

HUMAN RIGHTS AT INTERNATIONAL BORDERS:
A focus on OHCHR's Recommended Principles and Guidelines
Geneva, 23 March 2014

1. Introduction

- The EU is firmly committed to the promotion and protection of the human rights of international migrants. Our policies are founded on the principles of non-discrimination, proportionality, *non-refoulement*, access to justice and the best interests of the child.
- The importance of fundamental rights is taken into account in our legislative work and policy initiatives, in our advocacy towards Member States, in capacity-building, and in our priorities for infringement actions against Member States.
- Balancing States' interests, such as security at the borders and responding to trafficking and smuggling of human beings, against the protection of human rights is indeed a challenge.
- Our border management, migration and asylum instruments are intended to address this challenge. The application of these instruments is subject to the EU Charter of Fundamental Rights.

2. Recommended Principles and Guidelines on Human Rights at International Borders

- The Recommended principles and guidelines prepared by Office of the Human Rights Commissioner (OHCHR) offer valuable guidance as to the practical application of human rights at international borders. The principles on which these guidelines are based, namely: (1) primacy of human rights, (2) non-discrimination and (3) protection are reflected in EU law and in particular, in the EU Charter of Fundamental Rights.

3. Rights of the Child

- We welcome the fact that the rights of the child constitute an element which features prominently in these guidelines. At the European Commission we promote a child-rights approach and we subscribe to the guidelines relating to the protection and welfare of children.

- Children require special attention from their arrival at our borders, during their stay and eventually, in the case of return. Each decision affecting a child must be taken on a case-by-case basis with the best interests of the child being the guiding principle.
- Children need to be promptly identified and their needs must be assessed. Any person claiming to be a child should indeed be treated as such.
- Additional safeguards are provided for children, in particular unaccompanied minors, as regards access to international protection.

4. More specifically on the recommended principles and guidelines

Guidelines 1 (promotion and protection of human rights), guideline 2 (legal and policy framework) and guideline 3 (capacity building)

Guideline 2: Legal and policy framework

- EU law on border management, migration and asylum requires that measures taken in these areas are carried out in full respect of the protection of human rights, in accordance with the Charter.
- We agree that irregular entry and stay should not be criminalised, and the Court of Justice of the European Union has been an important driver in this regard.
- We agree that access to justice and effective remedies need to be guaranteed.
- We also agree that shipmasters should not be subject to criminal penalties for the sole reason of having rescued persons in distress and brought them to safety; we encourage EU Member States to make use of the humanitarian clause provided for in the directive defining facilitation of entry, transit and stay in EU Member States.

Guideline 1: Promotion and protection of human rights

- We recognise the importance of involving civil society; the Consultative Forum of Frontex, the European border control agency, made up of 15 international organisations and NGOs, and the office of the Frontex Fundamental Rights Officer are concrete examples of how civil society can be directly involved to

ensure that human rights considerations are integrated in border management practices.

- We agree to the importance of having a systematic reporting mechanism; Frontex has developed something similar, namely the Serious Incident Reporting System for allegations of violations of fundamental rights during operations coordinated by the Agency, which it then follows-up with the Member State concerned. Frontex is working with the FRO to establish an effective monitoring mechanism in accordance with its founding regulation.
- The Frontex Regulation requires that in case of any violation of fundamental rights during an operation coordinated by Frontex, the Member State hosting the operation must provide for appropriate disciplinary measures. Moreover, Frontex operations should be suspended or terminated, in whole or in part, if the Executive Director considers that such violations are of a serious nature or likely to persist.

Guideline 3: Building human rights capacity

- The training of border guards in human rights is essential – border guards forming part of the European Border Guard Teams must have followed this training; human rights is an integral part of the Common Core Curriculum for border guards established by Frontex and the Fundamental Rights Agency.
- Frontex also developed a Code of Conduct for those participating in its activities and joint return operations.
- The Commission encourages the Member States to ensure proper training of staff in contact with asylum seekers. This is done in coordination with EASO.

Guideline 4: Ensuring human rights in rescue and interception

Guideline 5: Human rights in the context of immediate assistance

- In Europe, one of the most distressing and challenging problems that we face in border management is the prevention of further loss of life at sea particularly in the Mediterranean region.
- The role of Frontex in the Mediterranean is important to ensure effective border control. Even though the Agency is not a search and rescue body it can

enhance the capacity of Member States to deal with search and rescue situations through increased technical and operational support such as the operation Triton.

- Every effort must be made to avoid loss of life at sea, irrespective of the nationality or status of the person in distress. In patrolling the seas, coast guard vessels must respect international obligations on search and rescue and the principle of *non-refoulement*. This is made explicit in the Regulation establishing rules for sea operations coordinated by Frontex.
- The European Commission continuously impresses upon Member States the importance of having adequate and effective rescue services at their coasts and ensure coordination so that as many persons as possible are brought to safety.

Guideline 6: Screening and interviewing

Guideline 7: Identification and referral

- The Commission agrees to the use of temporary reception facilities at the border so that the first basic needs may be met; and we also consider that accommodation in these temporary facilities should not be long – just enough for identification, arranging transfers and referrals.
- It is important to have adequate procedures to identify individuals and assess their needs, including the need for international protection, and any particular vulnerability.
- Screening or debriefing interviews should be carried out in a manner that respects the dignity and rights of the individual.
- Those who make an application for international protection must be referred to the competent national authorities. Those authorities that are likely to receive applications for international protection such as police, border guards and immigration authorities should be trained on asylum; they must receive instructions to inform applicants as to where and how to apply for international protection.
- In addition, where there are indications that persons held in detention facilities or present at border crossing points may wish to make an application for

international protection, Member States' authorities must inform them of the possibility to do so.

Guidelines 8 (Avoiding detention) and 9 (Human rights-based return or removal):

- We agree to all the principles advocated in these guidelines. They reflect – in essence – the main messages contained in EU law on asylum and return. Detention must not be arbitrary and it must be a measure of last resort.

Asylum

- In the EU, asylum applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. It is only when proven necessary that Member States may detain an applicant.
- The grounds for detention are defined in an exhaustive manner: detention should take place only when it proves necessary, on the basis of an individual assessment and if other less coercive alternative measures cannot be applied effectively; provisions on judicial review and free legal assistance and representation are also set out in the legislation.

Return

- The EU Return Policy has positively influenced the development of national law and practice regarding voluntary departure and has been a driver for change in forced return monitoring. It contributed to a convergence — and overall to a reduction — of maximum detention periods across the EU. There has also been consistent movement towards a wider implementation of alternatives to detention across Member States.

Guideline 10: Cooperation and coordination

- We agree that in migration and border management cooperation, whether within the State or with neighbouring States or international organisations, is essential.
- Cooperation with partner countries is an essential part of the EU's response and a concrete policy instrument that can lead to tangible results with the support of our Member States e.g. Mobility Partnerships.

- Cooperation can serve many purposes ranging from search and rescue, international protection, legal migration, border surveillance, prevention of trafficking and smuggling, protection of victims of trafficking and smuggling, return and readmission as well as resettlement.

5. Implementation

- At times the implementation of EU legislation by Member States may also fail to reach the required standards. The Commission is fully committed to protect human rights in pursuit of these policy areas.
- The Commission continuously monitors the correct application of EU law. We take any allegations of non-respect of human rights very seriously and follow-up any such allegations with Member States. We work closely with Member States to ensure that EU law is properly implemented in national systems and in practice.