



# The Migrant Crisis in the EU

## Executive Summary

1. The EU border agency, Frontex, recorded 1.8 million illegal border crossings in 2015. Meanwhile, the EU Commission estimate that around three million irregular migrants will enter the EU between now and 2017. Currently asylum systems in Greece and Italy cannot possibly cope with such numbers and it seems very unlikely that the hotspot approach will address the shortcomings of the present system. So far 683 migrants not entitled to protection have been returned to their country of origin on joint Frontex flights and only 481 asylum seekers have been relocated to other member states under the emergency relocation mechanism.

2. It is obvious that additional legal and policy changes are required to address this crisis. The introduction of additional border controls by six member states has been followed by the suggestion that these controls should remain in place for two years. There are also reports that the Commission plans to amend the Dublin regulations. These developments suggest that policy makers are well aware of the need for action.

3. Distinguishing economic migrants from those with a genuine claim for protection and returning them to their country of origin will be essential if a large and growing flow of economic migrants is to be avoided. So far, 53% of asylum decisions have been positive while the remaining 47% were denied refugee status or humanitarian protection.

4. It is therefore time to stimulate discussion of other options that could achieve this objective and also help to protect the credibility of asylum systems upon which thousands of genuine cases rely. One possibility would be the suspension of appeals or a variation of this applying only to those nationals with very low protection rates. Appeals are required by an EU Directive but not by the Refugee Convention. Another option would be for Ministers in the relevant countries to certify that removal would not breach human rights commitments, after which an appeal could be lodged only from the home country. Those from countries where there is serious internal or international armed conflict would of course be exempt from any such proposals. EU Directives would need to be amended.

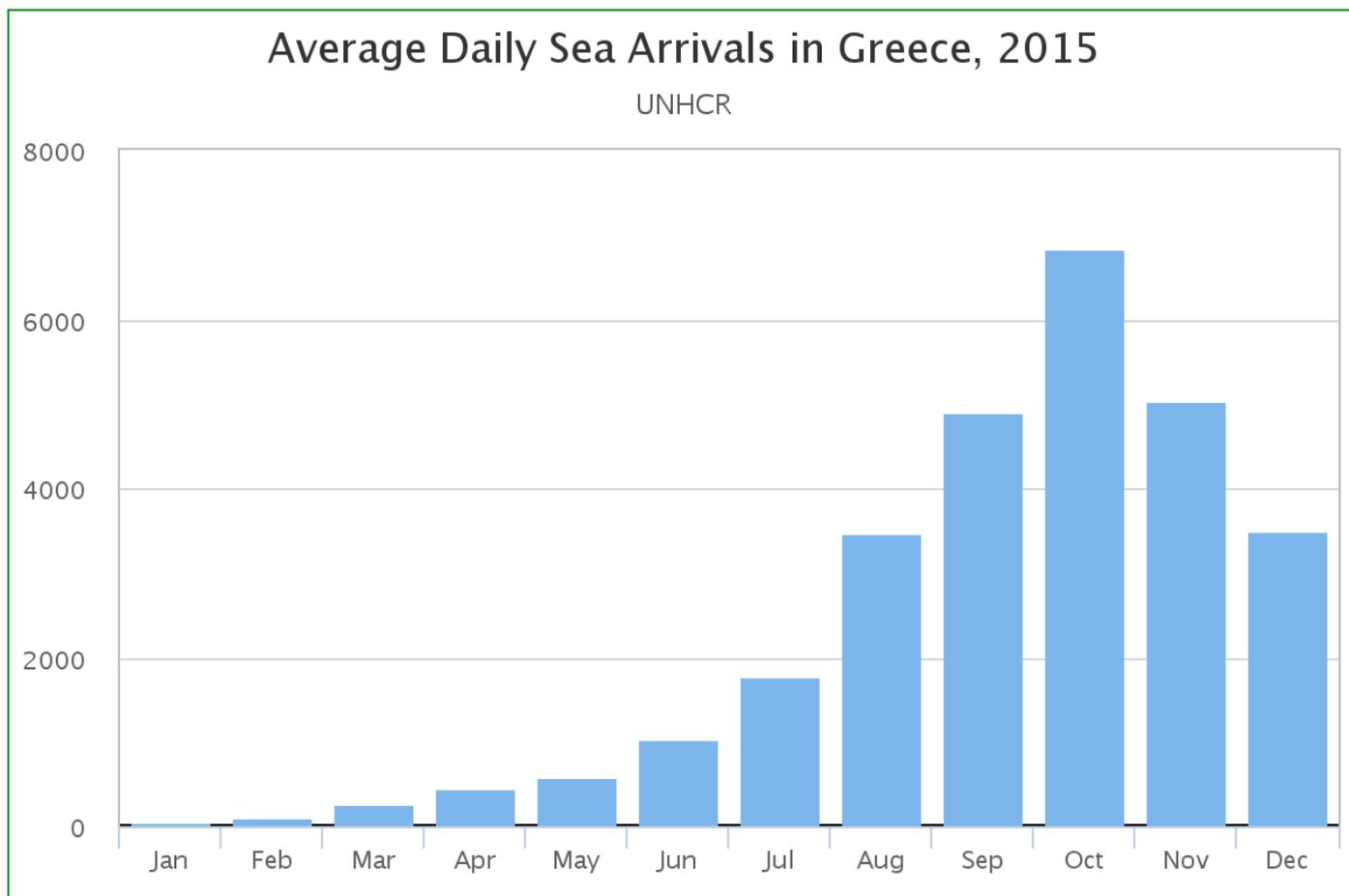
# Chapter 1 – Introduction

5. The European Union is grappling with the largest mass migration in Europe since the Second World War. The conflict in Syria has displaced millions, some are internally displaced but millions have left for Turkey, Lebanon, Jordan and many are making a second journey to Europe. Conflict in parts of Iraq and Afghanistan together with human rights abuses and forced conscription in Eritrea are also pushing people to seek sanctuary in Europe. People who face no threat to their life are also leaving their home countries to escape poor economic prospects in parts of Africa, Asia and the Balkans. It is crucial that any reception arrangements should be able to distinguish economic migrants and return them to their countries of origin.

6. The flow of migrants and asylum seekers to EU member states has been very large indeed, Frontex recorded 1.83 million border crossings in 2015.<sup>1</sup>

7. The majority have arrived in Greece where flows of arrivals peaked at around 6,800 a day in October 2015 as shown in Figure 1 below.

Figure 1. Average Daily Sea Arrivals in Greece, 2015. UNHCR<sup>2</sup>



1 Frontex, Greece and Italy continued to face unprecedented number of migrants in December, 22<sup>nd</sup> January 2016, URL: <http://frontex.europa.eu/news/greece-and-italy-continued-to-face-unprecedented-number-of-migrants-in-december-0BbBRd>

8. The people now entering the EU fall under three categories:

- a) Those fleeing persecution and entitled to protection under the 1951 UN Refugee Convention and its 1967 Protocol.
- b) Those who would, if returned, face a serious threat to life or person due to international or internal armed conflict and who would be entitled to Humanitarian Protection under EU Directive 2011/95.<sup>3</sup>
- c) Those who do not face such risks in their home countries and whose main motives are economic.

9. In practice, it is difficult to distinguish between those in need of asylum and those in need of humanitarian protection in countries such as Syria where conditions are extremely chaotic and dangerous for a significant number, indeed millions, of people. The overwhelming majority will be granted some form of protection if they make it to Europe. It can also be difficult in countries such as Iraq and Afghanistan where conditions vary from one part of the country to another but reliable evidence in individual cases is extremely difficult to obtain and evaluate. (See Annex A for the legal position on asylum seekers and those in need of humanitarian protection in the European Union.)

10. It is, however, important to separate out the economic migrants and return them to their countries of origin if there is to be any prospect of containing the numbers. This is not a simple process: issues of documentation and readmission to home countries are significant obstacles.

11. The European Commission has forecast that between the end of 2015 and 2017 an additional three million migrants will cross into EU territory, or 3,600 per day for the next two years. This does not seem outlandish; Mr Khalid Chaouki, a Member of the Italian Chamber of Deputies, suggested in evidence to the UK Home Affairs Committee that the International Organisation for Migration had estimated that there were presently 800,000 migrants waiting in North Africa to make the crossing to Europe.<sup>4</sup>

12. The purpose of this paper is to provide an overview of the events so far, the identity of those who have arrived in Europe and the measures that have been taken to address the issue. The UK can opt out of common measures adopted at the European level to tackle the current crisis, some of which will be outlined later.

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3 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ,URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN>

4 Khalid Chaouki, Member of the Italian Chamber of Deputies, Evidence to the Home Affairs Committee on the Migration Crisis, 26 January 2016, URL: <http://www.parliamentlive.tv/Event/Index/0dca3772-f15a-434d-ae59-1ec153372066>

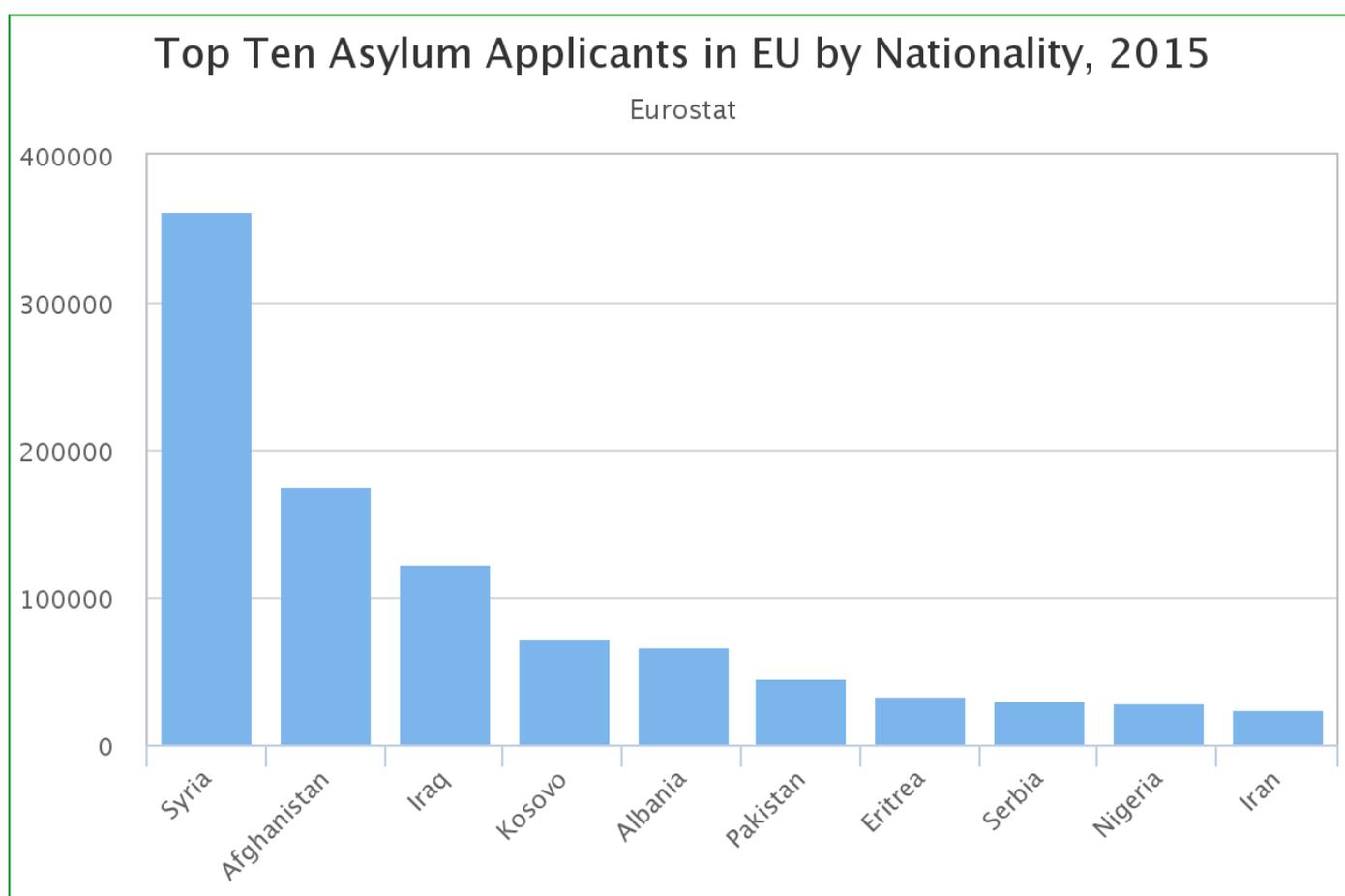
# Chapter 2 – Asylum Applications and Outcomes

## Applications and Initial Outcomes

13. In 2015 around 1.27 million people claimed asylum in the EU, a 95% increase on 2014.<sup>5</sup> (For more on recent asylum statistics see Annex B) The escalation of the crisis over the summer was largely due to remarks by the German Chancellor, Angela Merkel, who publicly stated that all applications for asylum from Syrian nationals would be heard, thus suspending the German government’s implementation of the Dublin regulations, under which asylum seekers must have their application heard in the EU country of first arrival. No doubt said with good intentions, the effect was to massively encourage the flow of migrants to Germany via land and sea borders elsewhere.

14. Of the 1.27 million applications for asylum lodged last year in the EU, less than one third came from Syria (362,000 or 28%). Afghans were the second largest group, 175,000 or 14% and Iraqis constituted 10% or 122,000. Significant numbers have also come from countries where there is no armed conflict – applications from Kosovars have reached 72,000 and Albanians – 66,000. See Figure 2 below.

Figure 2. Top Ten Asylum Applicants in EU by Nationality, 2015. Eurostat.

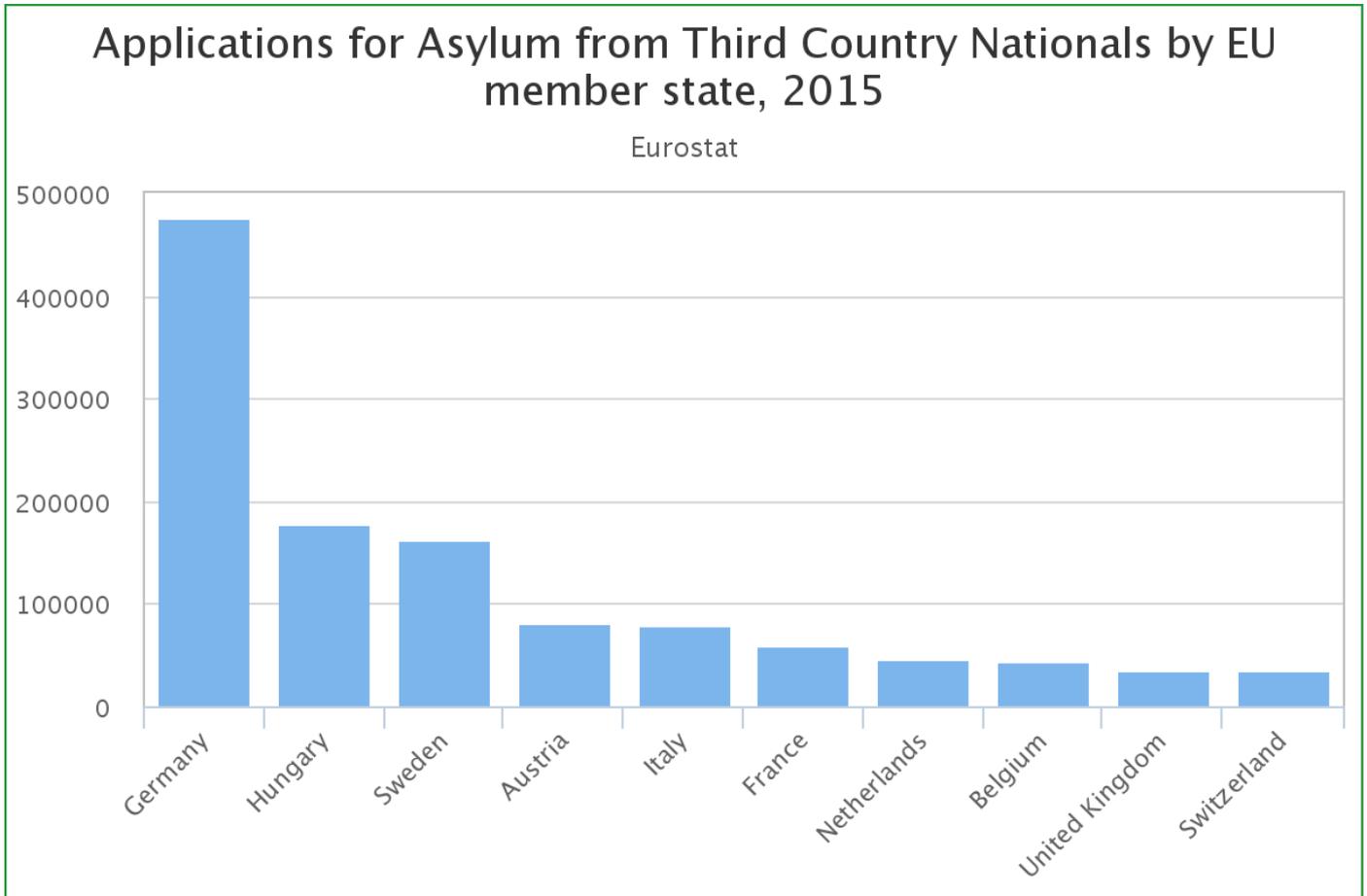


5 In 2014 627,770 applications for asylum were lodged in an EU member state. Eurostat, Asylum and First Time Asylum Applicants by Citizenship, Age and Sex, Monthly Data, Accessed January 2016.

15. Of the applicants, 72% were male and 53% aged between 18 and 34.

16. The largest number of applications was lodged in Germany, followed by Hungary and then Sweden as figure 3 below demonstrates.

Figure 3. Applications for Asylum from Third Country Nationals by EU member state, 2015. Eurostat.

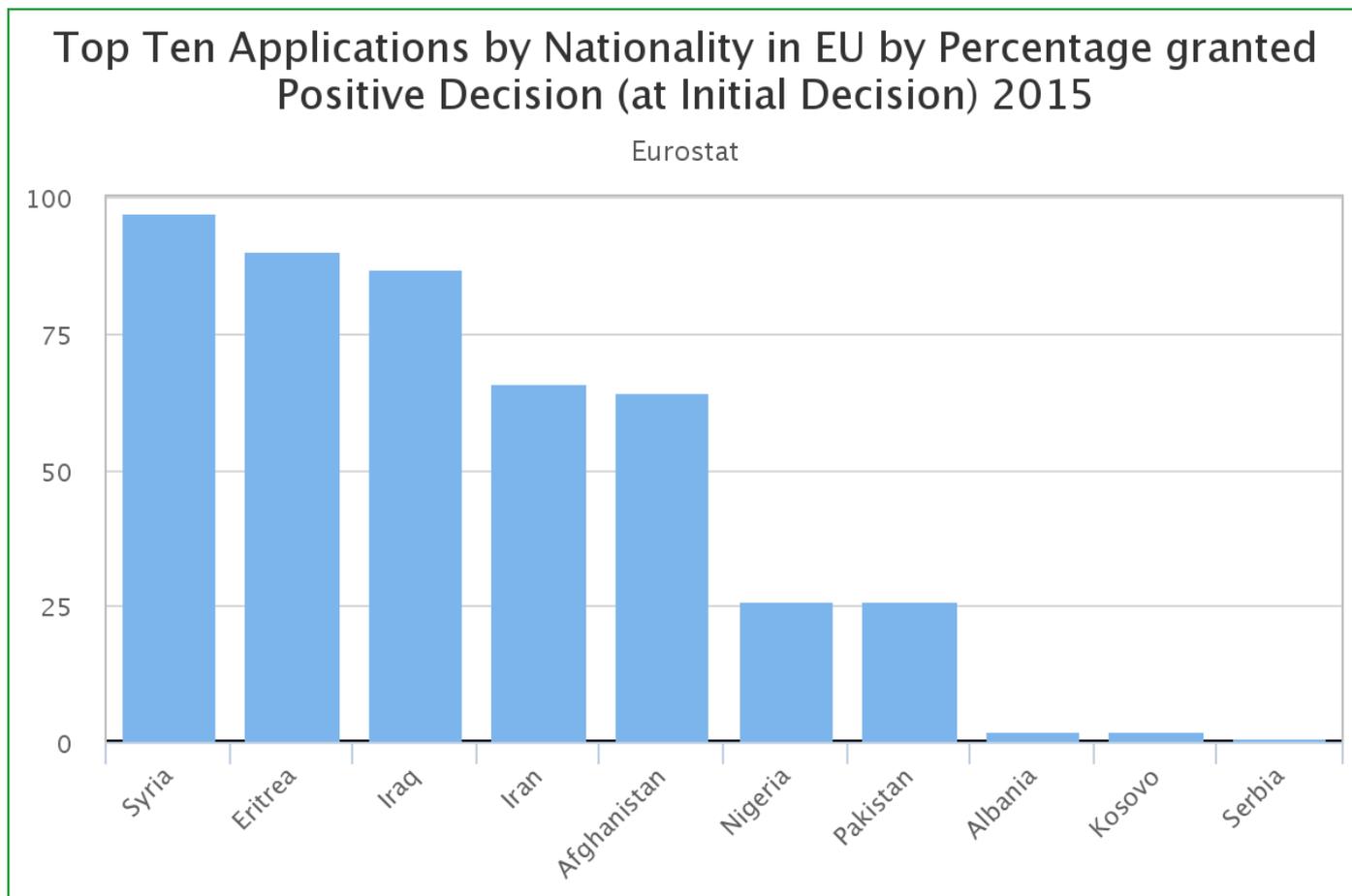


17. Of the 493,000 initial decisions on asylum applications in 2015, 53% (259,000) were positive decisions (refugee status and humanitarian protection) and 47% (234,000) were rejected.<sup>6</sup>

18. The protection rate varies by nationality. Of the 150,000 Syrian nationals that have received an initial decision in 2015, 97% have been granted refugee status or humanitarian protection. The protection rate of Eritreans is also very high, 90% granted protection while 87% of Iraqis and 64% of Afghan nationals have been granted protection. This compares to just 2% of applicants from Albania and 2% from Kosovo.

6 Eurostat, First Instance Decisions on Applications by Citizenship, Age and Sex, Quarterly Data, Accessed February 2016.

Figure 4. Top Ten Applications by Nationality in EU by Percentage granted Positive Decision (at Initial Decision) 2015, Eurostat.



19. The 234,000 failed asylum seekers all have a right to appeal their decision and while this appeal is pending member states cannot remove failed applicants.

20. The characteristics of those who arrive in the EU and claim asylum is constantly changing as factors encourage and discourage movements of certain nationalities. For example, the application rate of citizens from Balkan nations fell once German authorities fast tracked applications with the outcome that less than 1% were granted asylum. There now appears to be an increase in applications from nationals of North African countries. The First Vice President of the European Commission Frans Timmermans highlighted unpublished Frontex data in an interview with the Dutch national broadcaster NOS which suggested that of the 120,000 migrants that arrived in the EU in December 2015, 60% were economic migrants who were not entitled to asylum or humanitarian protection, and cited Moroccans and Tunisians as significant flows. He suggested therefore that economic migrants be returned quickly to their home countries.<sup>7</sup>

7 NOS, 'Timmermans: meer dan helft vluchtelingen heft economisch motief', URL: <http://nos.nl/artikel/2082786-timmermans-meer-dan-helft-vluchtelingen-heeft-economisch-motief.html>. The Irish Times, 'Most fleeing to Europe are 'not refugees' EU officials says', 26-1-2016, URL: <http://www.irishtimes.com/news/world/europe/most-fleeing-to-europe-are-not-refugees-eu-official-says-1.2511133>

## Removals

21. Applicants who lose their appeals become liable to removal to their home country. However, there are a number of practical obstacles to removal.

a) Documentation and re-documentation - In order to return someone with no claim for asylum or humanitarian protection an individual must have some form of identification such as a passport or temporary travel document. Some asylum seekers deliberately destroy their passports before they arrive in the host country making it extremely difficult for them to be removed. The authorities must apply for temporary travel documentation from Embassies and Consulates of the individual's home country. In some instances, the authorities of third country nationals drag their feet in re-documenting their own citizens; this is time consuming and has implications for detention capacity. Syrian applicants know that they will be treated more favourably than others so they retain their passports. However, there is a thriving trade in forged or stolen Syrian passports as applicants of other nationalities seek to pass themselves off as Syrians. It is reasonably simple to establish whether or not an individual is Syrian by a language test. However, this remains an administrative challenge as all those who falsely claim Syrian nationality must have their identities established and be re-documented.

b) Readmission Agreements - The process of removing those with no claim for protection can be facilitated by agreements with other states that allow for the return of those migrants who are their nationals. The EU has readmission agreements with Albania, Bosnia Herzegovina, the Former Yugoslav Republic of Macedonia, Georgia Hong Kong, Macau, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine.<sup>8</sup> However, there are some key source countries with which there is no such EU agreement, namely Afghanistan, China, Democratic Republic of Congo, Iraq and Nigeria. This can complicate and slow the removal process for those who are not in need of protection.

c) Detention Capacity - There are many people who would wish to evade removal and therefore will not cooperate with the removal process. In such circumstances, member states can detain those pending removal however the capacity to detain and remove is limited by the size of their detention estates. The UK's immigration detention capacity is around 3,500, one of the largest in Europe. France has an estimated capacity of 1,700 and Germany 1,500. The three largest countries in Europe therefore have a detention capacity of just 6,700.

22. There is not yet data available from Eurostat on the number of third country nationals ordered to leave in 2015 however the EU has published data on the number of people returned since September 2015. Italy returned 153 migrants in October 2015 on four separate flights to Egypt and Tunisia and 683 migrants have been returned on joint Frontex flights from various member states. In total six flights have returned migrants to Nigeria, three to Albania, three to Kosovo, two to Georgia, two to Pakistan and one flight to Armenia.<sup>9</sup>

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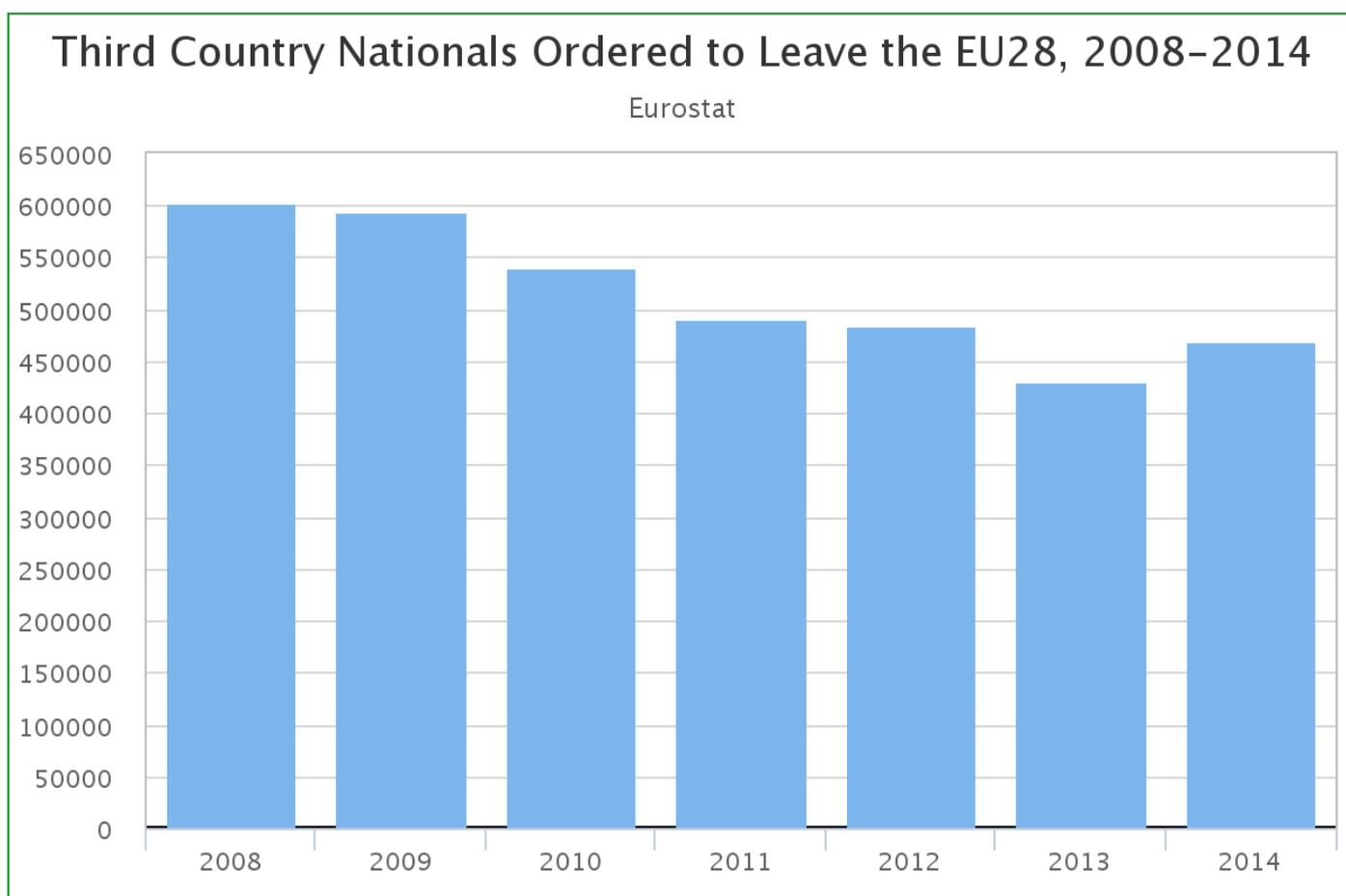
8 The UK has bilateral readmission agreements with Algeria, South Korea and Switzerland. It also has 'memoranda of understanding' for the return of nationals found illegally in the UK from Afghanistan, Angola, Burundi, China, Democratic Republic of Congo, Guinea, Iraq, Kuwait, Malaysia, Nigeria, Rwanda, Sierra Leone, Somaliland, South Sudan and Vietnam.

9 European Union, Returns since September, Updated 4 February 2016, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_returns\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_returns_en.pdf)

23. The Council of the European Union has called on member states to 'reinforce their pre-removal detention capacity'<sup>10</sup> meanwhile the European Commission suggests that 'member States should explore new alternatives to detention and the use of less coercive measures, as appropriate. This could include placement of irregular migrants under electronic surveillance or the use of semi-closed facilities.'

24. However, the European Union has a poor track record of removing those with no right to remain. A 2015 European Commission Communication to the Parliament and the European Council states that in 2014 less than 40% of illegal migrants that were ordered to leave the EU actually departed.<sup>11</sup> Between 2008 and 2014, 3.6 million third country nationals (non-EU) were ordered to leave the EU (not all of whom would have been failed asylum seekers, some might have overstayed their visas). If indeed just 40% departed, then around 2.2 million third country nationals remain in the EU despite being ordered to leave.<sup>12</sup>

Figure 5. Third Country Nationals Ordered to Leave the EU28, 2008-2014. Eurostat.



25. The European Commission has committed to enhancing the effectiveness of the returns programme for those with no right to remain such as failed asylum seekers. Member states will seek to increase the number of illegal migrants who return voluntarily on the grounds that this is far more cost-effective.

10 Council of the European Union, 'Council conclusions on the future of the return policy', October 2015, URL: [http://www.consilium.europa.eu/press-releases-pdf/2015/10/40802203341\\_en\\_635799226800000000.pdf](http://www.consilium.europa.eu/press-releases-pdf/2015/10/40802203341_en_635799226800000000.pdf)

11 European Commission, Communication from the Commission to the European Parliament and to the Council, EU Action Plan on Returns, November 2015, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication\\_from\\_the\\_ec\\_to\\_ep\\_and\\_council\\_-\\_eu\\_action\\_plan\\_on\\_return\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf)

12 Eurostat, Third Country Nationals Ordered to Leave, Annual Data, Accessed November 2015.

However, the Commission acknowledges, crucially, that ‘the success of voluntary return schemes also depends on how credible the prospect of forced return is. Migrants who often paid their lives’ savings to smugglers to bring them to Europe may not be ready to take up assisted voluntary return unless they see that they will be returned anyway. When migrants do not go back voluntarily, return must be enforced’ (Emphasis in original).<sup>13</sup> With just 683 forced returns between October and December, there is no credible prospect of forced return reducing the incentive for people to leave voluntarily.

26. The European Commission has proposed the following measures to increase returns, which are all sensible measures although appear not to be having any immediate effect:

- Enhancing voluntary returns
- Stronger enforcement of the EU Returns Directive
- Enhanced sharing of information to enforce returns
- Strengthening the role and mandate of Frontex to increase Joint Returns Operations and identify and re-document migrants
- Develop an integrated system of return management connecting all agencies
- Enhanced cooperation with third countries on readmission agreements including enforcement of existing agreements and opening new negotiations
- Using EU leverage to increase returns and readmissions.<sup>14</sup>

## Chapter 3 - The European Response

27. The EU has agreed various measures to address the issue. These initially focused on managing the flow of people into Europe however, as numbers escalated, attempts were made to address and minimise that flow, so far with little apparent effect. This section outlines some of the major initiatives agreed to address the crisis.

### The Hotspot Approach

28. In an attempt to manage the flow of people entering the EU at key entry points, the European Commission developed what it describes as the ‘Hotspot approach’, currently being implemented in Greece and Italy, both of which have seen large numbers enter their territory by sea from Turkey and North Africa. A hotspot is an area of the external EU border facing extraordinary migratory pressure. The hotspot approach allows member states to request additional resources in order to address the issues associated with these extraordinary pressures.

29. Upon request, hotspots will be run by various EU agencies including the European Asylum Support Office, Frontex (the EU Border Agency), Europol (EU Police Cooperation Unit) and Eurojust (the EU Judicial Cooperation Unit) and will identify, register and fingerprint those entering from outside Europe. Those seeking asylum will be separated ‘from those who are not in need of protection’ and Frontex will

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13 European Commission, Communication from the Commission to the European Parliament and to the Council, EU Action Plan on Returns, November 2015, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication\\_from\\_the\\_ec\\_to\\_ep\\_and\\_council\\_-\\_eu\\_action\\_plan\\_on\\_return\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf)

14 European Commission, Communication from the Commission to the European Parliament and to the Council, EU Action Plan on Returns, November 2015, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication\\_from\\_the\\_ec\\_to\\_ep\\_and\\_council\\_-\\_eu\\_action\\_plan\\_on\\_return\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf)

assist member states in returning the latter to their countries of origin - at least in theory.

30. EU staff have been deployed in Greece and Italy in order to support local agencies to address flows. At present there are 68 additional staff in Italy and 390 in Greece.<sup>15</sup>

31. Crucially, however, the hotspot approach is designed to be in support of national arrangements for dealing with asylum seekers and illegal entrants so the capacity to address extraordinary flows remains reliant on existing national structures. Statewatch, an organisation that monitors Justice and Home Affairs, Security and Civil Liberties in the EU, highlight that:

*“The “Hotspot” approach does not provide reception facilities to its host Member States but builds on their existence and functioning. The expert teams deployed under the “Hotspot” approach support the work of the host Member State in its national reception facilities and pre-removal centres (for those not in need of protection). The existence and functioning of national reception facilities and pre-removal centres is therefore necessary for the successful implementation of the “Hotspot” approach.”<sup>16</sup>*

32. However, at a Justice and Home Affairs Council meeting in November, the Presidency (currently held by Luxembourg) proposed that processing centres be set up in other areas in support of hotspot resources in Greece and Italy.<sup>17</sup>

33. At present there is capacity to receive 2,250 migrants in Italy (300 in Pozzalo, 300 in Porto Empedocle and 400 in Trapani and 300 in Augusta on the island of Sicily, 650 on the island of Lampedusa, and 300 in Taranato on mainland Italy) and 1,840 in Greece (1,480 on the island of Lesbos, 110 on Chios, and 250 on Samos).<sup>18</sup> Not all of the hotspots are operational yet, just three of the six Italian hotspots are operational at present.<sup>19</sup>

34. It is not yet clear how the hotspots will be able to cope with the number of people crossing. Between January and November last year 726,000 people were detected crossing the Eastern Mediterranean route (Turkey to Greece, Bulgaria and Cyprus), compared to 50,830 in 2014.<sup>20</sup> Many then leave EU territory through Northern Greece and then re-enter on the Western Balkan route (typically into Hungary and then on), in 2015 667,000 illegal border crossings were recorded on this route.

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15 European Commission, State of Play Hotspot capacity, 4 February 2016, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf)

16 Statewatch, ‘Explanatory Note on the Hotspot Approach, July 2015, URL: <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>

17 Presidency of the Council of the European Union, ‘Extraordinary JHA Council – The Presidency proposes the creation of ‘processing centres’ in addition to hotspots, in order to handle asylum seekers, especially for the Balkans’, November 2015, URL: <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/11/09-conseil-jai-extra/index.html>

18 European Commission, State of Play Hotspot capacity, 4 February 2016, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf)

19 Mr Khalid Chaouki, Member of the Italian Chamber of Deputies, giving evidence to the UK Parliamentary Home Affairs Committee, 26 January 2016, URL: <http://www.parliamentlive.tv/Event/Index/0dca3772-f15a-434d-ae59-1ec153372066>

20 Frontex, Migratory Routes Map, URL: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>

35. The other main route is the Central Mediterranean route (North Africa to Italy and Malta). In 2014, Frontex recorded 170,760 illegal border crossings on this route and 144,300 in the first eleven months of 2015.<sup>21</sup>

### Legislation on Emergency Relocation of Asylum Seekers

36. In September 2015 member states agreed to a Commission proposal that asylum seekers be relocated across the Union in order to alleviate the pressures on member states most affected by the migrant crisis, Greece and Italy.<sup>22</sup> A total of 160,000 migrants in need of protection will be relocated across the EU over the next two years.<sup>23</sup>

37. This represents a derogation from existing legislation whereby asylum seekers should have their asylum claims assessed in the first EU member state of arrival (The Dublin Regulations). Under the agreed system 160,000 migrants who have registered in Greece and Italy are to be redistributed across participating EU member states with the purpose of relieving pressure.<sup>24</sup> Those that will be redistributed are those with nationalities that have EU-wide asylum recognition rates of 75% or higher.<sup>25</sup> Relocated migrants are then to be registered in the member state and their claim for asylum processed there. Member states will receive €6,000 per relocated person.

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21 Frontex, Migratory Routes Map, URL: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>

22 Britain, Ireland and Denmark have an opt-out although Ireland and Denmark have chosen to opt in to this Commission proposed agreement.

23 On 14 September 2015 the Extraordinary Justice and Home Affairs Council agreed to relocate 40,000 asylum seekers from Italy and Greece and on 22 September it was agreed to relocate a further 120,000.

24 See here: <http://data.consilium.europa.eu/doc/document/ST-11161-2015-INIT/en/pdf> and here: <http://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf>

25 European Commission, Fact Sheet – Refugee Crisis - Q and A on Emergency Relocation, September 2015, URL: [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)

38. So far, the destinations for relocation of 66,000 migrants have been decided, as in Table 1 below.<sup>26</sup>

Table 1. Relocation Scheme agreed to date, Numbers to be allocated from Italy and Greece to Member States.

	Italy	Greece	TOTAL
Austria	462	1491	1953
Belgium	579	1869	2448
Bulgaria	201	651	852
Croatia	134	434	568
Cyprus	35	112	147
Czech Republic	376	1215	1591
Estonia	47	152	199
Finland	304	982	1286
France	3064	9898	12962
Germany	4027	13009	17036
Hungary	306	988	1294
Latvia	66	215	281
Lithuania	98	318	416
Luxembourg	56	181	237
Malta	17	54	71
Netherlands	922	2978	3900
Poland	1201	3881	5082
Portugal	388	1254	1642
Romania	585	1890	2475
Slovakia	190	612	802
Slovenia	80	257	337
Spain	1896	6127	8113
Sweden	567	1830	2397
TOTAL	15600	50400	66000

39. As of 19 January 2016, member states have made available 4,522 places (of 160,000) yet only 481 asylum seekers have actually been relocated, 279 from Italy and 202 from Greece.<sup>27</sup>

40. While the EU has successfully agreed mechanisms that could, in theory, go some way in addressing the pressures placed on member states, there are serious question marks about how effective they will be in practice. Additional resources in hotspots can only do so much faced with the flow that has been

<sup>26</sup> [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)

<sup>27</sup> Member States; Support to Emergency Relocation Mechanism, Communicated as of 4 February 2016, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)

witnessed this year and, crucially, the system still depends on local capacity and infrastructure which was never designed to cope with flows in the tens of thousands a month. Thus far only a tiny number of migrants have been relocated under the emergency relocation scheme and on 30 November 2015 the Prime Minister of Slovakia indicated that legal action will be taken to contest the plan as Slovakia did not vote in favour of the emergency measures.<sup>28</sup>

## Border Controls

41. In order to control the movement of third country nationals many EU member states have introduced border controls on a temporary basis. The European Commission has notification of border controls from Norway, Sweden, Denmark, France, Austria and Germany.<sup>29</sup> Reports suggest additional border controls are in place between Hungary, Croatia, Slovakia, and Serbia.<sup>30</sup>

42. Regulation 562/2006 known as the Schengen Borders Code allows for temporary border controls to be established for 30 days, which can be renewed for up to 30 day periods.<sup>31</sup> These controls can be introduced immediately if the member state is facing exceptional circumstances. Importantly, the decision to reintroduce border controls is taken by member states and while the Commission can issue an opinion on the necessity of border controls it cannot veto a decision taken by a member state to introduce border controls where deemed necessary.<sup>32</sup>

## Coordination with Third Countries

43. This crisis cannot be solved by the EU alone but will require considerable cooperation with African nations from where many migrants are leaving as well as with Turkey which is currently hosting two million Syrians who have fled the war and from where huge numbers have crossed into the EU.

a) Valletta Conference - The European Council held a summit of European and African leaders at Valletta, Malta in November 2015. It was agreed that European and African leaders would work together to enhance the development benefits of migration, address poverty, instability and crises, promote legal channels for migration, provide humanitarian aid for displaced people within Africa, prevent irregular migration and tackle the issue of smuggling and people trafficking, and strengthen returns, readmission and reintegration.<sup>33</sup> It was widely agreed that an EU fund of €1.2 billion to tackle the root causes of migration was insufficient yet there was very little enthusiasm from EU member states to contribute to it.

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28 Reuters, Slovakia pushes ahead with legal action over EU migrant quotas, 30 November 2015, URL: [www.reuters.com/article/europe-migrants-slovakia-idUSL1N1200LL20150930#Z3cPJjKBpJvJyQTS.99](http://www.reuters.com/article/europe-migrants-slovakia-idUSL1N1200LL20150930#Z3cPJjKBpJvJyQTS.99)

29 European Commission, Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq. of the Schengen Borders Code, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)

30 BBC News, 'EU seeks more controls for Schengen Borders', 25-1-2016 URL: <http://www.bbc.com/news/world-europe-35400495>

31 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R0562&from=EN>

32 European Commission, Temporary Reintroduction of Border Control, URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm)

33 European Council, Valletta Summit on Migration, 11-12 November 2015 – Action Plan and Political Declaration, URL: [http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/ACTION\\_PLAN\\_EN\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/ACTION_PLAN_EN_pdf/)

b) Agreement with Turkey - In the same month the EU and Turkey reached an agreement on a number of measures designed to address the migrant crisis. In return for Turkey's accession process being 're-energized', plus €3 billion (£2.1 billion) in additional support and a commitment to the lifting of visa requirements for Turkish nationals travelling to the Schengen zone, the Turkish authorities have agreed to stem the flow of illegal migrants to the EU and to improve the conditions of the two million Syrians currently in Turkey.<sup>34</sup> There were reports that, in addition to this, Germany wanted 400,000 Syrian migrants currently in Turkey to be resettled in the European Union where they could apply for asylum.<sup>35</sup>

44. There has been little detail on how exactly Turkey would be able to stem the flow of migrants who cross by sea to Greece. UNHCR data on the number of sea arrivals from Greece to Turkey show that average daily crossings fell to 3,500 a day in December from a peak of 7,000 in October, however it is likely that the principle cause of this reduction is weather conditions rather than action by Turkish authorities.

## Chapter 4 – How will the Crisis Develop?

### Future Arrivals in the European Union

45. The European Commission has estimated that, in the period Quarter 4 2015 to the end of 2017, an additional 3 million irregular migrants will enter the EU or 3,600 a day for the next two years. This is based on the assumption that flows will continue on the current scale throughout 2016 before slowing. The Commission anticipates that flows will gradually normalise in 2017 for reasons that are by no means clear.<sup>36</sup>

46. The Commission does however note that 'a sustained further rise in the influx cannot be excluded' if the already complex situations in Syria and elsewhere deteriorate further.<sup>37</sup>

### Possible solutions

47. It is important to distinguish economic migrants from those in genuine need of protection and return them to their countries of origin. Failure to achieve this will mean a large and continuing inflow from the many developing countries in Sub-Saharan Africa and Asia as well as Balkan nations whose current standard of living is far below that of Western Europe.

48. Unfortunately, it does not seem that this is possible at present. Returns have so far been minimal and so long as there is no credible threat of removal, migrants with no genuine claim for asylum will not go home voluntarily and indeed many more such migrants will be encouraged to make the journey. It seems that there will have to be further changes to the policy/legal framework.

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34 EU International Summit, Meeting of heads of state or government with Turkey - EU-Turkey statement, 29 November 2015, URL: <http://statewatch.org/news/2015/nov/eu-turkey-statement-29-11-15-2.pdf>

35 BBC News, EU migration deal with Turkey is fraught with risk, 2<sup>nd</sup> December 2015, URL: <http://www.bbc.com/news/blogs-eu-34975512>

36 European Commission, Autumn 2015 Forecast, Box 1.1: A first assessment of the macroeconomic impact of the refugee influx, 9<sup>th</sup> November 2015, URL: [http://ec.europa.eu/economy\\_finance/eu/forecasts/2015\\_autumn/box1\\_en.pdf](http://ec.europa.eu/economy_finance/eu/forecasts/2015_autumn/box1_en.pdf)

37 Ibid, p. 48.

49. The Danish Prime Minister has called for a debate on possible changes to the Refugee Convention itself as a means of addressing the extraordinary flow into Europe. This would represent fundamental reform of the principles that underpin the asylum framework in the EU. Prime Minister Rasmussen highlighted two problems with the current legal framework that he suggested should be altered, first that receiving countries are not able to send asylum seekers back to the non-EU safe country from where they came and cited the huge number of Syrian asylum seekers who had entered Europe after living in safety for some time in Turkey. He also suggested that the right of refugees to family reunification was problematic, presumably due to the large secondary flow that this would cause.<sup>38</sup> The President of Finland, Sauli Niinistö has also said that the Refugee Convention was borne out of different circumstances and suggested that were the rules to be drawn up today a different, and more 'stringent' legal framework might result.<sup>39</sup>

50. Reports suggest that in order to address the crisis member states may suspend Schengen rules for two years under Article 26 of the Schengen Code. Member states have the power under Article 26 to prolong border controls for periods exceeding 30 days. The Commission can issue an opinion on the necessity or proportionality of border control extension however cannot veto member states' decisions. The Commission is reported to have requested that Schengen rules remain in place. It remains a possibility that Greece may leave the Schengen zone making it easier for the external borders of the EU to be policed by removing the problematic Greek Turkish external sea border from the external borders of the Schengen zone.<sup>40</sup>

51. The European Commission is reportedly planning to amend the current Dublin Regulations (604/2013<sup>41</sup>) which require asylum seekers to claim asylum in the first EU country that they enter in favour of a permanent relocation scheme under which member states would be required to accept a share of applicants. No draft proposals have yet been put forward. The UK would have the option of opting out of amended regulations but under normal circumstances would continue to be subject to the previous regulations, allowing the UK to retain the right to send back asylum seekers to the first country they have entered where that country can be established. However, it is possible that the UK might effectively be forced out of the existing Dublin regulations if the government opts out of amended regulations. The Council can, by qualified majority voting, render the existing legislation inoperable under these circumstances.

52. Below are some additional suggestions of possible ways forward with a brief reference to the legal position with regard to derogations from existing procedure.

#### a) Suspend Appeal Rights

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38 'Denmark wants Geneva Convention debate if Europe cannot curb refugee influx', Reuters, 28 December 2015, URL: <http://www.reuters.com/article/us-europe-migrants-denmark-idUSKBN0UB10020151228>

39 YLE, 'President Niinistö: Migrants pose challenge to western values', 3rd February 2016, URL: [http://yle.fi/uutiset/president\\_niinisto\\_migrants\\_pose\\_challenge\\_to\\_western\\_values/8646204](http://yle.fi/uutiset/president_niinisto_migrants_pose_challenge_to_western_values/8646204)

40 The Times, 'Europe to end passport-free travel as migrant crisis grows', 26-2-2016, URL: <http://www.thetimes.co.uk/tto/news/world/europe/article4674529.ece>

41 See here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

A possible way forward would be for appeal rights to be suspended. It is not generally realised that the Refugee Convention itself does not require states to provide an appeals process for those refused asylum. However, Article 39 of the EU Asylum Procedures Directive (2005/85) states that:

“Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for asylum”<sup>41</sup>

If it is not possible or appropriate to implement a blanket ban on appeal rights then additional options are available, as per below.

#### b) Ministerial Certification

UK legislation allows for the removal of foreign national offenders in cases where Ministers have certified that removal will not breach UK human rights commitments, with any appeal lodged from the country of origin. The Immigration Bill currently going through Parliament extends this to cover all non-asylum removal cases. This could be a model that could be replicated with regard to appeals against decisions to refuse asylum across Europe. Applicants would be removed to their home country in the event of a failed asylum application if a Minister had certified that human rights commitments would not be breached by the removal. Applicants could then appeal from their home country. This would speed up the appeals process as well as discouraging vexatious appeals.

#### c) Application of different procedures by countries of origin of applicants according to their historic success rate

Applicants from certain countries have extremely low rates of asylum grants, for example, this year, just 2% of Kosovar nationals and 2% of Albanian nationals have been granted asylum across the European Union. It might be possible to apply different procedures to applicants who have extremely low grants such as the requirement that an appeal be heard from their home country. Of course, only those with extremely low success rates would be subject to such automatic out of country appeals. Alternatively, this procedure could be applied only to those on the European Union’s Safe Country List.

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42 Council Directive 2005/85/EC, URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

53. The legal position on the options outlined above is unclear. The relocation scheme detailed earlier at paragraphs 37-41 already represents a derogation from standard procedure for which the legal basis is presumably Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) below.

“In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.”<sup>42</sup>

54. Suspending appeal rights or amending the appeals process would require the Commission to propose a temporary suspension or amendment to the Asylum Procedures Directive which must then be passed by a simple majority in the European Parliament and by a double majority in the European Council –that is by at least 55% of member states representing at least 65% of EU citizens.

11th April 2016

## Annex A – Legal Position On Refugees And Subsidiary Protection

**1. The United Nations Convention And Protocol Relating To The Status Of Refugees, URL: <http://www.unhcr.org/pages/49da0e466.html>**

The international treaty, signed by all EU member states, which establishes the basis for the system of asylum.

The Convention defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.”

The Convention includes the principle of non-refoulement. The Convention states that “no contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion nationality, membership of a particular social group or political opinion”.

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43 European Union, The Treaty on the Functioning of the European Union, URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

If an application for asylum is made in a country, that country has a legal obligation to assess that claim and only if that claim is decided to be unfounded can an individual be returned to their country of origin.

**2. Treaty on the Functioning of the European Union, URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>**

This treaty is one of the primary treaties of the European Union and lays out the scope of EU law. Article 78 of this treaty forms the basis for secondary EU legislation which codifies in EU law the Refugee Convention as well as establishing minimum standards in the asylum and protection systems of member states.

**Article 78**

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- a. a uniform status of asylum for nationals of third countries, valid throughout the Union;
- b. a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection
- c. common system of temporary protection for displaced persons in the event of a massive inflow;
- d. common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- e. criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- f. standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- g. partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

**3. Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (commonly known as the Recast Asylum Procedures Directive), URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>**

This piece of secondary legislation is one of the main Directives (recast) that fully codifies the Refugee Convention in EU law. It essentially codifies minimum standards for granting refugee status, which go

beyond those standards required by the Refugee Convention. It covers issues such as the application process, the right to legal representation, and the concept of safe countries, etc. Article 46 relates to the right to an effective appeal and states:

*1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for international protection, including a decision: (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status; (ii) considering an application to be inadmissible pursuant to Article 33(2); (iii) taken at the border or in the transit zones of a Member State as described in Article 43(1); (iv) not to conduct an examination pursuant to Article 39; (b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28; (c) a decision to withdraw international protection pursuant to Article 45.*

### **Article 39 - The right to an effective remedy**

1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

**4. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (replaced Directive 2004/83/EC, commonly known as the Asylum Qualification Directive), URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN>**

This piece of secondary legislation is where the qualification procedures for asylum and international protection are codified in EU law.

Articles 4-12 cover the assessment of an application for protection, qualification for refugee status, exclusion from refugee status and cessation of status. Articles 13 and 14 cover the granting of refugee status and revocation or refusal to renew refugee status. Article 15 - 19 cover qualification for subsidiary protection, exclusion from or cessation of subsidiary protection status, the granting of protection and revocation or refusal to renew status. An individual qualifies for subsidiary protection if they are at risk of serious harm in their home country, rather than persecution:

### **Article 15 - Serious harm**

Serious harm consists of:

- a. the death penalty or execution; or
- b. torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

- c. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Chapter VII outlines the content of international protection. Article 21 outlines protection from refoulement, Article 23 (below) requires that member states maintain family unity, Article 24 (below) outlines the residence permits that must be issued to those granted protection and the duration of those permits, Article 25 covers travel documents, Article 26-30 and 32 - 34 cover the right to employment, education, welfare, healthcare, accommodation and integration services and the right to free movement in the member state. Article 31 covers unaccompanied minors.

### **Article 23 - Maintaining family unity**

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.
3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.
4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

### **Article 24 - Residence permits**

1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.

2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.

**5. Charter of Fundamental Rights of the European Union, URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>**

**Article 47 - Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

**Article 51 – Field of Application**

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

**6. European Convention on Human Rights, URL: [https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf)**

**Article 5 - Right to Liberty and Security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

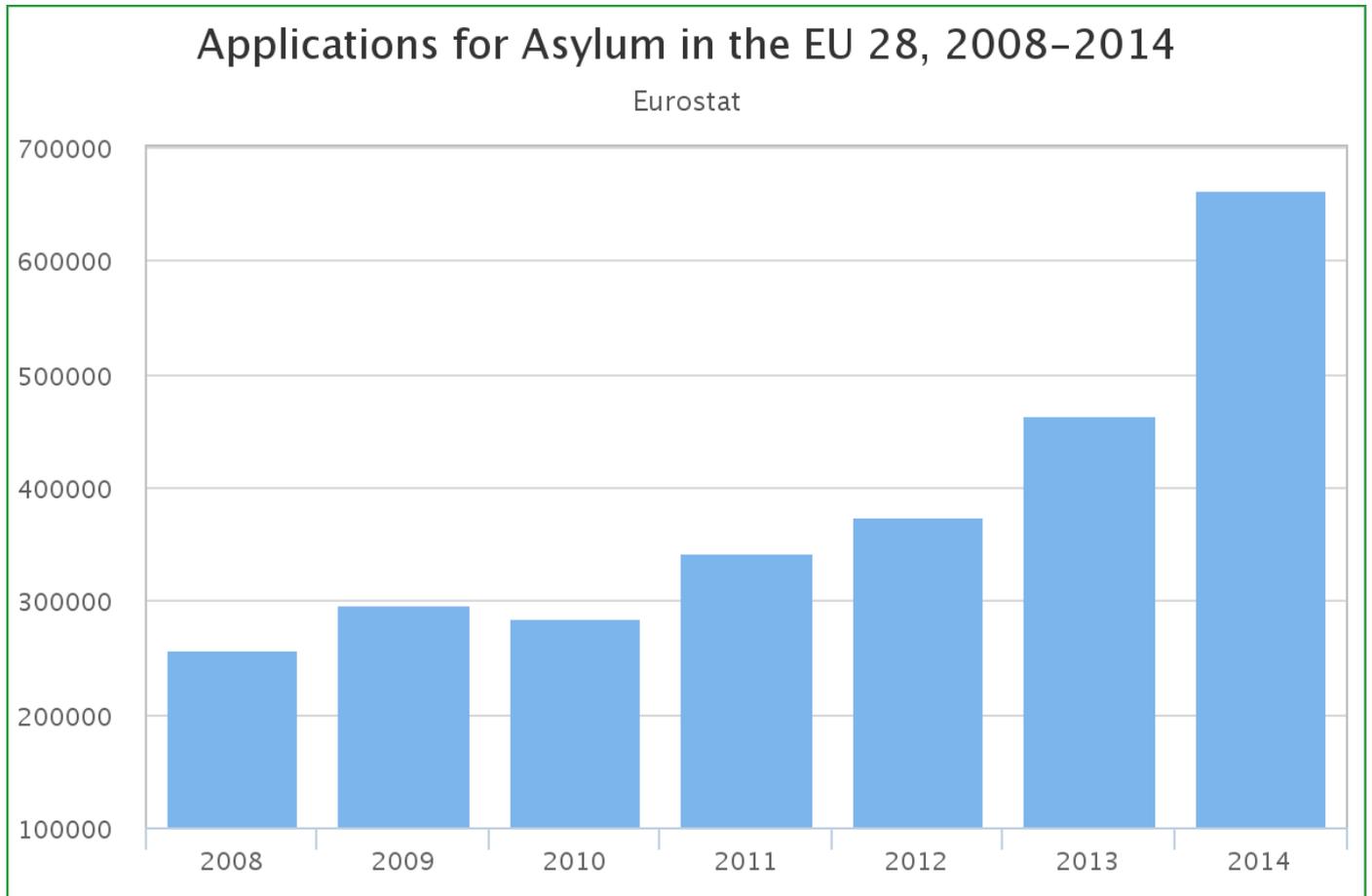
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily

## Annex B – Applications and Outcomes for Asylum 2008-2014

B1. The number of applications in 2015 – 1.2 million – is significantly higher than in previous years. As Figure A shows.

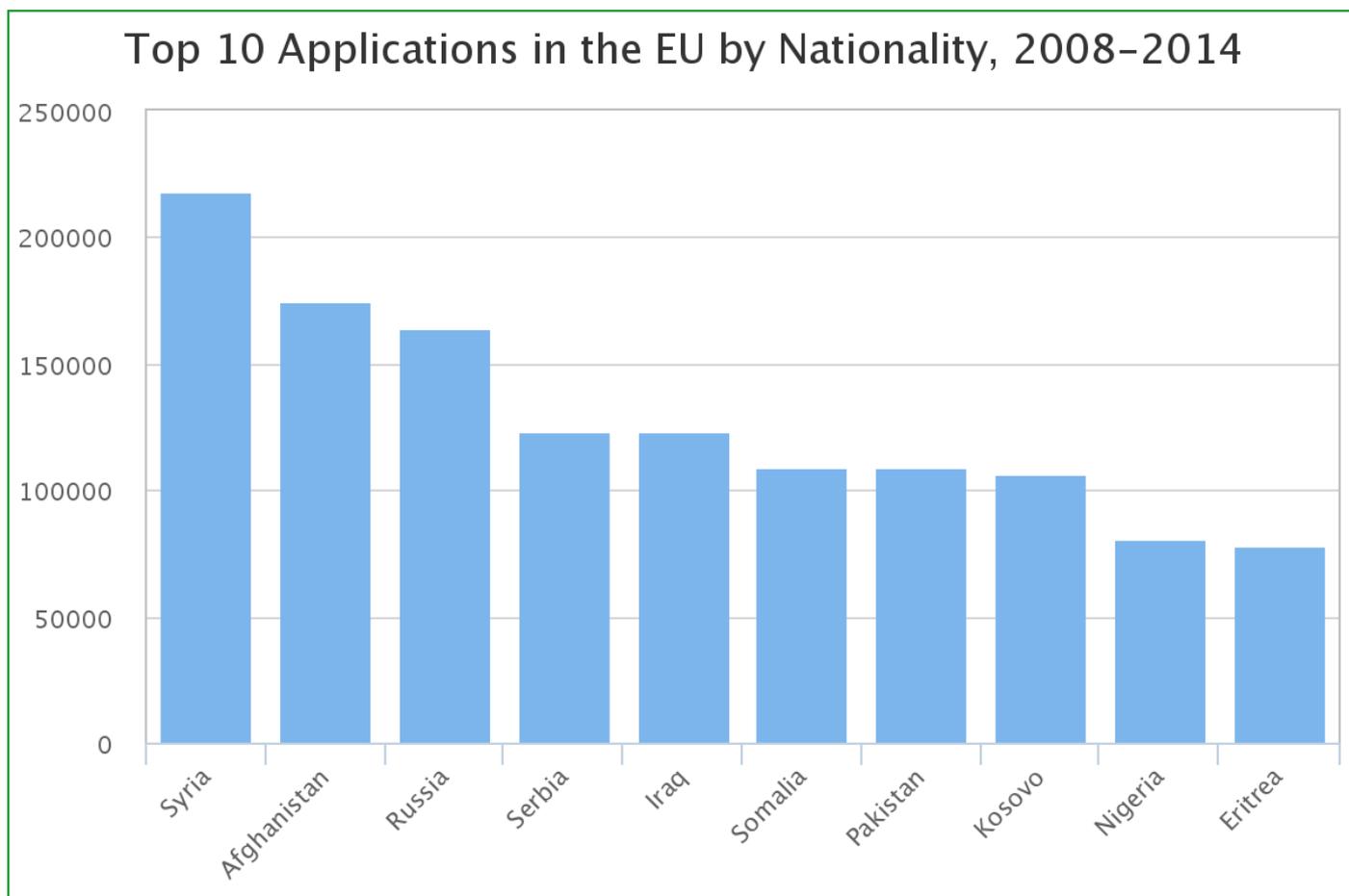
Figure A. Applications for Asylum in the EU 28, 2008-2014. Eurostat.<sup>44</sup>



<sup>44</sup> Eurostat, Asylum and First Time Asylum Applicants by Citizenship, Age, Sex, Annual Aggregated Data, Accessed: November 2015.

B2. Syrian nationals represent the largest number of asylum applicants in the EU between 2008 and 2014, although over half of Syrian applications were lodged in 2014 alone. Figure B2 below shows the top 10 nationalities of asylum applicants in the EU between 2008 and 2014.

Figure B. Top 10 Applications in the EU by Nationality, 2008-2014



B3. Between 2008 and 2014 1.9 million asylum applications from third country nationals were decided by member states, of which 68% were rejected and 32% received a positive outcome.

B4. Final decisions on applications show the outcome of final decision at appeal. Between 2008 and 2014 805,000 final decisions were taken (at appeal), 80% of which were rejected and 20% of which were overturned and therefore granted either refugee status or humanitarian protection. Thus the overall grant rate was 40%.