustainability, thereby increasing the potential benefits for the concerned migrants and the countries of origin and destination alike.

⁶⁴ See judgement of the Court of Justice of the European Union of 5 June 2014 in case C-146/14 of *Bashir Mohamed Ali Mahdi*.

The competencies within the migration structures in some PP5 states were modified due to the changing migration realities. In some cases, the cooperation between different stakeholders (e.g. MFA and police or migration services) was facilitated through the introduction of specific internal procedures and other measures. In others, the changes introduced were also motivated by the aim to facilitate the implementation of RAs (e.g. Azerbaijan, after signing the RA with the EU in 2014). Overall, the PP5 participating states agreed that the (presumed) countries of origin, requested to establish/confirm the identity or nationality of own nationals should apply the general provisions of their national legislation. The latter may of course differ significantly from one country to another, as was also the case among the PP5 participating states (e.g. whereas some countries establish their migration services as contact points for third countries, others task their MFAs with this function).

2.3.1. EU Readmission Agreements (EURAs)

In his recent study on the implementation of EURAs, Sergio Carrera provided a thorough analysis of the various challenges linked to the problems described⁶⁵. Referring to the proclaimed priority of the EU to swiftly raise the numbers of irregular migrants returned to third countries, he raises various doubts about the 'pervasive readmission mantra', which has been shaping European policy-making in view of the ongoing 'European migration crises'.

EURAs represent a key component in the EU's external migration policy, laying down common rules and conditions for the readmission of irregular third country nationals (TCNs) and stateless persons, either to their country of origin or to a transit country on their way to the EU. "All EURAs include one Section dedicated to 'Readmission Procedures' which includes articles covering the principles to guide the readmission procedure, specific rules of the readmission application, a provision on the means of evidence regarding the nationality of the person to be readmitted, TCNs and stateless persons as well as time limits and transfer modalities."⁶⁶

The means of evidence for determining a person's nationality, together with the annexed lists of documents, the presentation of which is to be considered as evidence or prima facie evidence of nationality/citizenship, represent a common key provision of EURAs. "Since the EURA with Georgia, all subsequent EURAs provide that the Implementing Protocols may also include the modalities for readmission under accelerated procedures and the above-mentioned procedures for interviews in cases where there are no documents proving nationality. Similarly, the other five EURAs set specific deadlines for this interview to take place; specifically ranging between three to five working days in the EURAs with Armenia, Azerbaijan, Cape Verde and Georgia, to seven in the EURA with Turkey."⁶⁷

The 2015 'European Migration Agenda' and the subsequent 'EU Action Plan on Return' confirmed the external cooperation on readmission as a policy priority once again, with the main objective to increase the number of returns significantly and ensure the success of EU return policies. As of May 2016, the EU has concluded 17 EURAs with various non-EU countries.

Carrera argues that contrary to their intended goal, the empiric evidence raises doubts about the added value of EURAs. After all, the expulsion rates of irregular migrants have in most cases not increased after their successful ratification. Moreover, little is still known about their actual operability, uses and effects on the ground. And while EURAs should define the rules and procedures in a way to enhance the identification process and consequently accelerate the issuing of travel documents by the countries of origin, the identity determination challenge remains among the biggest and most obvious obstacles to return. An equally important deficit of EURAs relates to doubts concerning the legality of his/her expulsion against the background of the described EU law and fundamental rights standards⁶⁸.

65 S. Carrera, *Implementation of EU Readmission Agreements*, Springer Briefs in Law, 2016.

66 Carrera, p. 29.

67 Carrera, p. 34.

68 Carrera, p. 63ff.

As pointed out before, EURAs also tend to depend heavily on the actual inter-state relations of the signatory parties. This can lead to a series of practical challenges in handling conflicting sovereign interests in the course of expulsion procedures. At the same time, it is also worth mentioning the dissatisfaction of the European Commission resulting from the continuous application of bilateral RAs by some EU MS, after having successfully concluded EURAs with the same partner country.

3. Operational Aspects of Identification

3.1. Practices applied across EU Member States

The EMN Focussed Study “Establishing Identity for International Protection: Challenges and Practices” (2013) provides an overview of the challenges facing national authorities in their efforts to establish both the identity of applicants for international protection and for the return of rejected applicants, often in the absence of (valid) documentation. The study also presents an overview and analysis of national approaches across the EU, identifying various good practices. While the following section does not aim to provide full account of the rich information generated by the study, it is firmly based on some of its findings.

Beyond the context of return and readmission, “the ability to unequivocally establish the identity of migrants is a key factor with regard to applications for a visa to legally enter or for asylum after irregular entry, family reunification, ensuring standards of care or procedures to groups such as vulnerable persons, and, finally, when granting status and providing subsequent integration measures.”⁶⁹ However, a reliable and accurate determination of an individual’s identity is not always possible.

Due to the substantial illegal migration flows described in the first chapter and the very high numbers of individual cases received, the identification of irregular migrants has now become even more essential, pressing and challenging. The interest of receiving countries to know who is entering their territories, in which ways and for what purpose and duration is self-explanatory: The inability to identify the incoming individuals is raising fundamental concerns about the plausibility of the migration and asylum system and the ability to ensure public safety. Moreover, all countries aim to demonstrate that they can and will remove from their territory those TCNs who do not qualify to remain.

A number of EU MS have recently been confronted with substantial numbers of undocumented TCNs applying for international protection. Rather than presenting (valid) identity documents, applicants merely tend to declare their identity. But even when identity documents are presented, their authenticity needs to be properly assessed in view of the frequent use of falsified documents and false identities. Attempts to mislead authorities and the unwillingness of the applicant to cooperate with the authorities may also severely obstruct asylum procedures or the implementation of a return decision.

However, the absence of identity documents may also be well-founded: Those fleeing war or persecution may have had no possibility to bring their documents with them or may have lost or damaged their identity documents in the course of their challenging journey. On the contrary, it may also be the case that the concerned individuals indeed try to withhold their identity from the authorities in charge. Such lack of cooperation and attempts to mislead the authorities create substantial difficulties and delays in the identification and present an enormous challenge for effectively implementing the Common European Asylum System (CEAS). But even when the identity documents are being presented, assessing their authenticity may be challenging, for example due to the lacking administrative structures or capacities in the (presumed)

⁶⁹ EMN, *Establishing Identity for International Protection: Challenges and Practices*, Brussels, 2013, p.6.

country of origin, or because of the differing quality standards of the issued document.

Forged document and “identity swaps”⁷⁰

We speak of a forged document when an illegal change was introduced to the document (e.g. replacement of the personal page or photo, change of the serial number). This can also entail blank passports, which are usually stolen before being registered on name by the authorities. When reported stolen, these passports are systematically registered by the authorities of the country.

Against the background of the contemporary migration situation, it is no surprise that there is a big market in forged documents. One should also keep in mind that a forged identity documents are not only used to gain access to other countries, but also provide criminals with new identities and are often used as an identification paper for financial transactions. It is therefore not surprising that the total costs for such a document can amount to EUR 15,000.

Here is an overview of the most common forgeries:

- ⇒ **Photo replaced:** Smugglers often carry several documents with the same photo but with different names.
- ⇒ **Stamps:** Stamps in a passport are often falsified to make the document look more trustful (e.g. showing that one has been to the Schengen area before). However, these stamps are difficult to imitate and can be identified due to their differing lines or ink.
- ⇒ **Imposter:** The person shown in the travel document is not the actual traveler. This is called the ‘look-a-like method’.
- ⇒ **Identity Swap:** Changing of the identity for the purpose of admission to a particular country. Such swaps are commonly used by smugglers at international airports: Passengers arrive with valid identity documents but then change route and receive a new travel documents while in the international transit lounge (often accessed by smugglers with a cheap flight ticket). One reason behind ID swaps on European airports is visa-free travel within the Schengen area.

It should be underlined that the security of passports is constantly improving, which makes their falsification more difficult and more expensive. Over the recent

years, this has led to an increase in the number of imposters traveling with an authentic document. It still remains important to know what types of fake documents are in use and to therefore provide regular trainings to border guards and air company staff, as well as to share information on the newest trends. Increased cooperation between police forces across Europe could provide a better insight into the criminal methods of smugglers and help the sharing and replication of the solutions found and good practices established.

As previously noted, the need to establish identity is commonly laid down in the national legislation of EU MS, primarily reflecting their obligations and duties according to EU legislation. Some EU MS have nonetheless included more detailed provisions, defining the methods to be used and setting out a detailed process. It should be considered that the authorities responsible for identity determination differ considerably among EU MS, both when it comes to asylum applicants and irregular migrants. States also differ with regard to the exact roles and responsibilities assigned to these organisations. In most countries, however, the process of establishing identity is part of the procedure for deciding on applications for international protection.

When establishing the identity of applicants for international protection, EU MS accept a wide range of documents. Most states distinguish between ‘core documents’ (e.g. passport, ID cards) and ‘supporting documents’ (other forms of identity documentation). While half of EU MS accept copies of documents for identification purposes, most only recognise them as supporting documents. When it comes to the identification for the purpose of return, the (presumed) countries of origin usually only accept a much narrower range of documents for determining the identity of the undocumented irregular migrants. The requirements depend considerably on the country of origin, however.

⁷⁰ See: Klamer, R., Forged Documents and Identity Swap, 2016 in EMN, *The Establishment of Identity in the Migration Process*, Meeting Report, Brussels, 2016, p. 25-30.

Policy example: Identification within the EU's 'Hotspot' approach⁷¹

The extraordinary irregular migration flows that Europe has been facing since 2015 were mainly characterized by the unprecedented numbers of migrants and asylum seekers who have neither been crossing international borders at the foreseen crossing points, nor have carried the travel documents necessary to fulfil the legal entry conditions. Instead, these people were mainly arriving by sea, often undocumented, thus making it very challenging to establish who they are. The hotspot approach brought forward by the EU has aimed at addressing the challenges of identification and registration by providing operational support to Greece and Italy, the two main access points for irregular migration into the EU (see chapter 1).

A first key step in the identification process consists in checking the authenticity of the identity documents presented by the migrants. Here within, the national authorities of Greece and Italy are assisted by documents experts, deployed by the EU as well as the so-called „Frontex Advanced Level Document Officers“. Together they are tasked to ensure that the documents correspond to the person, or otherwise detect any fraudulent or falsified identity documents.

The high quality of forgeries made it necessary to also control what the persons actually know of their documents. Who issued them? In which office? How much did they cost, etc.? While the applicants do of course not need to know all the answers, they should at least know something. Important follow-up measures to the actual identification include the seizing of documents and contributing to the further risk analysis. The work is carried out using all relevant databases, including national ones, Interpol or FADO (False and Authentic Documents Online).

However, most migrants arriving irregularly to the EU come undocumented. In Greece, their share has been estimated at almost two thirds of the total arrivals. The identification process of these undocumented migrants is of course much more complex. The reasons for not presenting an identity document may range from the unwillingness of migrants to disclose their true identity (i.e. national or ethnic belonging, age), to the loss of documents during their journey or the impossibility to obtain a valid document (e.g. in Libya or Syria).

When no identity documents are available, a screening process is undertaken by experts and interpreters of the national authorities, together with screening experts deployed by Frontex. Their objective is to establish the assumed nationality of the undocumented person. The screening process is essential to detect false identities/

nationalities and to collect valuable information on the migration paths and the methods applied by smuggling networks⁷². It entails security checks, carried out with the assistance of EUROPOL and also involving checks against national databases, in order to ensure that the person does not represent a threat for public security. Obviously, checking all individuals against the Schengen Information System (SIS)⁷³ also forms part of the screening exercise, as do the various Interpol databases (e.g. Stolen Travel Documents Database, SLTD). Together with other European agencies and the national authorities, EUROPOL also contributes to identifying the smuggling routes and criminal networks used on the migrant journey.

Meanwhile, the so-called EURODAC system is used to register the fingerprints and other available data of all migrants (above the age of 13) entering the EU. EURODAC is the key tool to identify which Member State is responsible for the asylum application process in line with the so-called 'Dublin Regulation'.

Beyond the general necessity to establish the identity of the newcomers, the correct identification is also crucial with regards to identifying which individuals or groups belong to vulnerable categories and thus need to be redirected to specific facilities or even to segregated areas for their protection. After the initial registration process, the further status of a migrant is identified (e.g. asylum seeker, vulnerable person, minor, subject to removal) and the person is transferred accordingly⁷⁴.

Policy Recommendations (Identity and determination):

- ⇒ Establish detailed guidance and specific provisions in the national legislation, elaborating on the methods and the step-by-step processes;
- ⇒ Use of different methods to establish identity flexibly or in combination;
- ⇒ Regarding the identification of irregular migrants, good cooperation with the country of origin is decisive;
- ⇒ Make optimal use of databases and other available IT tools, ensuring their mutual compatibility;
- ⇒ Ensure better cooperation and sharing of information with other states;
- ⇒ Keep relevant information, databases and information sources up-to-date.

⁷¹ See: Vaschetto, D., *The Establishment of Identity in the Migration Process: The Hotspots in Greece and Italy*, 2016 in EMN, *The Establishment of Identity in the Migration Process*, Meeting Report, Brussels, 2016, p. 9-16.

⁷² EMN, p.14

⁷³ The SIS is a large scale database that supports external border control and law enforcement across the Schengen area. It allows the competent authorities to enter and consult alerts on certain categories of wanted or missing persons and objects. A SIS alert also contains clear instructions on what to do when the person or object has been found.

⁷⁴ EMN, p.13

3.2. Methods used in the Identity Determination Process

The applied methods mostly include interviews, fingerprints and photographs, which are checked against national and European databases. Moreover, age assessment and language analysis are also commonly used when need arises. Some EU MS apply almost identical methods for asylum procedures and return cases, while others apply a more limited range to irregular migrants. Whereas contacts with the national authorities in the presumed country of origin are not permitted in the context of refugee status determination procedures, they are considered indispensable for return procedures. Moreover, while a refugee status may even be granted without certainty on the individual identity (e.g. belonging to an ethnic group is considered as sufficient proof), "identity" is very strictly defined in return procedures, where especially the nationality is of decisive importance. Partial determination is rarely recognised - most EU MS consider identity either verified or not verified.

Methods for establishing identity in the absence of credible identity information⁷⁵:

- ⇒ Language analysis;
- ⇒ Age assessment;
- ⇒ Comparison of finger prints with national or EU databases;
- ⇒ Comparison of photographs with national or EU databases;
- ⇒ DNA analysis;
- ⇒ Interviews;
- ⇒ Consultations with country liaison officers based in the (presumed) countries of origin;
- ⇒ Coercive methods, including forced searches of the applicant's property.
- ⇒ Use of Country of Origin Information (see below)

The range of methods used for identification of irregular migrants is usually more limited, which might be a consequence of the stricter demands for documenting identity in the case of return. The use of coercive methods is also more common here within as compared to asylum procedures where coercion should remain the exception.

Biometrics⁷⁶

Biometrics represents the physical characteristics of a person that can be used for determining his/her identity. Later on, the stored biometrics can also be used to verify whether a person is the one s/he claims to be or not. The determination and verification of identity should nevertheless not solely be based only on biometrics, as an eventual erroneous recognition can lead to erroneous rejections. The final decision on an identification procedure should therefore always be taken by people rather than machines. Among the various forms of biometrics, some are more reliable than others: The iris or retina scan, fingerprints, and photo belong to the forms most commonly recognised.

Biometrics is used globally for the identification and verification of persons. Within the Schengen area, biometrics is regularly used to determine whether the holder of an identity document is the real holder. However, this kind of determination requires the respective documents to be equipped with a chip carrying the fingerprints of the holder. This form is used for passports and stay permits for foreign nationals. Biometrics is also collected from asylum seekers and applicants for long term visas and residence permits.

The experience of PP5 Participating States

PP5 states reported of the challenges faced in communicating with the questioned migrants, which may either result from cultural and linguistic barriers, or from the unwillingness of the migrant to cooperate. Addressing these challenges requires detailed instructions and sophisticated interview techniques with regards to irregular migrants. Most often, these guidelines form part of the internal instructions or working procedures of a given institution. The specific trainings undertaken by the Netherlands and Azerbaijan go one step further and may be considered a good practice to be followed by other states. These trainings support case workers in their interviewing methods

75 EMN, 2013, p.15.

76 GDISC ERIT Ukraine, *Effective Response to Irregular Transit-Migration in Ukraine*, ICMPD, Vienna, 2010, p. 89ff.

and make them familiar with necessary techniques and standards that have to be respected during the procedure. Both, internal instructions and trainings are efficient and flexible tools, making the adaptation of existing methods to the changing migratory situation easier than it would be if this information was prescribed by law. Such initiatives have been supported by UNHCR and IOM, among others.

Cooperation with reliable interpreters (who know the language but also the culture, history, geography and political reality of the concerned country of origin) is also recognised as of key importance. Meanwhile, cooperation with academia is being appreciated, but mostly occurs on an ad hoc basis (when need arises) through short term engagement of external experts. Unfortunately, not all countries can afford employing a linguist. Others, like Poland, have developed a questionnaire for preliminary linguistic identification, used as an additional source of information in case of countries featuring frequent document fraud.

Language analysis can also be helpful in establishing the nationality of a migrant⁷⁷. Some PP5 states employ specific experts whereas others recruit external analysts. The minimum requirements for such linguistic analysts suggest that:

1. the language in question is their mother tongue;
2. they have proven linguistic capability of listening, observing and providing qualified feedback;
3. they are able answering to questions on behalf of linguists and providing for written assessments;
4. their assessment complies with and complements other assessments on the same case;
5. they were properly examined with regards to their capability of identifying the languages and dialects in question;
6. they are able to pass the internal security check⁷⁸.

During the identification process, PP5 states do provide medical and psychological support to irregular migrants - either through regular employees or external experts. It could be recollected as a good practice to provide consultations and support in detention centres when need arises. This is best carried out by the personnel of the centre itself in order to ensure that the expert is easily available, fully informed about the situation in the centre and familiar with return procedures.

It is also recommended for a doctor to assist the age examination procedure as well as the assessment of whether the physical ability and medical state of a migrant allows him to undertake the return journey. The involvement of doctors is considered a good practice but also requires the provision of targeted trainings for them and the personnel responsible for the organisation of returns in general. The involvement of language specialists and psychologists in these trainings should also be considered. While it is a common practice to organise this kind of trainings internally, Poland and the Netherlands also engaged with representatives of academic institutions or other training centres, which further enriched the training curricula.

The provision of adequate training to case workers can contribute to overcoming the barriers experienced in the communication with migrants. The national legislation of several PP5 countries even sets explicit rules regarding the training of personnel that is interviewing migrants. But even in the absence of such legislation, national institutions tend to provide for trainings to improve the conversational and interviewing skills of case workers. Moreover, in their responses to the questionnaire some countries expressed their interest in considering the introduction of rules on such training into their national legislation.

Cooperation with IOM was also mentioned as beneficial to the identification process. Meanwhile, diaspora representatives are rarely consulted when establishing a deemed nationality.

It should be clear that not all challenges in communication can be avoided. This will depend on the engagement of the responsible authorities of the hosting country as well as on the willingness on behalf of the individual migrants to cooperate and provide genuine information. Consequently, there is no common one-fits-all solution to all mentioned challenges. Instead, the concrete procedures and solutions should either be established at national level or on a case-by-case basis.

⁷⁷ Home Office Science: Migration and Border Analysis, *Language analysis testing of asylum applicants: Impacts and economic costs and benefits*, September 2011 (REDACTED VERSION April 2012), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257177/language-analysis.pdf, last accessed on: 20.1.2016, passim.

⁷⁸ D. Eades, *Applied Linguistics and Language Analysis in Asylum Seeker Cases*, *Applied Linguistics* 26/4, p. 508-509.

3.2.1. Screening and Interview Techniques

The screening is in principle, a fact finding interview session. The procedure performed by the officers during the initial screenings is very similar between the countries. Obviously the form, questions and documentation follow a certain pattern, based on different national practices. To win the battle on the field of adequate handling of mixed migration flows it is essential that the initial screening is carried out sufficiently and in a professional manner⁷⁹.

In order to enhance the screening processes, investments in infrastructure and personnel must go hand in hand with appropriate training courses, especially on interpersonal communication and cultural sensitivity. The techniques and tactics to conduct a successful interview depend on the experience and training of the interviewer. Non-binding standards have been developed to raise the awareness. Some of these standards can be handled and covered by legislative background and adequate training courses, but the personal factor of the officers always remains as one of the prime conditions for success.

The initial interview (screening), most commonly undertaken by Border Guards is of great importance because it offers the first real contact with the migrant, creates the ground for effective case management and ensures information required and also used by other state authorities. Careful preparation should be carried out before conducting an interview with a client and the country of origin information shall be reflected properly during the process.

Preparation for an interview is not a routine work but can be as important as the actual interview. Obviously, certain patterns can be followed, but in general most of the cases differ from one another. Not only the pre-conditions

of arrival, but also nationalities, genders and modus operandi can be different, which often requires a change, not only in the methodology used, but also in the approach to the apprehended person. In order to implement the initial and further interviews successfully, it is advisable to follow certain steps in the course of preparation and execution⁸⁰.

Respective time should be dedicated to learn as much as possible about the background of the case. Before the initial interview, the officer has to become familiar with the basics of the situation, which, at a later stage, will help him to detect “holes” in the story, or untrue statements. Preparing the ground of the interview and briefing the interpreter is also part of the preparation. The interview should be conducted in a private room, equipped with all necessary technical tools (enough chairs, table, computer, audio and/or video recorder etc.). The role of an interpreter – especially if this is his/her first time at interpreting such an interview – should be clearly described. The proper behaviour of this person is extremely important (e.g. the interpreter should not engage in private discussions with the apprehended person).

During the actual interview, it is of utmost importance to form a connection between the interviewee and the interviewer. Therefore, the interview should start with mutual introduction and with basic questions about name, origin, family ties etc. The way you start the interview can influence the degree of “opening up” of the person questioned. It is important to ask only one question at a time and to wait for a full answer, before asking another question. Asking simple, well-established questions could lead to structured and understandable answers. If the questions are set up chronologically, it will be easier for the interviewee to concentrate and remember the story. The interviewee should not be confused with mixed or complex questions and should not be interrupted when answering. It is always good to repeat what the witness had said both for better memorising and as a way

79 See: GDISC ERIT Ukraine, p. 23-31.

80 GDISC ERIT Ukraine, p. 29.

to show that the officer who conducts the interview pays attention to the apprehended.

The analysis of the knowledge of the language and geography of their claimed country of origin and region is crucial, albeit not mandatory. Especially, the importance of testing the applicants linguistically is to be underlined, both with regards to proficiency and to regional varieties such as dialect. The geographic background, including questions on the social and cultural features of the region of provenance, can be assessed during this review of the language knowledge. The available Country of Origin Information can then be used to assess whether there indeed is a risk of persecution in the confirmed place of origin. The compiled information is then to be shared with all units involved in the refugee status determination, including the courts eventually addressed.

Attention should be paid to the development of common standards regarding the forms and templates accompanying them with adequate instructions for the users. The reason for standardization is to provide common standards for all officers dealing with interviews, on the one hand, and to collect and summarise the already existing good practices of the agency, on the other.

Policy Recommendations (Interview techniques):

- ⇒ Help the applicant to present his/her claim (to evaluate all the relevant facts of the claim);
- ⇒ Record all the facts of the claim fully accurately and clearly;
- ⇒ Ensure the applicant that you have documented the claim accurately and fully;
- ⇒ Prepare your conclusions taking into account all the relevant aspects of the evidence presented (applicability to the law).

3.2.2. Country of Origin Information⁸¹

Country of Origin Information (COI) is an important tool to support migration management as a whole, as well as different migration procedures. In particular, COI supports the decision making in asylum procedures. It may as well be considered as a valuable tool to decide whether removal of irregular migrants or denied asylum seekers would be in line with international obligations. It might be used by first instance migration authorities as well as second instance courts or administrative bodies. Another important field of potential use of COI may be seen in extradition cases of courts as the question whether to extradite a person or not poses similar questions as when deciding if an irregular migrant or denied asylum seekers can be removed or not. Lessons learned in many industrialized countries that face larger numbers of asylum seekers, showed that the creation of a specialised and professional unit solely dedicated to the research and collection of COI is an inevitable part of modern asylum and migration systems.

Beyond the general COI, case workers increasingly seek more specific inputs and details about the identity documents issued in the (assumed) countries of origin. To assist caseworkers in their identity resolution work, the Norwegian ID Centre has developed the ID database, which can serve as a policy example for other states as well. The database's restricted area is of course only available to Norwegian police and immigration authorities⁸². Below is a short description of this important tool.

⁸¹ See: GDISC ERIT Ukraine, p. 49-57.

⁸² See: Petterson, V., *The ID Database: Using Country Specific Information in the Identity Establishment Process*, 2016 in EMN, *The Establishment of Identity in the Migration Process*, Meeting Report, Brussels, 2016, p. 18-25.

Policy example: The Norwegian ID database

The ID database contains identity related information from the most important countries of origin of asylum seekers. It includes a basic description of the most common used passports, ID-cards and certificates for each country. The database has proven to be an efficient tool in addressing the challenges arising from the use of falsified European ID documents (e.g. the frequently used falsified Italian and Romanian identity documents), including a list over the latest document alerts, as well as a description of the most commonly misused documents. New countries are constantly being added to the database in order to get a fuller picture. The alerts issued by the database are either based on the document examination of fraudulent ID documents in Norway or on behalf of partner states around the world. They entail information on both what the authentic documents should look like and on the common falsifications identified. The importance and added value of the tool in first line checks should be underlined.

The ID database makes use of various sources of information such as maps, which are used in confirming the geographical knowledge of migrants with regards to their claimed countries of origin, the border crossing points and travel routes used, or even the streets neighboring their supposed homes. Other useful maps may display the ethnic, linguistic or religious composition of a given region. The use of similar information sources is one important element to verify the authenticity of the stories and the claimed identities of the applicants⁸³. Moreover, the database features information on the status granted and the documents issued on behalf of transit countries. Such information is particularly useful in order to verify identity information with foreign state authorities.

As the maintenance and improvement of similar databases is quite burdensome and expensive, cooperation and information sharing among a number of countries can be mutually beneficial. For this reason, Norway has been trying to initiate cooperation agreements with the responsible authorities of various countries from within and outside the EU. The resulting data sharing should not only widen the content of the database but also help agreeing on shared principles and parameters of the assembled data.

Policy Recommendations (COI):

- ⇒ Keep up international contacts to allow further development of the COI unit;

- ⇒ Introduce regular feedback tools to evaluate services of the COI unit and to ensure realistic expectations of the end users of COI services;
- ⇒ Provide funding for translation of country reports and other valuable information to further fill the COI database;
- ⇒ Regularly check whether the way the COI unit offers its service is also meeting the needs of the asylum case workers.

3.3. Cooperation with Third Countries

The presence of reliable identity documents is often decisive, as most countries of origin request a person identified by nationality, surname, first name and date of birth. But although identity verification is required to initiate the return process, not all third countries require absolute verification to accept their nationals back. Some African countries in particular rely heavily on the interviews they conduct with the person concerned.

Return policies tend to be most effective when simultaneously combining the approaches of forced expulsion with assisted voluntary return (AVR). This may also enhance the effective cooperation with the country of origin, which is essential in order to agree on operational aspects of readmission and return. Such agreements may require political and expert-level dialogue of different stakeholders. Furthermore, countries need to decide whether to seek agreements in a formal, written form or based on looser (and perhaps more flexible) terms of understanding.

Assisted Voluntary Return (AVR) ⁸⁴

AVR programmes, most commonly implemented by IOM, aim to facilitate orderly, safe and humane options for the voluntary return of irregular migrants⁸⁵. As already mentioned, AVR can enhance more sustainable returns and support cooperation mechanisms between countries of origin, transit and destination in jointly managing migration. The main services provided within

⁸⁴ See: GDISC ERIT Ukraine, p. 77-79.

⁸⁵ AVR should be based on a decision freely taken in the absence of any physical or psychological pressure, as well as on an informed decision, which requires having enough accurate and objective information.

AVR programmes entail interviews and counseling, information provision, interpretation and, most importantly, the safe assisted return to the country of origin, which is accompanied by the provision of pre-departure, transit and reintegration assistance.

AVR is often a quicker and more cost-effective solution than forced removal. Moreover, it can foster respect for international principles/standards with regards to migrants in irregular situations on the one hand, and reinforce the responsibility of countries of origin vis-à-vis their returning nationals on the other. It represents a more humane and dignified approach to return, often also addressing reintegration perspectives at home (AVRR) whilst also allowing for the migrants to prepare for their return⁸⁶.

When a country seeks to launch cross-border cooperation regarding the identification of irregular migrants, the MFA is best suited to suggest what political leverage to use to enable such cooperation (e.g. enhanced processing of diplomatic visas) or to respond to an eventual rejection thereof (e.g. obstructing the swift issuance of visas). Possibilities for offering legal immigration and facilitated visa procedures in return for cooperation on return procedures are often being explored in this context.

Common challenges:

- ⇒ Frequent lack of a legal basis for AVR programmes and state funding thereof;
- ⇒ Insufficient consideration of legal barriers to forced return procedures;
- ⇒ Insufficient protection of personal data, hindering bilateral cooperation on return;
- ⇒ Lack of efficient inter-agency cooperation within the identification process (e.g. with MFA);
- ⇒ Interpretation services used in the return procedures not meeting international/EU standards.

The diplomatic missions of countries of origin can issue (Emergency) Travel Documents when the identification of the migrant is completed. Again, the MFA of the requesting state should

examine current arrangements with them in order to ensure that national needs in terms of timeliness for issuing of the travel documents are met, but also with regards to their validity, and that they are issued in sufficient numbers to match demand. The political leverage can be increased through various formal or informal bilateral arrangements (e.g. RAs, MoUs) with the countries of origin. Such arrangements are commonly concluded at senior officials' level and represent an agreement on how the documentation procedures should be handled.

3.4. Detention

The duration of the detention of migrants should be limited to the shortest possible period needed for proceeding of their case⁸⁷. The state authorities should consequently release the migrant if there are no prospects for ensuring his/her return. The reasons why this may be the case can range from technical to legal ones (e.g. impossibility to arrange a flight; lack of required documents). The prospects for ensuring return should always be verified through a detailed examination of the individual case. Consequently, no concrete time limits are set for releasing a migrant from detention.

Various judgements make reference to the identification process of irregular migrants, although most cases focus on the issue of expulsion and the rule of law rather than the identification process itself. Two cases are of utmost importance in this respect: *C 146/14 of Bashir Mohamed Ali Mahdi, judgment of the Court of Justice of the European Union of 5 June 2014*; and *C-357/09 of Said Shamilovich Kadzoev (Huchbarov), judgment of the of the Court of Justice of the European Union of 30 November 2009*.

In the Mahdi case, the Court referred to a "lack of cooperation", as outlined in Article 15 of the 'Return Directive'. This concept requires the authority which is determining

⁸⁶ For example, through counseling and encouraging them to identify potential opportunities for social and economic reintegration

⁸⁷ See judgment of the of the Court of Justice of the European Union of 30 November 2009 in case *C-357/09 of Said Shamilovich Kadzoev (Huchbarov)* described below, all cases of the court available at: <http://curia.europa.eu/>, last accessed on: 13.05.2016.

the application for an extension of the detention of a third-country national (TCN) to examine that person's conduct during the initial period of detention in order to establish whether s/he has failed to cooperate with the competent authorities as regards the implementation of the removal operation. Moreover, authorities have to scrutinise the likelihood of the removal operation if the process lasts longer than anticipated because of the conduct of the person concerned (as in C 357/09 *Kadzoev* case). The authority concerned should be able to demonstrate that the removal operation is lasting longer than anticipated, despite all reasonable efforts. Meanwhile, it should continue to seek securing the identity documents of the (TCN). A detailed examination of the factual matters relating to the entire initial detention period is necessary. Such an examination, however, is a matter for the national court and lies outside the jurisdiction of the European Court in proceedings under Article 267 TFEU.

The issue of detention has attracted the interest of the Court in other cases as well. It is clear that according to the Return Directive, unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a (TCN) who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the (TCN) concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as the removal arrangements are in progress and executed with due diligence⁸⁸. Each EU MS shall set a limited period of detention, which may not exceed six months. EU MS may not extend that period for more than a further twelve months, and only if in accordance with national law and in cases where, regardless of all their reasonable efforts, the removal operation is likely to last longer owing to: (a) a lack of cooperation by the (TCN) concerned,

or (b) delays in obtaining the necessary documentation from third countries.

As outlined by the Court in its judgment of 6 December 2012 in *C-430/11 Md Sagor* case, point 41, "it should be noted that Article 7(4) allows the EU MSs to refrain from granting a period for voluntary departure, in particular where there is a risk that the person concerned may abscond in order to avoid the return procedure. Any assessment in that regard must be based on an individual examination of that person's case".

Further limitations were specified in *C-375/09 Kadzoev* case where the Court provided that:

- ⇒ a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115;
- ⇒ Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure;
- ⇒ Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect of successful removal, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

⁸⁸ Detention shall be maintained for as long as the conditions laid down in paragraph 1 are fulfilled and only as long as is necessary to ensure the successful removal.

Furthermore, Article 15(3) and (6) of Directive 2008/115, read in the light of Articles 6 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that any decision adopted by a competent authority upon expiration of the maximum period allowed for the initial detention on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision. Also in C-357/09 Kadzoev case the Court underlined in point 6 of the judgment that “Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.”

Finally, according to the Court, as outlined in its judgment in the Mahdi case, Member States may grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a (TCN) staying illegally on their territory. Furthermore, a State should provide (TCN) who are staying illegally, but who cannot yet be removed with written confirmation of their situation. Nevertheless, the State enjoys wide discretion concerning the form and format of the written confirmation.

The experience of PP5 participating states

Detention of irregular migrants whose identity has not yet been confirmed is a common practice among PP5 states. The law most often specifies the maximum period of detention and possible prolongations. Usually, the limit is set to either 12 or 18 months of total duration, thus complying with EU law. It is considered a good practice for courts to decide on any detention that is longer than 48 hours. The court reviews such cases and decides on whether to allow or dismiss a prolongation of the detention. The maximum extension is usually provided for by the law.

In most PP5 countries, irregular migrants who are released from detention are issued some kind of written document – even when their identity remains unconfirmed. Most countries issue a temporary permit, while in others migrants may be granted a right to stay either on humanitarian basis or because of the impossibility to return them. Nominal personal information is included in the document. Inclusion of a photo and identification number can be considered a good practice in this regard.

Policy Recommendations (Detention):

- ⇒ Ensuring appropriate conditions in detention centres for illegal migrants;
- ⇒ Ensuring compliance with international standards for administrative legislation in respect of persons detained for illegally crossing the border;
- ⇒ Provide access to human rights organisations to detention centres, including a role in the efforts to improve the human rights within the penal system;
- ⇒ Allocate appropriate budgetary funds not only for maintenance, but also for efficient running of the screening centres;
- ⇒ Increase screening capacity by opening new centres based on a comprehensive assessment of the present and foreseeable migration situation;
- ⇒ Revise the status of the existing special premises for screenings and elaborate a plan for the upgrade/reconstruction (or closure);
- ⇒ Establish of an adequate human resource strategy and an implementation plan for the new centres, including allocation of an appropriate budget for the running and maintenance, or revision of the pre-existing ones;
- ⇒ Improve the accessibility of NGOs/International Organisation to the screening centres;
- ⇒ Harmonise procedures among all involved counterparts at local, regional and central level;
- ⇒ Strengthen inter-agency co-operation, in order to facilitate better procedure management among the competent agencies;
- ⇒ Establish standardised joint protocols and a clear description of tasks between the agencies;
- ⇒ Use proper interview techniques and tactics;
- ⇒ Consider country of origin information in the decision-making process;
- ⇒ Create a comprehensive curriculum and training programme, especially advanced training on interview techniques and tactics, country of origin information, management and operational practices in screening centres.

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