

# FUNDAMENTAL RIGHTS TRAINING FOR BORDER GUARDS



**TRAINERS' MANUAL**



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FOR BORDER GUARDS

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Dear reader,

Frontex is fully committed to develop and promote a shared understanding of fundamental rights among the entire European Union border-guard community and integrate this also into the cooperation with third countries (i.e. non-member countries). This shared understanding, based on the EU *acquis* (i.e. the rights and obligations that EU Member States share, including all of the EU's treaties and laws), in particular the Charter of Fundamental Rights of the European Union and international law encompassing international protection obligations, shall further reinforce an EU border-guard culture characterised by the spirit of mutual respect and cooperation. In order to achieve efficient and effective border management, Frontex aims at the highest operational standards, notably in terms of safeguarding fundamental rights and professional ethics.

The respect for and promotion of fundamental rights in all Frontex activities remains a high priority for the agency. Hence, Frontex has been active in the implementation of the fundamental rights strategy and provisions of the amended Frontex regulation<sup>1</sup>. A consultative forum assisting the executive director and the management board in fundamental rights matters has been established and an independent fundamental rights officer (reporting directly to the management board and to the consultative forum) was designated by the management board to contribute to the mechanism for monitoring fundamental rights.

An important task of Frontex is to support the training and education of national border guards through the establishment of common training standards at the European level. Fundamental rights has always been an integral part of Frontex's training activities. In 2012, a full palette of new instruments was developed and this manual for trainers is one of them.

The manual aims to raise awareness and ensure a harmonised training of all EU border guards in respecting fundamental rights, aspiring to ever-higher standards of professionalism as part of an EU border-guard culture. It also takes into consideration the complexity of the duties performed by officials at the border and demonstrates how fundamental rights permeate and advance their professional lives. It shows how important it is for border guards to know their own rights and entitlements, as well as how adhering to fundamental rights enhances their performance.

I congratulate the team of experts from Member States and partner organisations for developing this manual and I hope it will help you in your continued efforts to promote the respect of fundamental rights.

**Ilkka Laitinen**  
Executive Director, Frontex

<sup>1</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union (OJ L 304, 22.11.2011, p. 1).



## Acronyms

<b>CAT</b>	Committee Against Torture
<b>CCC</b>	Common Core Curriculum
<b>CED</b>	Committee on Enforced Disappearances
<b>CEAS</b>	Common European Asylum System
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CIRAM</b>	Common integrated risk analysis model
<b>CJEU</b>	Court of Justice of the European Union
<b>CMW</b>	Committee on Migrant Workers
<b>CPT</b>	European Commission for Prevention of Torture
<b>CRC</b>	Committee on the Rights of the Child
<b>CRPD</b>	Committee on the Rights of Persons with Disabilities
<b>EASO</b>	European Asylum Support Office
<b>ECHR</b>	European (formally, Convention for the Protection of Human Rights and Fundamental Freedoms)
<b>ECtHR</b>	European Court of Human Rights
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>EQF</b>	European Qualifications Framework
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>Frontex</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>GMG</b>	Global Migration Group
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Commission of Jurists
<b>IGO</b>	Intergovernmental organisation
<b>ILO</b>	International Labour Organisation
<b>IMO</b>	International Maritime Organisation
<b>IOM</b>	International Organisation of Migration
<b>NGO</b>	Non-governmental organisation
<b>NHRIs</b>	National Human Rights Institutions
<b>NRM</b>	National referral mechanism
<b>NQF</b>	National Qualifications Framework

<b>OECE</b>	Organisation for Economic Cooperation in Europe
<b>OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>OPCAT</b>	Optional Protocol to the UN Convention against Torture
<b>OSCE</b>	Organisation for Security and Cooperation in Europe
<b>OSCE/ODIHR</b>	OSCE Office for Democratic Institutions and Human Rights
<b>PTSD</b>	Post-traumatic stress disorder
<b>SAR</b>	International Convention on Maritime Search and Rescue
<b>SIS</b>	Schengen Information System
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>SPT</b>	Subcommittee on Prevention of Torture
<b>SQF</b>	Sectoral Qualifications Framework
<b>TEC</b>	Treaty establishing the European Community
<b>TEU</b>	Treaty on European Union
<b>THB</b>	Trafficking in human beings
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCLOS</b>	UN Convention on the Law of the Sea
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>Unicef</b>	United Nations International Children's Emergency Fund



## Acknowledgements

The Frontex Training Unit developed the 'Fundamental rights training for border guards – Trainers' manual' with the active participation of a multidisciplinary team comprising experts from EU Member States (Belgium, Bulgaria, Ireland, Spain, Italy, Cyprus, Malta, the Netherlands, Slovenia and the United Kingdom) and experts from the European Union Agency for Fundamental Rights (FRA), European Asylum Support Office (EASO), United Nations High Commissioner for Refugees (UNHCR), Office of the High Commissioner for Human Rights (OHCHR) and OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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## Common statement

The fundamental rights manual for border-guard trainers was written by a working group of border management experts and fundamental rights practitioners. It was drafted in accordance with the latest international and European human rights standards.

The manual takes into consideration the complexity of the duties performed by officials at the border. In this respect, we have taken great care to remain as close as possible to the everyday reality of officers, endeavouring to use user-friendly language and avoiding jargon when possible.

The goal of the manual is to support trainers in their duty to prepare border guards on how to conform to their regional and international human rights obligations. The manual demonstrates how fundamental rights permeate and advance their professional lives. It shows how important it is for border guards to know their own rights and entitlements, as well as how adhering to fundamental rights enhances their performance.

In drafting the manual, we have also taken particular care to ensure that the content of the manual reflects the latest European educational practice and that the manual conforms to the European sectorial qualification framework for border guarding.

In writing the manual, particular attention was paid to groups demanding special protection, such as people fleeing persecution, torture survivors, victims of trafficking, the elderly, pregnant women and children.

All the members of the working group cooperated with openness and respect and created this manual with confidence and enthusiasm. This is a testimony of joint commitment to the respect of fundamental rights and proof of excellent cooperation between national and international experts. There were different approaches, perspectives and domestic realities; nevertheless, the group coherently put forward a perspective of how to respect and protect fundamental rights, in accordance with EU law and its deeply held norms and values which call for human rights to be adhered to.

The working group entrusts to the national trainers the dissemination of the values, skills and knowledge of fundamental rights represented in this manual.



# Introduction

'The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

**Article 2, Treaty on European Union**

## Background

Border control officers are placed in a unique position to facilitate the movement of people engaged in legitimate business, travelling for tourism or individuals aiming to cross the border to seek international protection. At the same time, they have to guard the national territory from the entry of individuals involved in criminal activities (trafficking in human beings, drug trafficking, etc.), which makes the nature of their duties complex and demanding.

Frontex considers that respect for and the protection of fundamental rights<sup>1</sup> is an unconditional and essential component of effective integrated border management. Frontex is fully committed to developing and promoting a shared understanding of fundamental rights within the entire European Union (EU) border-guard community as well as integrating this into its cooperation with third countries. This shared understanding, based on the EU *acquis*, in particular the Charter of Fundamental Rights of the European Union and on international law encompassing international protection and human rights obligations, shall further reinforce an EU border-guard culture characterised by the spirit of mutual respect and cooperation.

An important task of Frontex is to support the training and education of national border guards through the establishment of common training standards at the European level. Frontex contributes to improving the professionalism and interoperability of the Member States' border-guard agencies, inter alia by developing harmonised and comprehensive training programmes. One of the key tasks is to establish and further develop common core curricula for border-guard training and to provide training at the European level for national border-guard instructors.

<sup>1</sup> In this manual, the terms 'fundamental rights' and 'human rights' are used interchangeably. Module 1 explains in detail the origins of human rights and the emergence of the concept of 'fundamental rights' within the EU.

The common core curriculum (CCC) for basic border-guard training is the first curriculum including the necessary skills and competencies (as common standards) for the basic training of border guards in the EU. In 2011, the CCC was revised and updated in accordance with the latest developments in fundamental rights and a new version was published in 2012. Designed to be implemented within national curricula, students should gain the professional knowledge, relevant skills and appropriate competences required for their border-guard duties.

Fundamental rights training has always been an integral part of the CCC. Respect for fundamental rights is integrated in all the chapters of the CCC. Moreover, there is a special chapter in the general part specifically focused on fundamental rights<sup>2</sup>.

The updated specific chapter on fundamental rights includes the following 10 topics: (1) fundamental rights and border-guard work; (2) international human rights law; (3) Convention for the Protection of Human Rights and Fundamental Freedoms (often referred to as the European Convention on Human Rights (ECHR)); (4) UN Convention relating to the Status of Refugees and its Protocol (1951 convention); (5) UN Convention relating to the Status of Stateless Persons; (6) Charter of Fundamental Rights of the EU; (7) persons seeking asylum; (8) identification and referral of victims of trafficking; (9) protection of children; (10) non-discriminatory ethnic profiling.

The CCC for border guards is coherent with the aims and priorities of the Copenhagen declaration<sup>3</sup> and is focused on the development of an integrated approach to education and training policies at European level. The CCC also meets the challenges when moving from Copenhagen process-based vocational border-guard basic education to Bologna process-based tertiary mid-level officer training. The switch from vocational training to the European higher education area will take place so that after passing CCC-based border-guard basic education, a student is principally competent to continue in Bologna process-based higher education.

The 2012 version of the updated CCC is consistent with the European qualifications framework for lifelong learning (EQF) at levels 4 and 5. The EQF is a common European reference system which links participating countries' national qualifications frameworks as well as the sectoral qualifications framework (SQF).

When determining the EQF level of CCC-based national curricula, reference should primarily be made to the national qualifications framework (NQF). All

<sup>2</sup> The CCC consists of a general part and three specialised modules on air, land and sea borders.

<sup>3</sup> Declaration of the European Ministers for Vocational Education and Training, and the European Commission, convened in Copenhagen on 29 and 30 November 2002, on enhanced European cooperation in vocational education and training.



NQFs are linked to the EQF and, therefore, it is easy and transparent to locate national training within the European scale.

In 2011, the Frontex Training Unit launched a project aiming to raise awareness and ensure a harmonised training of all EU border guards in respecting fundamental rights, aspiring to ever-higher standards of professionalism as part of an EU border-guard culture. The first step is the creation of the current fundamental rights trainers' manual based on the CCC. The primary target group of the manual is border-guard instructors in the Member States.

The trainers' manual was developed with the active participation of a multidisciplinary team comprising experts from EU Member States (Belgium, Bulgaria, Ireland, Spain, Italy, Cyprus, Malta, the Netherlands, Slovenia and the United Kingdom) as well as experts from international organisations and other EU agencies (EASO, FRA, OHCHR, OSCE/ODIHR and UNHCR).

### **Aims of the trainers' manual**

The overall aim is to raise awareness and facilitate the comprehensive training of all EU border guards in respecting fundamental rights, aspiring to ever-higher standards of professionalism as part of an EU border-guard culture. Frontex is committed to the development and implementation of effective training methodologies favouring practical and learner-centred approaches.

The manual is developed for use by professionals who train border guards. As a next step, Frontex will facilitate the implementation of the training at the national level by providing expert support and training of national trainers.

The content of the manual is based on:

- the universal human rights system – the UN;
- the European system – the Council of Europe and the EU;
- international intergovernmental organisations' (IGOs) guidelines and recommendations.

The key human rights documents used to develop the manual were: the UN Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Charter of Fundamental Rights of the EU; the ECHR; the European Social Charter; the 1951 Convention relating to the Status of Refugees; and case-law. The manual is primarily based on hard law ratified by governments, but it also uses guidelines and good practice recommendations prepared by specialised agencies of the UN and the EU and declaratory instruments approved by states in international fora, such as the UN General Assembly.

The manual does not cover the specific national laws and has not listed the many reservations or opting-outs that individual Member States have determined. Thus, it is implicit that the national trainers with their expertise should add to and adapt the manual according to such national realities. However, the manual strives and encourages the trainers, in line with the CCC, to present and support best practices that respect, protect, promote and fulfil human rights as embodied in the principal UN human rights treaties, the ECHR and the Charter of Fundamental Rights of the EU.

### **Course outcomes**

On completion of this course, border guards will be able to:

- recognise the important role and responsibility of the border guard to protect fundamental rights and prevent fundamental rights violations;
- explain fundamental rights and outline the characteristics of fundamental rights in general and specifically pertaining to the duties of border guards;
- demonstrate their ability and competence to respect and protect fundamental rights, and prevent fundamental rights violations in the performance of their duties;
- identify individuals or groups in need of special assistance and of international protection.

### **Structure**

This training package is structured on the core functions of the border guards, covering all the topics from the CCC. As Frontex Training Unit has already developed a manual on anti-trafficking ('Anti-trafficking training for border guards – Trainers' manual', Frontex, 2012), human trafficking is not included in the current manual. Trainers are encouraged to consult this other manual to complement any training on fundamental rights.

### **The training material is comprised of five training modules.**

**Module 1 – Fundamental rights in relation to border guarding** Its aim is to introduce fundamental rights and develop awareness of the importance of fundamental rights in border guarding.

#### **Module 2 – Interception at sea, land and air**

Its aim is to establish awareness among border guards of the importance of fundamental rights in relation to interception at sea, land and air.



### Module 3 – Reception and assistance<sup>4</sup>

Its aim is to establish awareness among border guards of the importance of fundamental rights in the execution of their duties concerning reception and assistance at the border entry point.

### Module 4 – Interviewing

Its aim is to enable border guards to conduct interviews with migrants according to fundamental rights standards and principles.

### Module 5 – Deprivation of liberty<sup>5</sup>

Its aim is to enable border guards to ensure that any deprivation of liberty is approached according to fundamental rights standards and principles.

## How to use the trainers' manual

The trainers' manual is a modern and easy-to-use training package. The five modules may be used as a complete programme or selectively, according to needs. Each module has defined specific learning outcomes, training material, references and tools.

The modules also include lesson plans provided in a table outlining the content, the suggested sequence and methods as well as activities and reference material needed. Specific notes for the trainer are provided for all topics.

## Training material

While the manual is designed to fully equip the trainer with the necessary key materials, the national trainers will have to adapt them to the specific national legislation and conditions, the specific needs of the training programme and the trainees' experience.

A toolkit with resources is provided in addition to the manual. It contains background material such as video clips as well as ready-made training tools such as PowerPoint presentations, scenarios and case studies which can be used in the training. It also contains suggested methods to assess the learning outcomes for each module.

- 4 This manual and all the modules are about the assistance given to everyone at the entry point only. The particular rights covered are related to this brief moment of contact that the border guard has with the person(s) at the entry point. Issues related to the right to housing, accommodation, maintenance, subsistence, education, etc. that, in practice, come into play at the moment the migrant has crossed the border are not the topic of this manual. This manual does not deal with the asylum application process nor the rights involved in it, but only with those related to the functions of the border guards at the moment of entry.
- 5 The trainer may want to consider including some components of Module 2 when teaching Module 5 or vice versa; for example teaching about the use of force in compliance with fundamental rights may be a relevant skill also when teaching about the deprivation of liberty.

## Practical approach

Border guards should learn and understand how fundamental rights standards must be applied in their everyday work. A practical approach and interactive techniques are suggested, as well as the use of creative, interactive teaching methods which help secure the active and committed involvement of participants.

The manual, following recognised best practice, uses learner-centred approaches to encourage cooperative and active learning, commitment to the subject and the learning process, creativity and self-esteem. For this purpose, the manual proposes the analysis of case-law, international and regional legal instruments, case studies and scenarios based on real-life border guarding<sup>6</sup>.

The way the content has been written (in an accessible manner) and the variety of participatory teaching methods presented to the trainer intend to facilitate the acquisition of knowledge, skills and attitudes that help the border guard deliver his / her duties with confidence and in full respect for fundamental rights.

## Training methodology and training evaluation: an overview<sup>7</sup>

A human rights training course for professional audiences, such as border guards, aims at providing knowledge and developing skills and attitudes among the learners to enable them to carry out their responsibilities effectively and professionally, in accordance with human rights standards. In order to achieve this, the training methodology must be appropriate.

Training can be seen as a cycle following specific phases, with each phase accompanied by evaluation activities which allow the trainers to measure and maximise the impact of their training effort and the trainees to assess their development and areas which still need to be covered. A brief description of each phase and the relevant evaluation methodology follows.

### 1. Planning phase

As a first step in the preparation of a training course, it is fundamental to carry out a thorough assessment of the training needs of the trainees. The needs assessment exercise involves both the learners (to assess their overall profile and

6 Guidelines on human rights education for law enforcement officials, OSCE/ODIHR, Warsaw, 2012 (<http://www.osce.org/odihr/93968>).

7 For more details concerning the human rights training methodology and evaluation, see 'Human rights training' and 'Evaluating human rights training activities: A handbook for human rights educators', published by the Office of the United Nations High Commissioner for Human Rights. They are available on line through the office's website (<http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducation.aspx>) and can also be requested in hard copy.



in particular their current human rights knowledge, skills and attitudes) as well as the institution to which the learners belong and the human rights challenges it faces (to assess the elements of the context which need to be taken into consideration in designing the course). Tools for the preliminary needs assessment include questionnaires, consultations with experts, review of related documentation and interviews with learners. A sample needs assessment questionnaire is provided in the toolkit.

## **2. Design phase**

Training design, based on the results of the training needs assessment, includes the development of overall learning outcomes and an agenda for the course as well as specific session plans (containing for each session: learning outcomes, content, methodology, resource persons, equipment and materials). In this phase, it is important to validate the designed training course in order to assess its potential effectiveness before delivery. This is called 'formative evaluation'; tools to conduct it include review by subject-matter experts and by training methodology experts, informal discussions with representative learners and pilot testing.

## **3. Delivery phase**

During the training course, which should make maximum use of interactive methods as mentioned above, training can continue to be fine-tuned through, for instance, observation and debriefings and learners' feedback at the end of each day ('real-time formative evaluation'). At the end of the training, the final evaluation ('end-of-training summative evaluation') is carried out to assess whether the learning outcomes have been achieved and if the training has been effective. Tools to do so include questionnaires, a review of products generated during the training (action plans, lesson plans, etc.), final exercises/tests, role-plays, self-assessments and informal discussions with all those involved in the training (learners, trainers and other resource persons).

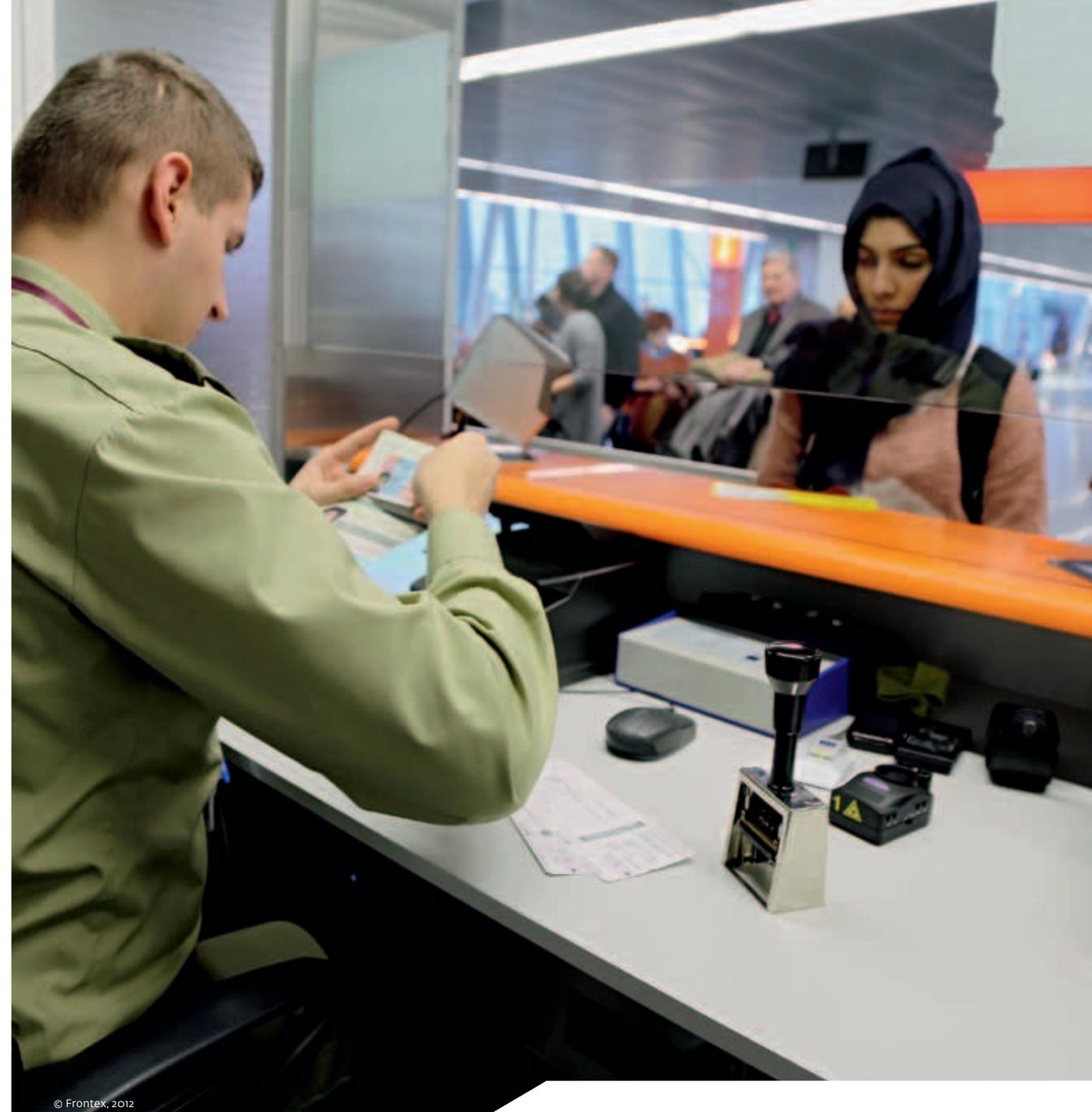
## **4. Follow-up phase**

After the training, in the medium ('transfer evaluation') and long ('impact evaluation') term, training evaluation should continue to take place to assess if learners have put into practice what they have learnt, and whether the training course has had an impact on their work and on their institution. Tools to do so include follow-up questionnaires, on-the-job observation, review of products developed by the learners, follow-up interviews with all those involved in the training as well as review of organisational performance records, media news and reports by governmental and civil society organisations.

## **Resource materials**

The manual, through the toolkit, includes a list of further reading and training materials to further support the border-guard instructor to continue his or her professional development and to enrich the courses they are developing.

Some of the materials suggested may be used with high-ranking officers, but in general the resources are aimed at the trainers or the officers attending a basic training course at the beginning of their career.



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## MODULE 1

# Fundamental rights in relation to border guarding



The aim of this module is to introduce fundamental rights and develop awareness of the importance of fundamental rights in border guarding.

## 1. Learning outcomes

At the end of this module, participants should be able to:

- recognise the important role and responsibility of the border guard to prevent fundamental rights violations and protect victims;
- describe the legal nature and scope of fundamental rights, their characteristics and the consequences of their violations;
- describe causes, trends and current events in international migration and how these affect border guarding;
- outline the entitlements and rights of border guards and the potential personal impact of border-guarding activities;
- recognise the relationship between fundamental rights, border guards' ethical codes of conduct and the function of border guarding.

## 2. Lesson plan

Content	Method	Toolkit
1. Introduction	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Discussion</li> </ul>	<ul style="list-style-type: none"> <li>• Quiz on myths (handout)</li> <li>• Introduction to fundamental rights and migration (PowerPoint presentation)</li> <li>• Introduction to right to life, non-refoulment, movement, prohibition of torture and international protection (PowerPoint Presentation)</li> <li>• Questions to encourage discussion on fundamental rights and migration</li> <li>• Universal Declaration Of Human Rights</li> <li>• Charter of Fundamental Rights of the EU</li> <li>• Video clip "A path to dignity"<sup>8</sup></li> <li>• Video clip instructions</li> </ul>
2. The rights of border guards and the complexity of working in a border area	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Discussion</li> </ul>	<ul style="list-style-type: none"> <li>• Questions to encourage discussion on human rights and entitlements of border guards</li> </ul>
3. Professional standards and the human rights framework	<ul style="list-style-type: none"> <li>• Pre-course reading</li> <li>• Discussion</li> <li>• Case study</li> </ul>	<ul style="list-style-type: none"> <li>• Pre-course reading and discussion on ethics</li> <li>• The ethical slippery slope (exercise)</li> <li>• The ethical issues of tragic cases (case study)</li> </ul>
4. Assessment	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>

<sup>8</sup> "A path to dignity: the power of human rights education" © "Human Rights Education Associates (HREA), Gakkai International (SGI), Office of the United Nations High Commissioner for Human Rights (OHCHR), 2012

## 3. Training material

### 3.1. Introduction to fundamental rights and migration

#### Notes to the trainer

This part of the training material seeks to explain why border guards should be aware of fundamental rights and their frontline responsibility to safeguard the human rights of all people crossing borders and ensure access to protection to those fleeing persecution or risking serious harm upon return. It also presents the complexity surrounding the reasons why people migrate and the diverse contexts migrants come from.

#### References

- Universal Declaration of Human Rights (1948)
- UN Convention relating to the Status of Refugees (1951) and its 1967 protocol
- UN International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966) and its 1989 Protocol No 2 on the death penalty
- International Covenant on Economic, Social and Cultural Rights (1966)
- UN Code of Conduct for Law Enforcement Officials (1979)
- UN Convention on the Elimination of All Forms of Discrimination against Women (1979)
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
- UN Convention on the Rights of the Child (1989) and its 2000 Protocols Nos 1 and 2
- International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families (1990)
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
- Optional protocol to the UN convention against torture (2002)
- International Convention for the Protection of All Persons against Enforced Disappearance (2006)
- UN Convention on the Rights of Persons with Disabilities (2006)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- European Social Charter (1961)
- Declaration on the Police, Council of Europe (1979)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)
- Charter of Fundamental Rights of the EU (2000)
- European Code of Police Ethics, Council of Europe (2001)

#### Relevant IGOs and NGOs

- Office of the High Commissioner for Human Rights
- UN High Commissioner for Refugees
- The Global Migration Group
- International Organisation for Migration
- International Commission of Jurists



### 3.1.1. Migration in today's context<sup>9</sup>

Migration is a human phenomenon; it is not a problem, nor is it a criminal activity. It is as old as humanity. Our ancestors moved in search of food and water, hunting and grazing lands and also out of sheer curiosity. Population movements in history have been both forced and voluntary as people moved in search of opportunity and also in search of protection. Wars and environmental disasters compelled people to move, as did poverty, lack of economic prospects, settlement in colonial territories, and the desire to unite with family members abroad.<sup>10</sup>

Migration is considered to be one of the defining global issues of the early 21st century, as more and more people are on the move today than at any other point in human history.

Migrants constituted 3.1% of the world's population in 2012<sup>11</sup>. In other words, one out of every 33 persons in the world today is a migrant (whereas in 2000, one out of every 35 persons was a migrant). The percentage of migrants has remained relatively stable as a share of the total population, increasing by only 0.2% (from 2.9% to 3.1%) over the last decade. However, the percentage of migrants varies greatly from country to country. Countries with a high percentage of migrants include Qatar (87%), the United Arab Emirates (70%), Jordan (46%), Singapore (41%) and Saudi Arabia (28%)<sup>12</sup>.

Migration is now more widely distributed across more countries. Today, the top 10 countries of destination receive a smaller share of all migrants than in 2000.

Global population growth differs between developed and developing countries. In the developed countries, the current annual rate of growth is less than 0.3%, while in the rest of the world the population is increasing almost six times as fast. Demographic changes affect international migration in two ways: rapid population growth combined with economic difficulties push people to move out of their habitat, and a declining and ageing population pressures countries to accept migrants.

Sustained low fertility in developed countries produces a rapidly ageing population. The 'smaller and older' population projected for developed countries over the next 50 years may enhance possibilities for greater mobility of people, in part as the demand for care workers increases.

For example, the population of Italy is projected to decline from the current 57 million to 41 million by 2050. Similarly, the population of Japan is projected to decline to 105 million by 2080 from the current 127 million. While not a solution on its own, one way to address this reality might be to facilitate migration.

Nevertheless, few countries have a defined and articulated migration policy. Migration is difficult to manage without a policy structure established to guide managers. Yet even countries that do have a coherent migration policy backed by legislation often experience serious difficulties in managing migration.

Some critics of public policy, particularly in the developed countries, have characterised the period from the mid-1970s to the present time as a quarter-century of migration mismanagement. Moreover, the large-scale movements have not ceased, and irregular migration has become one of the major issues of our time. Migrant smuggling now matches drug trafficking as a major source of income for organised crime. Trafficking in human beings is a significant worldwide concern. Migration has moved up the scale of important issues facing the countries of the developed world to the top of the policy agenda of the G8 countries.

With today's transportation and telecommunications, more people are able to move. The poor and disadvantaged can now watch live the wide disparity between their standard of living and that of the richer people in the world. They need to provide for their families and understandably seek work to escape poverty. The demand for lower skilled labour is high in many developed countries, which creates pull factors for migrants. At the other end of the skills scale, with economic globalisation and the proliferation of international business, there is also increasing demand for the mobility of professionals. The financial crisis in Europe has also meant an increase in the number of Europeans seeking work beyond the EU. For example, according to the Office for National Statistics (United Kingdom), approximately, 350 000 emigrants left the United Kingdom in 2012. The challenge for all countries is how to regulate and manage these large-scale migratory movements.

<sup>9</sup> The text in this section has been partially reproduced from the IOM's website (<http://www.iom.int/cms/en/sites/iom/home/about-migration/facts--figures-1.html>) and the information displayed on this webpage includes excerpts from the 2004 publication 'Essentials of migration management: A guide for policy makers and practitioners, Volume One: Migration management foundations', a training manual for practitioners, students and others interested in the topic of migration management.

<sup>10</sup> Excerpt from the OHCHR's training modules on migration and human rights (forthcoming).

<sup>11</sup> See footnote 9.

<sup>12</sup> See footnote 9.



### 3.1.2. The origins of fundamental rights<sup>13</sup>

Human rights or fundamental rights<sup>14</sup> are universal legal guarantees belonging to all human beings – protecting individuals and groups of individuals against actions which interfere with fundamental freedoms and human dignity. They originate from the duty of the state to protect and respect human dignity. Human rights in the 20th century emerged from the desire of world leaders to avert the horrors that took place during World War I and World War II.

#### What is the difference between human rights and fundamental rights?

- Traditionally, the term 'fundamental rights' is used in a constitutional context whereas the term 'human rights' is used in international law.
- The two terms refer to the same content and substance as can be seen by the similarities between the content in the Charter of Fundamental Rights of the EU, the ECHR and the UDHR.

Some of the most important characteristics of human rights are the following:

- they are internationally guaranteed;
- they are legally protected;
- they focus on the dignity of the human being;
- they protect all individuals and groups;
- they obligate states and state actors to protect, respect and fulfil them;
- they are universal, interrelated, interdependent and indivisible.

Rights are integral to all human beings, whatever the nationality, place of residence, sex, national or ethnic or social origin, genetic features or skin colour, religion, language, belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation or any other status. We are all equally entitled to all human rights without discrimination.

Human rights are all interrelated, interdependent and indivisible. This means that they are all important.

<sup>13</sup> Adapted from <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> and 'Professional training series No. 6: Human rights training – A manual on human rights training methodology', UN, New York and Geneva, 2000, p. 10.

<sup>14</sup> According to the European Union Agency for Fundamental Rights, the **'fundamental rights, or human rights'** express values that entitle individuals to expect a certain level of freedom and treatment... Human dignity, freedom, democracy, equality, the rule of law and respect for human rights are the values on which the European Union is founded. Embedded in the Treaty on European Union, they have been reinforced by the Charter of Fundamental Rights of the EU. Countries seeking to join the EU must respect human rights, and so must countries which have concluded trade and other agreements with it'. See <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions>. The terms refer to the same content and will be used interchangeably.

All human rights are indivisible, whether they are civil and political rights (such as the right to life, equality before the law and freedom of expression) or economic, social and cultural rights (such as the rights to work, social security and education). Likewise, the deprivation of one right adversely affects the others.<sup>15</sup>

Non-discrimination is a cross-cutting principle in international human rights law, and is present in all the major human rights treaties, constituting the central theme of the international human rights conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as nationality, place of residence, sex, national or ethnic or social origin, genetic features or skin colour, religion, language, belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation or any other status. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the UDHR: 'All human beings are born free and equal in dignity and rights.'

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasised in the 1948 UDHR, has been reiterated in numerous international human rights conventions, declarations and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of states to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems<sup>16</sup>.

The Charter of Fundamental Rights of the EU<sup>17</sup> sets out the civil, cultural, economic, political and social rights of European citizens and all persons in the EU. The charter was drawn up by a convention consisting of a representative from each EU Member State and the European Commission, as well as members of the European Parliament and national parliaments. It was formally proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission. In December 2009, with the entry into force of the Lisbon Treaty, the charter was given binding legal effect equal to the Treaties. To this end, the charter was amended and proclaimed for a second time in December 2007<sup>18</sup>.

<sup>15</sup> Adapted from <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

<sup>16</sup> The ICCPR, the ICESCR and the ECHR also state this duty of the state.

<sup>17</sup> [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>18</sup> See [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/l33501\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_en.htm); [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) and [http://europa.eu/legislation\\_summaries/human\\_rights/index\\_en.htm](http://europa.eu/legislation_summaries/human_rights/index_en.htm)



### 3.1.3. States and fundamental rights

It is the states themselves, individually and working in cooperation, 'who make the rules, through the development of custom, through the development of treaties and through the development of declarations, bodies of principles and other similar instruments. States agree on the content of these sources and agree to be bound by them. In the case of human rights law, while it is individuals and groups which are protected, it is the conduct of states (and state actors) which is regulated'<sup>19</sup>.

International law recognises that the state has primary responsibility for ensuring the respect, protection, promotion and fulfilment of human rights. The state has both the authority and the responsibility to put rights into practice on a day-to-day basis. For example, local and national public authorities are responsible for ensuring public safety and order which safeguard the protection of people's rights, for ensuring that no one is expelled in a country where he or she is at risk of torture or cruel, inhuman and degrading treatment, and for fulfilling the rights to housing, water and health.

#### The obligation of the state and its agents

The obligation **to respect** means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation **to protect** requires states to protect individuals and groups against human rights abuses, including non-state actors such as business enterprises. The obligation **to promote** involves the states having to ensure that everyone has opportunity to learn about their rights. The obligation **to fulfil** means that states must take positive action to facilitate or provide for the enjoyment of human rights, for example ensuring that border guards are trained in order to uphold human rights.

State representatives or agents, such as border guards, are responsible for upholding the state's obligations. The state and its agents have the duty to prevent violations by private persons against people subject to its jurisdiction, for example human trafficking.

All persons physically within the jurisdiction of the EU, even if they are not EU citizens – including migrants and asylum seekers – enjoy the human rights protection of the national legal system, the European system and European human rights law as well as the UN system and international human rights law.

<sup>19</sup> 'Professional training series No 6: Human rights training – A manual on human rights training methodology', UN, New York and Geneva, 2000, p. 12.

### 3.1.4. Human rights law and who monitors its application?<sup>20</sup>

Nowadays, there is an impressive collection of international, regional and national human rights instruments setting out human rights standards applicable to all areas of life. This development has taken place at the level of the UN as well as at the regional and the national levels.

International treaties, referred to variously as covenants, protocols or conventions, are legally binding for those states that ratify or accede to them. Through ratification of human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented and enforced at the local level.

Other documents, such as declarations, principles, codes of conduct, guidelines, resolutions and recommendations, do not have a binding legal effect for states. Nevertheless, they have an undeniable moral force and provide practical guidance to states in their conduct. The value of such instruments rests on their recognition and acceptance by a large number of states, and even without binding legal effect they may be seen as declaratory of broadly accepted principles within the international community.

Relevant international and regional human rights instruments are listed in the references in Section 1, Module 1.

#### The complementary nature of UN and European instruments

UN and European human rights treaties are equally applicable to EU Member States which have ratified these treaties. The different treaties coexist with each other. According to a well-established principle of international law, in case of several norms being applicable to the same situation, those norms shall be applied which are most favourable to the individual.

<sup>20</sup> This section has been adapted from training materials elaborated by the European Union Agency for Fundamental Rights and the Office of the UN High Commissioner for Human Rights.



### 3.1.5. International mechanisms monitoring human rights<sup>21</sup>

At the UN level, there are two main types of human rights monitoring mechanisms: **UN charter-based bodies**, including the Human Rights Council, and **bodies created under the international human rights treaties** and made up of independent experts mandated to monitor state parties' compliance with their treaty obligations. Most of these bodies receive secretariat support from the OHCHR.

#### Charter-based body

**The Human Rights Council** is an intergovernmental body within the UN system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and making recommendations on them. It has the mandate to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN office in Geneva.

The council is made up of 47 UN Member States which are elected by the UN General Assembly. The Human Rights Council replaced the former UN Commission on Human Rights.

The council was created by the UN General Assembly on 15 March 2006 by Resolution 60/251. Its first session took place from 19 to 30 June 2006.

One year later, the council adopted its 'institution-building package' to guide its work and set up its procedures and mechanisms. Among them are the following:

- The Universal Periodic Review mechanism serves to assess the human rights situations in all UN Member States. It is a unique process which involves a review of the human rights records of all UN Member States. The UPR is a state-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each state to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.
- The advisory committee serves as the council's 'think-tank', providing it with expertise and advice on thematic human rights issues.

The advisory committee provides expertise in the manner and form requested by the council, focusing mainly on studies and research-based advice. Such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance. It should be implementation-oriented. The scope of its advice should be limited to thematic issues pertaining to the mandate of the council; namely promotion and protection of all human rights. The committee shall not adopt resolutions or decisions, but may propose to the council, within the scope of its work as set out by the council, suggestions for further enhancing its procedural efficiency, as well as further research proposals within the scope of the work set out by the council.

In the performance of its mandate, the advisory committee is urged to establish interaction with states, national human rights institutions, NGOs and other civil society entities.

- The human rights complaint procedure allows individuals and organisations to bring human rights violations to the attention of the council.

Pursuant to Council Resolution 5/1, the complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

It retains its confidential nature, with a view to enhancing cooperation with the state concerned. The procedure, inter alia, is to be victims-oriented and conducted in a timely manner.

Two distinct working groups – the Working Group on Communications and the Working Group on Situations – are established with the mandate to examine the communications and to bring to the attention of the council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

A communication related to a violation of human rights and fundamental freedoms is admissible, unless:

- it has manifestly political motivations and its objective is not consistent with the UN charter, the UDHR and other applicable instruments in the field of human rights law; or
- it does not contain a factual description of the alleged violations, including the rights which are alleged to be violated; or
- its language is abusive; however, such communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language; or

<sup>21</sup> This section on international mechanisms monitoring human rights is adapted from <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> and its supplementary pages.



- it is not submitted by a person or a group of persons claiming to be the victim of violations of human rights and fundamental freedoms or by any person or group of persons, including NGOs acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the UN charter and claiming to have direct and reliable knowledge of those violations; nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual author is second hand, provided they are accompanied by clear evidence; or
- it is exclusively based on reports disseminated by mass media; or
- it refers to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or another UN or similar regional complaints procedure in the field of human rights; or
- the domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

Communications intended for handling under the council complaint procedure may be addressed to the UN Office of the High Commissioner for Human Rights (OHCHR).

- ♦ The UN special procedures were established by the former Commission on Human Rights and are now assumed by the council. These are made up of special rapporteurs, special representatives, independent experts and working groups that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries.

The system of special procedures is a central element of the UN human rights machinery and covers all human rights: civil, cultural, economic, political and social. As of 1 January 2013, there are 36 thematic and 12 country mandates.

With the support of the OHCHR, special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to states and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy; raise public awareness; and provide advice for technical cooperation. Special procedures report annually to the Human Rights Council; the majority of the mandates also report to the general assembly.

Country and territory mandates include the Special Rapporteur on Violence against Women, its Causes and Consequences.

Thematic mandates include:

1. Working Group on Arbitrary Detention;
2. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography;
3. Working Group on Enforced or Involuntary Disappearances;
4. Special Rapporteur on Extreme Poverty and Human Rights;
5. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health;
6. Special Rapporteur on the Situation of Human Rights Defenders;
7. Special Rapporteur on the Human Rights of Migrants;
8. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance;
9. Special Rapporteur on Contemporary Forms of Slavery, including its Causes and its Consequences;
10. Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
11. Special Rapporteur on Trafficking in Persons, especially Women and Children;
12. Special Rapporteur on Violence against Women, its Causes and Consequences.

## Treaty-based bodies

### HUMAN RIGHTS COMMITTEE

The Human Rights Committee (HRC) is a UN body of independent experts with the task of monitoring the implementation of the ICCPR. Its main tasks are as follows. (1) to examine reports that states parties are obliged to submit on a regular basis on how rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of 'concluding observations'. (2) to examine individual complaints with regard to alleged violations of the ICCPR by states and to issue (non-binding) decisions. As is the case with the European Court of Human Rights for the European level, the practice of the Human Rights Committee is a main source for knowing what human rights provisions formulated at UN level mean in concrete terms. In addition to concrete cases, the committee issues general comments. General comments analyse a specific article or general issue in the covenant in an extended and comprehensive fashion. While most general comments are detailed interpretations of a specific covenant right, some address the covenant rights of specific groups, such as migrants, while others address procedural issues, such as the preparation of reports, or miscellaneous issues, such as reservations to the covenant. The general comments are available in the treaty bodies' database of the OHCHR (<http://www.unhcr.ch/tbs/doc.nsf>)<sup>22</sup>.

<sup>22</sup> 'Human rights – Civil and political rights: The Human Rights Committee, Fact Sheet No 15' (Rev. 1), UN, Geneva, 2005.



## COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors the implementation of the ICESCR by its states parties. All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. The committee examines each report and addresses its concerns and recommendations to the state party in the form of 'concluding observations'.

With regard to individual complaints, on 10 December 2008, the general assembly unanimously adopted an optional protocol (GA Resolution A/RES/63/117) to the ICESCR which provides the committee with the competence to receive and consider communications. The optional protocol was opened for signature at a signing ceremony in 2009. In addition to the CESCR, other competent committees can consider individual communications involving issues related to economic, social and cultural rights in the context of its treaty. The committee also publishes its interpretation of the provisions of the covenant, known as general comments.

## COMMITTEE AGAINST TORTURE

The Committee against Torture is the UN body of independent experts with the task of monitoring the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Its functions are similar to those of the HRC. In addition, it has the mandate of examining country situations in more depth, within its inquiry procedure. Its practice, including case-law, is important for understanding what exactly torture and other ill-treatments mean<sup>23</sup>.

## SUBCOMMITTEE FOR THE PREVENTION OF TORTURE AND NATIONAL PREVENTIVE MECHANISMS

**The Subcommittee for the Prevention of Torture** (SPT) was set up by the Optional Protocol to the UN Convention against Torture (OPCAT). Its tasks are similar to those of the European Committee for the Prevention of Torture: to visit places of detention in order to assess how persons deprived of their liberty are treated, to draw up reports and to make recommendations to the states on how to improve protection against torture.

Moreover, it obliges states to establish national preventive mechanisms (NPMs). As the name suggests, they are set up at the national level and have the same

<sup>23</sup> For more information, see <http://www2.ohchr.org/english/bodies/cat/index.htm>

task as the SPT. In the concrete field of law enforcement, the NPMs will be the most relevant institution for monitoring<sup>24</sup>.

## COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination is the UN body of independent experts with the task of monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. Its functions are similar to those of the HRC<sup>25</sup>.

## COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The Committee on the Elimination of Discrimination against Women is the UN body of independent experts with the task of monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. Its functions are similar to those of the HRC. In addition, it has the mandate of examining country situations in more depth, within its inquiry procedure<sup>26</sup>.

## COMMITTEE ON THE RIGHTS OF THE CHILD

The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors the implementation of the Convention on the Rights of the Child by its states parties. It also monitors the implementation of two optional protocols to the convention, on the involvement of children in armed conflicts and on the sale of children, child prostitution and child pornography. On 19 December 2011, the UN General Assembly approved a third optional protocol on a communications procedure, which will allow individual children to submit complaints regarding specific violations of their rights under the convention and its first two optional protocols. The protocol opens for signature in 2012 and will enter into force upon ratification by 10 UN Member States. The committee also publishes its interpretation of the content of human rights provisions, known as general comments.

<sup>24</sup> For more information regarding the OPCAT: <http://www2.ohchr.org/english/bodies/cat/opcat/index.htm>  
Regarding NPMs:  
<http://www2.ohchr.org/english/bodies/cat/opcat> and <http://www.apt.ch/en/history-of-the-opcat-1>  
Also: 'National human rights institutions in the EU Member States: Strengthening the fundamental rights architecture in Europe', FRA, 2010 ([http://fra.europa.eu/fraWebsite/attachments/NHRI\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/NHRI_en.pdf)).

<sup>25</sup> For more information, see <http://www2.ohchr.org/english/bodies/cerd/index.htm>

<sup>26</sup> For more information, see <http://www2.ohchr.org/english/bodies/cedaw>  
Further reading: 'Human rights and law enforcement, A manual on human rights training for the police', UN, 2002, pp. 25–35 (<http://www.ohchr.org/Documents/Publications/trainings5Addzen.pdf>).



### COMMITTEE ON MIGRANT WORKERS (CMW)

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of independent experts that monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>27</sup> by its states parties. It held its first session in March 2004. All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. States must report initially 1 year after acceding to the convention and then every 5 years. The committee will examine each report and address its concerns and recommendations to the state party in the form of 'concluding observations'. The committee will also, under certain circumstances, be able to consider individual complaints or communications from individuals claiming that their rights under the convention have been violated once 10 states parties have accepted this procedure in accordance with Article 77 of the convention. At the moment, two states have accepted this procedure. The committee also publishes statements on themes related to its work and interpretations of the content of the provisions in the convention (general comments).

### COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors the implementation of the convention by the states parties. All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. The committee examines each report and shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the state party concerned. The optional protocol to the convention gives the committee competence to examine individual complaints with regard to alleged violations of the convention by states parties to the protocol.

### COMMITTEE ON ENFORCED DISAPPEARANCES

The Committee on Enforced Disappearances (CED) is the body of independent experts which monitors the implementation of the convention by the states parties. All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. The committee examines each report and shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the state party concerned. In accordance with Article 31, a state party may at the time of ratifica-

<sup>27</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the UN General Assembly, Resolution 45/158 of 18 December 1990. (<http://www.un.org/documents/ga/res/45/a45r158.htm>).

tion of this convention or at any time afterwards declare that it recognises the competence of the committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this state party of provisions of this convention.

### 3.1.6. European human rights mechanisms

#### COURT OF JUSTICE OF THE EUROPEAN UNION

The status of the Court of Justice of the European Union (CJEU) has changed considerably when it comes to the further incorporation of fundamental rights in the EU since the entry into force of the Treaty of Lisbon. The Charter of Fundamental Rights of the EU became legally binding when implementing EU law. The CJEU, as it is responsible for judgments on compliance with EU law, can now also look at compliance with the charter after domestic legal remedies have been exhausted.

As part of its mission, the Court<sup>28</sup>:

- reviews the legality of the acts of the institutions of the EU;
- ensures that the Member States comply with obligations under the Treaties; and
- interprets EU law at the request of the national courts and tribunals.

Three of the most common types of cases brought to the CJEU are as follows.

- Direct actions

Any person or company which has suffered damage as a result of the action or inaction can bring an action seeking compensation before the General Court.

- Action for failure to fulfil an obligation

The Court of Justice determines whether a Member State has fulfilled its obligations under EU law. Before bringing the case before the Court of Justice, the European Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.

<sup>28</sup> [http://curia.europa.eu/jcms/jcms/02\\_6999](http://curia.europa.eu/jcms/jcms/02_6999)



The action may be brought by the Commission – as, in practice, is usually the case – or by a Member State. If the Court finds that an obligation has not been fulfilled, the state must bring the failure to an end without delay.

The Court investigates the allegations and gives its judgment. If the country is found to be at fault, it must put things right at once. If the Court finds that the country has not followed its ruling, it can issue a fine.

- Actions for failure to act

These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the EU to act to be reviewed. However, such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures.

#### EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECtHR) is tasked with supervising the implementation of the ECHR. It was set up in 1959 (and since 1998 operates on a full-time basis) and is located in Strasbourg. It is the oldest and most influential international human rights mechanism in the European context. Any person who thinks that his/her human rights have been violated by a state party to the convention can lodge a complaint with the Court. Furthermore, states can bring cases against other states. Its decisions are binding on the state, and its case-law has influenced the law and practice in EU Member States to a great extent. The Court has made a significant contribution to a contemporary understanding of human rights; in other words, if you want to know how a particular human rights provision is interpreted in the European context, the first step is to look at what the Court says<sup>29</sup>.

#### EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE OF THE COUNCIL OF EUROPE

The European Committee for the Prevention of Torture (CPT) was set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The task of the CPT is to visit places of detention in EU Member States in order to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals and social care

<sup>29</sup> For further information, see [http://www.echr.coe.int/echr/homepage\\_EN](http://www.echr.coe.int/echr/homepage_EN)  
Court cases can be found at: <http://www.echr.coe.int/ECHR/EN/hudoc>

homes. The CPT delegations have unlimited access to places of detention and the right to move around inside such places freely without restriction. They interview persons deprived of their liberty in private, and communicate freely with anyone who can provide information. After the visit, the CPT draws up a report on its findings and issues recommendations to the authorities with a view to strengthening the protection of detainees against torture and other forms of ill-treatment. Its reports are published (with the consent of the state concerned). The CPT has greatly contributed to increasing awareness of human rights problems in places of detention and has led reforms in many countries<sup>30</sup>.

#### EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

The European Commission against Racism and Intolerance (ECRI) is a human rights body of the Council of Europe, established by a decision in 1993 and composed of independent experts. The ECRI monitors problems of racism, discrimination on grounds of ethnic origin, citizenship, colour, religion and language, as well as xenophobia, anti-Semitism and intolerance, from the perspective of the protection of human rights. Its statutory activities are threefold: (1) country-by-country monitoring; (2) general policy recommendations; and (3) information and communication activities with civil society. The ECRI prepares reports and issues recommendations to Member States. The field of law enforcement has been treated by the ECRI in the context of country monitoring and in General Policy Recommendations No 11<sup>31</sup>.

#### THE EUROPEAN COMMISSIONER FOR HUMAN RIGHTS

The European Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in 47 Council of Europe Member States. The initiative for setting up the institution was taken by the Council of Europe's Heads of State or Government at their second summit in Strasbourg on 10–11 October 1997. On 7 May 1999, the Committee of Ministers adopted a resolution which instituted the Office of the Commissioner and elaborated the Commissioner's mandate. The current Commissioner, Mr Nils Muižnieks, succeeded Thomas Hammarberg (2006–12) and Álvaro Gil-Robles (1999–2006).

The Commissioner is mandated to:

- foster the effective observance of human rights, and assist Member States in the implementation of Council of Europe human rights standards;

<sup>30</sup> For more information, including its reports, see <http://www.cpt.coe.int/en>

<sup>31</sup> For more information, see [http://www.coe.int/t/dghl/monitoring/ecri/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp)



- promote education in and awareness of human rights in Council of Europe Member States;
- identify possible shortcomings in the law and practice concerning human rights;
- facilitate the activities of national ombudsperson institutions and other human rights structures; and
- provide advice and information regarding the protection of human rights across the region.

The Commissioner's work thus focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.

The Commissioner cooperates with a broad range of international and national institutions as well as human rights monitoring mechanisms. The Office's most important intergovernmental partners include the UN and its specialised offices, the EU and the OSCE. The Office also cooperates closely with leading human rights NGOs, universities and think-tanks.

### 3.1.7. National human rights mechanisms

Human rights must be protected primarily at the national level, through the whole state apparatus. It is a fundamental state function to respect, protect, promote and fulfil human rights, and all governmental agencies are thus tasked with the protection of human rights.

Institutions for the protection of human rights at the national level may include:

- courts, including constitutional courts;
- ombudspersons or national human rights commissions;
- parliament, including parliamentary bodies specifically tasked to monitoring human rights;
- monitoring mechanisms of places of detention, including national preventive mechanisms under the optional protocol to the convention against torture;
- national equality and non-discrimination bodies;
- NGOs;
- media;
- trade unions;
- professional groups.

Border guards are actors in human rights protection in that they represent the state in all effects, also in engaging its responsibility for its human rights obligations.

'National human rights institutions (NHRIs) play an important role in the human rights architecture at the national level, by monitoring compliance, conducting research, initiating preventive measures and awareness-raising'<sup>32</sup>. 'NHRIs also operate as hubs within countries, by linking actors, such as government agencies with civil society. By making these connections, NHRIs contribute to narrowing the "implementation gap" between international standards and concrete measures. NHRIs also help to ensure that the indivisibility and interdependence of the full spectrum of human rights is given'<sup>33</sup>.

Civil society organisations and in particular international, regional and national human rights NGOs such as Amnesty International, Human Rights Watch, the International Commission of Jurists, the International Rehabilitation Council of Torture Victims, etc. play a fundamental role in protecting and promoting human rights, in particular by monitoring and reporting human rights violations, by contributing to awareness and reform processes and providing assistance to victims of human rights violations.

The consequences of human rights violations in the European human rights system

According to the ECtHR<sup>34</sup>:

'In the event of a violation being found, the state concerned must be careful to ensure that no such violations occur again in the future, otherwise the European Court of Human Rights may deliver new judgments against them. In some cases the state will have to amend its legislation to bring it into line with the ECHR'<sup>35</sup>.

'When the Court finds against a state and observes that the applicant has sustained damage, it awards the applicant just satisfaction, that is to say a sum of money by way of compensation for that damage. The Committee of Ministers ensures that any sum awarded by the Court is actually paid to the applicant'<sup>36</sup>.

<sup>32</sup> 'National human rights institutions in the EU Member States (Strengthening the fundamental rights architecture in the EU I)', FRA, 2010, p. 7.

<sup>33</sup> Ibid, p. 8.

<sup>34</sup> Taken from court's website: <http://www.echr.coe.int/echr>

<sup>35</sup> [http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/o/FAQ\\_ENG\\_A4.pdf](http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/o/FAQ_ENG_A4.pdf), point 41.

<sup>36</sup> [http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/o/FAQ\\_ENG\\_A4.pdf](http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/o/FAQ_ENG_A4.pdf), point 42.



The proceedings not only come with a high financial cost to the state (the tax payer), but they also have a moral and reputational cost which prejudices the standing of the said state in the regional and international arenas.

It is also important to underline that the ECHR, the ICCPR and, less commonly, the ICESCR may have direct effect in the national system through the constitution and the stated obligations recognised by it (see for example Article 117 of the Italian Constitution: 'Legislative powers shall be vested in the state and the regions in compliance with the constitution and with the constraints deriving from EU-legislation and international obligations').

Whatever the reasons may be for an individual, a family or group of people to migrate, they all share to a lesser or greater extent the same experience of embarking in an unfamiliar and at times dangerous journey. Migration with appropriate papers entails a complex, often long and uncertain maze of bureaucratic procedures at times landing the person(s) in legal limbo. Undocumented migrants have limited access to their rights and are vulnerable to abuse and slavery, and are constantly on the move for fear of detection<sup>37</sup>. In many cases, migrants can be so reluctant to be sent back because of a well-founded fear of persecution or risk of harm in returning to their place of origin that they will risk their lives and undergo severe adversity rather than face return to their country of origin. Motivations can change as migratory journeys progress, and migrants can fall in and out of a range of legal categories as they move from their country of origin through one or more transit countries, on to the country of destination and even as they return once more to their own country.

States, on the other hand, have a vested interest in controlling migration. According to the International Commission of Jurists (ICJ)<sup>38</sup>:

'Migration is a highly charged and contested political issue in most destination States. Control of national borders is seen as an essential aspect of the sovereign State. National political debates on migration or migrants can be a flashpoint for political and social anxieties about security, national identity, social change and economic uncertainty. These political battles are also manifested in national law, which sets the framework within which migrants' human rights are threatened. States adopt increasingly restrictive rules, often fuelled by popular hostility to immigrants. Such policies and laws, restricting legal migration, often have the effect of increasing the proportion

<sup>37</sup> 'Migration and international human rights law, Practitioners guide No 6', International Commission of Jurists, Geneva, 2011, Introduction.

<sup>38</sup> 'Migration and international human rights law, Practitioners guide No 6', International Commission of Jurists, Geneva, 2011.

of undocumented migrants, whose vulnerability to exploitation and abuse is acute<sup>39</sup>. There are therefore essential interests at stake for both the individual and the State.'

It is in this contested political climate that the Global Migration Group (GMG)<sup>40</sup> affirms the following.

'The Universal Declaration of Human Rights begins with a recognition of the "inherent dignity and of the equal and inalienable rights of all members of the human family." Human rights law thus provides that in general, all persons, without discrimination, must have access to all fundamental human rights with narrow limitations related to political rights and freedom of movement. States are further obliged to ensure that any differential treatment, between citizens and non-citizens or among different groups of non-citizens, is undertaken in a non-discriminatory manner that is, for a legitimate objective, and that the course of action taken to achieve this objective is proportionate and reasonable. A human rights approach to migration places the migrant at the centre of migration policies and management, and pays particular attention to the situation of marginalised and disadvantaged groups of migrants'<sup>41</sup>.

The GMG, in accordance with internationally accepted human rights standards, further states that regardless of their migration status, migrants' rights include:

- 'the right to life, liberty and security of the person and to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;
- the right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status;
- the right to be protected from abuse and exploitation, to be free from slavery, and from involuntary servitude, and to be free from torture and from cruel, inhuman or degrading treatment or punishment;
- the right to a fair trial and to legal redress;
- the right to protection of economic, social and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work; and

<sup>39</sup> 'Second report of the special rapporteurship on migrant workers and their families in the hemisphere', OAS Doc. OEA/Ser.L/V/II.111, Doc. 20 rev., IACHR, 2001, para. 56.

<sup>40</sup> The GMG was established by the UN Secretary-General in early 2006 in response to a recommendation of the Global Commission on International Migration for the establishment of a high-level interinstitutional group of agencies involved in migration-related activities. The GMG is an inter-agency group bringing together heads of agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration.

<sup>41</sup> <http://www.globalmigrationgroup.org/en/addressing-vulnerabilities-associated-with-migration/human-rights-of-migrants>



- ♦ other human rights as guaranteed by the international human rights instruments to which the state is party and by customary international law<sup>42</sup>.

'All these rights are human rights to which all persons, without exception, are entitled. Persons do not acquire them because they are citizens, workers, or on the basis of a particular status. No one may be deprived of their human rights because they have entered or remained in a country in contravention of the domestic immigration rules, just as no-one may be deprived of them because they look like or are "foreigners", children, women, or do not speak the local language<sup>43</sup>.

<sup>42</sup> Statement of the Global Migration Group on the human rights of migrants in irregular situations (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>) and as reproduced in 'Migration and international human rights law, Practitioners guide No 6', International Commission of Jurists, Geneva, 2011, p. 30.

<sup>43</sup> 'Migration and international human rights law, Practitioners guide No 6', International Commission of Jurists, Geneva, 2011.

### 3.2. The rights and the entitlements of border guards and the impact of working in a border control environment

#### Notes to the trainer

This section seeks to equip the trainee with the background knowledge about the rights and entitlements of border guards and the potential personal impact that border-guarding activities may bring, such as the psychological consequences, and the coping mechanisms which may form the basis of a common organisational culture.

Trainees should be aware that the border guards and their institutions should take every possible step to ensure a healthy approach to their work.

#### References

- ♦ Resolution 690 on the Declaration on the Police, Council of Europe (1979)
- ♦ UNHCR protection training manual for European border and entry officials (2011)

#### 3.2.1. The rights and entitlements of border guards

Border guards enjoy the same rights as everyone else. Restrictions to these rights may only be made where necessary for the exercise of their functions, in accordance with the law, and they must be proportional and necessary in a democratic society.

Any citizen may join the border guard or police service if he or she satisfies the relevant conditions. They shall receive thorough training throughout their career, as well as appropriate instruction on social issues, fundamental freedoms, human rights and in particular the ECHR and the Charter of Fundamental Rights of the EU.

Border guards also have rights related to their employment. These should protect the ability of border guards to perform their duties and ensure their colleagues do theirs in accordance with the law (human rights) and binding professional standards. The professional, psychological and material conditions under which border guards perform their duties protect their integrity, impartiality and dignity.

Border guards are entitled to a fair remuneration, and special factors are to be taken into account, such as greater risks and responsibilities and more irregular working schedules. Thus, they should have the choice of whether to set up professional organisations, join them and play an active part therein. They may also play an active part in other organisations.



A professional organisation, provided it is representative, may take part in negotiations concerning the professional status of officers.

Sometimes, in the course of their duties, the physical and mental well-being of border-guard personnel may be endangered. In particular, border guards may be at serious risk of physical attack when carrying out border surveillance at unauthorised crossing points. For example, they may be heavily outnumbered by people attempting to cross illegally; people may be armed and may forcibly resist being conveyed to a particular border point. In such cases, border guards should not be required to confront such persons until assistance is provided. At the same time, border guards should be permitted to use force to defend themselves as necessary, with necessary and proportionate force and equipment<sup>44</sup>.

Border guards should also have access to make substantiated complaints about the behaviour of colleagues to the proper authorities without fear of this prejudicing their career prospects.

Border guards are entitled to work in an environment that enables them to respect and enjoy the human rights and the professional standards associated with their position.

Border guards have the right to a fair hearing if complaints against them are made either by colleagues or members of the public.

### 3.2.2. The complexity of working in border control areas<sup>45</sup>

As with anyone working in complex environments, including with persons in distress, the challenges that surround the work of border officials can have an impact on their own psychological well-being. In turn, this can affect the effectiveness and quality of their work.

In the discharge of their duties, border officials can experience varied emotions, ranging from compassion, through indifference, to rejection of the individuals they deal with on a daily basis. At the end of the day, this will also have an impact on their ability to respond objectively and empathetically to the different situations at the border and take appropriate action.

<sup>44</sup> For more detailed information on the use of force and fundamental rights, see Module 2.

<sup>45</sup> This presentation is taken from the 'UNHCR protection manual for European border and entry officials', which greatly based it on two articles on the psychological effects on humanitarian workers of working with refugees and in conflict situations. The facilitator may offer interested participants a copy (they are included as background reading for facilitators). The articles are Mark Walkup, 'Policy dysfunction in humanitarian organisations: The role of coping strategies, institutions and organisational culture', *Journal of Refugee Studies*, 1997, Oxford University Press, and the article by Barbara Harrell-Bond, 'Can humanitarian work with refugees be humane?', *Human Rights Quarterly*, Vol. 24, 2002, pp. 51–85, The John Hopkins University Press.

Extensive research on the work of institutions dealing with victims of trauma or human rights violations as well as more generally with people in need has shown the kind of psychological strain that such kind of work may place on staff, particularly those working on the ground in daily or regular contact with people in need. Individuals working for border control agencies are probably no exception.

### What is secondary trauma?

The demanding complexity of the work and the frequent encounter with people who are traumatised, are scared or exhibit mental or physical distress plus hearing their stories can lead to developing vicarious or secondary trauma. It is important to be able to identify the symptoms of secondary trauma that one may develop, so as to act upon them.

Some of the symptoms of secondary trauma are:

- ♦ intrusive thoughts;
- ♦ chronic fatigue;
- ♦ sadness;
- ♦ anger;
- ♦ poor concentration;
- ♦ detachment;
- ♦ emotional exhaustion;
- ♦ fearfulness;
- ♦ shame;
- ♦ physical illness;
- ♦ absenteeism.

Professionals studying and working with secondary traumas concur that it is essential that individuals working with victims of trauma are able to acknowledge the existence of symptoms associated with secondary trauma and that they do not need to deal with them alone. Secondary trauma is relatively common and employers and colleagues can assist in overcoming the symptoms. Access to counselling should be easily available, protected by confidentiality and accessible.



### 3.3. Professional standards and the human rights framework

#### Notes to the trainer

This part of the training material seeks to explain how ethical and human rights issues pertain to all aspects of the functions of a border guard.

#### References

- Universal Declaration of Human Rights (1948)
- UN Code of Conduct for Law Enforcement Officials (1979)
- 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)<sup>46</sup>
- Schengen border guards' handbook (2006)
- Updated Schengen catalogue (2008)
- Charter of Fundamental Rights of the EU (2000)
- Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen borders code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union<sup>47</sup>
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>48</sup>
- Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen information system (SIS II)<sup>49</sup>
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals<sup>50</sup>
- Twenty guidelines on forced returns, Council of Europe Committee of Ministers (2005)
- European Code of Police Ethics, Council of Europe (2001)
- Frontex/64/2010, Ethics of Border Security, Centre for the Study of Global Ethics, University of Birmingham (2011)
- Code of conduct for all persons participating in Frontex activities adopted by the decision of the Frontex Executive Director on 21 March 2011, Executive Director Decision No 2011/24, Frontex
- Your national code of conduct if it exists

<sup>46</sup> OJ L 105, 13.4.2006, p. 1.

<sup>47</sup> OJ L 111, 4.5.2010, p. 20.

<sup>48</sup> OJ L 281, 23.11.1995, p. 31.

<sup>49</sup> OJ L 205, 7.8.2007, p. 63.

<sup>50</sup> OJ L 348, 24.12.2008, p. 98.

The nature of the work of border guards and police requires them to come in close contact with the public, and the efficacy and efficiency of their tasks are dependent on public support.

Public confidence in the work of those agencies managing the borders is intrinsically linked to the attitudes and behaviour that officers display towards the public, in particular their respect for human dignity, fundamental rights and freedoms of any individual or group crossing the border, be it at sea, land or air. Violating human rights and behaving unethically does not contribute to the maintenance of law and order. Violations of fundamental or human rights occur both due to action or omission (not acting to protect or prevent a violation).

The complexity and difficulties encountered by border guards demand that they are not only familiar with the law (including human rights) but also with ethical issues; each border guard integrates ethical concerns and practices in all of his or her functions, including own values and conduct.

The effects of violations perpetrated by border guards are multifold<sup>51</sup>:

- erosion of public trust;
- aggravation of unrest;
- hindering successful prosecution in courts (i.e. in instances of human trafficking);
- making the state liable to pay reparations to victims;
- leaving vulnerable individuals in need of protection without justice;
- causing national, international public and media criticism and condemnation.

To dispel old myths that law enforcement is weakened by human rights and the ethical issues that emerge from them, the UN Code of Conduct for Law Enforcement Officials<sup>52</sup>, the European Code of Police Ethics of the Council of Europe<sup>53</sup> and the Ethics of Border Security<sup>54</sup> commissioned by Frontex, amongst other related codes of conduct, have been written to provide a framework for border officials to act in an ethical manner, in full conformity with fundamental rights.

#### The Frontex code of conduct for all persons participating in Frontex activities – ethical code of conduct for border guards

In general, a code of conduct ensures high professional and personal standards through the identification and understanding of ethical questions and the appro-

<sup>51</sup> 'Professional training series No 5 – Human rights and law enforcement', UN, New York, Geneva, 1997.

<sup>52</sup> <http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforLawEnfOfficials-E.pdf>

<sup>53</sup> [http://polis.osce.org/library/details?doc\\_id=2687&\\_ru=/library/details%3Fdoc\\_id%3D2658](http://polis.osce.org/library/details?doc_id=2687&_ru=/library/details%3Fdoc_id%3D2658)

<sup>54</sup> [http://www.frontex.europa.eu/assets/Publications/Research/Ethics\\_of\\_Border\\_Security\\_Report.pdf](http://www.frontex.europa.eu/assets/Publications/Research/Ethics_of_Border_Security_Report.pdf)



appropriate way to address those questions. In this regard, the Frontex code of conduct for all participants in Frontex activities (hereinafter 'Frontex code of conduct') makes clear the values and standards that are required from all participants in an activity coordinated or led by Frontex, thus creating the framework under which their duties are performed. It should be emphasised that with this document Frontex fills an existing gap in the legal system: a comparative study commissioned by Frontex on existing law enforcement ethical codes of the EU Member States shows that, while many EU Member States have codes of conduct that are used by border guards (23 of the EU and Schengen-associated countries), only three were written specifically for border guards. The vast majority were those used by police or other services performing border management functions in the Member States concerned.

The Frontex code of conduct aims to promote professional values based on the principles of the rule of law and the respect of fundamental rights and to establish the ethical behaviour standards that guide all persons participating in Frontex activities.

As regards its content, the code lists the principles and values which guide the performance of their duties and personal behaviour, recommends the best practice and defines which conducts are forbidden. Recognising the need to uphold a proper balance between the efficiency of the border control and the respect for fundamental rights, the code establishes, alongside with lawfulness, the respect but foremost the promotion of fundamental rights as one of its main principles. According to this provision, under no circumstances can it be admissible for the participants to inflict, instigate or tolerate any form of violation of those rights. It implies that they have an obligation to do their utmost to hinder any serious offence against human dignity.

A final set of rules envisages that law enforcement officers, due to their particular functions, focus on the human conduct in ways that may touch the fundamental rights of citizens. The Charter of Fundamental Rights of the EU was the basic framework for the drafting of the code. Moreover, other international texts which are particularly applicable to law enforcement officials in the international context, such as the UN Code of Conduct for Law Enforcement Officials and Resolution 690 (1979) of the Parliamentary Assembly of the Council of Europe on the Declaration on the Police, have not only been considered in depth, but have also been influential sources for the drafting of the code. Furthermore, and as mentioned above, the comparison of national codes of conduct was prepared and the results of the study have been taken into account in the course of drafting the code.



## MODULE 2

# Interception at sea, land and air



The aim of this module is to establish awareness among border guards of the importance of fundamental rights in relation to interception at sea, land and air.

## 1. Learning outcomes

At the end of this module, participants will be able to:

- prioritise and account for actions taken during an interception in the context of the right to life;
- recognise fundamental rights implications/considerations at every stage of the interception process, in particular the right to life and physical, psychological or mental integrity;
- outline the principles of the prohibition of arbitrary collective expulsions and any form of discrimination.

## 2. Lesson plan

Content	Method	Toolkit
1. Introduction to the right to life	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Discussion</li> </ul>	<ul style="list-style-type: none"> <li>• The right to life (PowerPoint presentation)</li> <li>• Questions to encourage discussion on the right to life</li> <li>• Video clip from 'Borderlands'</li> <li>• Video clip instructions</li> <li>• Interception step by step (PowerPoint presentation)</li> </ul>
2. Stages related to interception (planning, preparation, detection, interception and transportation to reception location) in compliance with fundamental rights	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Brainstorming</li> <li>• Reflection</li> <li>• Case study</li> </ul>	<ul style="list-style-type: none"> <li>• Brainstorm prompts for how to carry out an interception</li> <li>• Case studies exercise on interception and reception</li> </ul>
3. Fair treatment and non-discrimination, and the prohibition of collective expulsions	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Reflection based on a case study</li> </ul>	<ul style="list-style-type: none"> <li>• Case study on fair treatment and non-discrimination</li> </ul>
4. Assessment	<ul style="list-style-type: none"> <li>• Questions and answers</li> </ul>	<ul style="list-style-type: none"> <li>• Questions</li> <li>• Answer sheet</li> </ul>

## 3. Training material

### 3.1. Introduction to the right to life

#### Notes to the trainer

This part of the training material seeks to present: (1) why during interception, whether at sea, land or air, the right to life is fundamental, and (2) the legal obligations governing the actions taken by border guards.

The protection of the right to life and to non-refoulement are located in this module, as it is particularly relevant and most at stake during an interception. However, they remain paramount at all stages of the contact a border guard has with any individual crossing a border.

#### References

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966) and 1989 Protocol No 2 on the death penalty
- International Convention for the Safety of Life at Sea (SOLAS convention) (1974)
- International Convention on Maritime Search and Rescue (SAR) (1979)
- UN Convention on the Law of the Sea (Unclos convention) (1982)
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families (1990)
- UN Convention on the Rights of the Child (1989) and Protocols Nos 1 and 2 (2000)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)
- European Convention on Human Rights (ECHR) (1950)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)
- Charter of Fundamental Rights of the EU (2000)
- FRA report 'Fundamental rights at Europe's southern sea borders' (2013):  
Please include appropriate national references.



### 3.1.1. The right to life in human rights treaties

The right to life is the most basic fundamental right of all. Though the wording varies, it is set out in all major human rights treaties. The differences in formulation do not detract from the fact that all of these standards aim to provide the same protection. The right to life is a fundamental right because, without it, the enjoyment of other rights is not possible.

The right to life is enshrined in:

- Article 3 of the UDHR;
- Article 6 of the ICCPR;
- Article 6 of the Convention on the Rights of the Child;
- Articles 9 and 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- Article 2 of the Charter of Fundamental Rights of the EU; and
- Article 2 of the ECHR.

Principle 9 of the basic principles on the use of force and firearms by law enforcement officials<sup>55</sup> reads:

'Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.'

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families clearly enshrines the protection to the right of life of all migrants and members of their families, regardless of their status and in the jurisdiction they find themselves in. The relevant articles read:

'The right to life of migrant workers and members of their families shall be protected by law.'

(Article 9)

Article 28 stipulates how the right to health is inherently linked with the preservation of life.

<sup>55</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

'Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the state concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.'

Article 2 of the Charter of Fundamental Rights of the EU reads:

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.'

When an individual or a group not possessing the necessary papers or with an entry ban enters a country, it may be perceived as an abuse of the system; however, his/her fundamental right to life supersedes any migratory considerations<sup>56</sup>.

His or her right to life requires that they be offered all the necessary care to safeguard their life.

The European Court of Human Rights deems that Article 2 of the ECHR establishes a 'positive obligation' on states to investigate deaths that may have occurred in violation of this article<sup>57</sup>.

'The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State'<sup>58</sup>.

<sup>56</sup> UNHCR protection training manual for European border and entry officials, Session 4.

<sup>57</sup> For more information on case-law on how investigations should be carried out read *Jordan v UK and McKerr v UK* (<http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-68397-68865>).

<sup>58</sup> McCann GC judgment, ¶ 161 in 'The right to life: A guide to the implementation of Article 2 of the ECHR', Douwe Korff, Human rights handbooks No 8, Council of Europe, 2006.



### 3.1.2. At sea

The 1974 International Convention for the Safety of Life at Sea (SOLAS convention) and the 1982 UN Convention on the Law of the Sea (Unclos convention) provide that:

1. 'All shipmasters, state and merchant, are bound to render assistance;
2. The responsibilities of governments require parties, either individually or in cooperation with other states, to establish basic elements of a search and rescue service, to include:
  - ♦ legal framework;
  - ♦ assignment of a responsible authority;
  - ♦ organisation of available resources;
  - ♦ communication facilities;
  - ♦ coordination and operational functions; and
  - ♦ processes to improve the service including planning, domestic and international cooperative relationships and training.
3. Any ships have to proceed instantly to the rescue of all persons at distress at sea without regard to circumstances in which they are found. No time may be wasted, even while the ship master is waiting for instructions.
4. Unless the rescue operation may endanger the lives of crew members or the ship itself, the fact that the cargo ship is not intended to carry a large crew is irrelevant. The top priority is to save lives'<sup>59</sup>.

Under the International Convention on Maritime Search and Rescue, state vessels may carry additional obligations<sup>60</sup>.

### 3.1.3. The use of force

The right to life as well as the right to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment is 'non-derogable', meaning that they may not be denied even in 'time of war or other public emergency threatening the life of the nation', as defined in the UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provi-

<sup>59</sup> UNHCR protection training manual for European border and entry officials, Session 6.

<sup>60</sup> [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx)

sions in the ICCPR<sup>61,62</sup>. Article 4 of the ICCPR<sup>63</sup> and Article 15 of the ECHR<sup>64</sup> reinforce this legal principle.

Nevertheless, there is not an absolute prohibition of taking of life by state officers, as in some circumstances the deprivation of life may be justified (see the list below under Article 2 of the ECHR).

Article 2 of the ECHR covers the right to life.

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

<sup>61</sup> Annex to UN Doc. E/CN.4/1985/4, 1985.

<sup>62</sup> Non-derogable rights:

'58. No state party shall, even in time of emergency threatening the life of the nation, derogate from the covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.'

59. State parties to the covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (Art. 2(1)) and to adopt measures to secure an effective remedy for violations (Art. 2(3)), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extra-judicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

60. The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.'

<sup>63</sup> Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any state party to the present covenant availing itself of the right of derogation shall immediately inform the other states parties to the present covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

<sup>64</sup> Article 15 Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the convention are again being fully executed.'



2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to carry out a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

In all circumstances, the use of force will have to be necessary, proportional to the threat faced and hold up to evidence in which the burden of proof shows its use being justified.

Moreover, the tendency in Europe and reflected in the ECHR is that the death penalty is not accepted<sup>65</sup>. This is clearly stated in Protocols 6 and 13.

Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty<sup>66</sup>

'Article 1, Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.'

Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances<sup>67</sup>

'The Member States of the Council of Europe, signatory hereto, Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings; Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No 6 to the convention, concerning the abolition of the death penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances.'

<sup>65</sup> For more information on case-law view case of Al-Saadoon and Mufdhi v the United Kingdom (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97575>).

<sup>66</sup> Strasbourg, 28.4.1983.

<sup>67</sup> Vilnius, 3.5.2002.

### 3.1.4. Non-refoulement

Non-refoulement is the total prohibition of returning anyone, regardless of nationality, status or other groups, who may be at risk of torture<sup>68</sup>.

The principle of non-refoulement is applicable to all places where the state intercepts the migrant(s) in question and where it exercises jurisdiction, including the high seas. The leading case on this is *Hirsi v Italy*<sup>69</sup>. Any attempt to push back irregular migration does not absolve the state from its human rights responsibilities to uphold the absolute nature of the non-refoulement principle.

<sup>68</sup> Article 19.2 of the Charter of Fundamental Rights of the EU; Article 3 of the convention against torture; in the case of refugees, Article 33 of the 1951 Convention relating to the Status of Refugees.

<sup>69</sup> *Hirsi Jamaa and Others v Italy*, Application No 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012 (<http://www.unhcr.org/refworld/docid/4f4507942.html>).



### 3.2. Stages related to interception (planning, preparation, detection, interception and follow-up) in compliance with fundamental rights

#### Notes to the trainer

This part of the training material seeks to highlight the key moments when fundamental rights need to be considered and applied during the different stages when intercepting migrants.

#### References

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Convention for the Safety of Life at Sea (SOLAS convention) (1974)
- International Convention on Maritime Search and Rescue (SAR) (1979)
- UN Convention on the Law of the Sea (Unclos convention) (1982)
- UN Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families (1990)
- The European Convention on Human Rights (ECHR) (1950)
- Frontex common core curriculum. Please use appropriate local references.

#### 3.2.1. Professional planning and preparation

Professional planning and preparation prevents poor performance!

Of course, not every interception of a person will be covered by standard operating procedures or specific planning. However, every operation, activity, procedure or even routine should be based on, or take into account, a risk analysis. The interests of victims, suspects, other persons present as well as the concern for the safety and security of the border guard(s) should be at the centre of this analysis – in other words, fundamental rights should be considered at all times<sup>70</sup>.

From a fundamental rights view, a minor operational plan should also handle questions on officers using methods and means the right way; thus, the need to secure the use of proportionality, particularly in relation to ensuring that the minimum force and restraint necessary are applied.

<sup>70</sup> Frontex common core curriculum.

Any operation's order should contain the necessary provisions for fundamental rights issues<sup>71</sup>:

- The safety and well-being of all concerned could necessitate contracting partners and, for example, having medical personnel or an interpreter present or standing by.
- Foresee protection at all stages. Provisions could include surgical or rubber gloves, masks for the face for conducting searches, equipment to film the operation and allowing for internal / external oversight. These measures will not solely benefit the targeted public, but will also protect the border guard.
- Prevention will prevail. Methods will aim at de-stressing and de-escalation.
- The element of time should be calculated in order to allow due attention to people in need or potential victims. Overly long waiting times and/or not enough time for proper execution may place unnecessary stress on border guards.
- During the identification procedure and searches, women, people with disabilities and children always have priority over all others and are entitled to specific treatment.
- Any use of force or constraint should be legitimate (justifiable), i.e. the last resort (meaning the objectives cannot be reached in any other way or using any lesser force), in proportion to the desired effect and according to legal provisions; border guards should be competent with the knowledge, well-trained skills and attitude for the particular operation<sup>72</sup>. The need for improvisation should be minimised through further detailed instructions<sup>73</sup>.
- Planning should be flexible and be adapted to specific, situational details on migrants that might, will or could be intercepted (numbers, origin, motives, communication, needs, etc.).
- Men and women should be kept separate, with the exception of families, unless otherwise requested by the family member<sup>74</sup>.
- When possible, organise the distribution of food and drinking water, taking into account the religious differences (e.g. no pork for Muslims, Jews, etc.).
- Generally plan and be ready for the unexpected. What if? More people could be involved, more (expert) capacity or support might be needed, cars may break down and things will go wrong.
- Include provisions for an efficient transfer and humane transport for the intake.
- Foresee possible contacts with the press and how to safeguard the privacy of intercepted persons.

<sup>71</sup> The 1974 SOLAS convention, the 1982 Unclos convention, the Charter of Fundamental Rights of the EU and the ECHR. However, when teaching this it would be important to also make reference to national law.

<sup>72</sup> For more information on the use of force and human rights, see the section in this module on the use of force.

<sup>73</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>74</sup> Article 17 and Article 23(1) of the International Covenant on Civil and Political Rights.



The preparation of any operation should include a proper briefing explaining at least the situation, the mission (i.e. the objectives of the operation), the execution (i.e. the use of force), the administration and communication (also with the press). The content should reflect the fundamental rights based approach. If, for example, potentially harmful technical means or dogs would be used, the briefing should mention the necessity of providing warnings raising the awareness that exposure to dogs, in some cultures, may have very negative connotations, thus provoking fear or distress and rejection that may be wrongly interpreted as aggression or flight.

### 3.2.2. Detection and interception

The reaction upon the detection of one or more (potentially) undocumented persons should be prompt. If people are detected by third parties – lorry-drivers, a ship's crew, private security personnel – the border guards' response times should be organised in such a way that it does not endanger the public, the detected persons or the border guards themselves.

The border guards shall ensure that the persons are not photographed by journalists, both for respect of their privacy, but mostly because asylum seekers, trafficked persons and other vulnerable groups could encounter serious repercussions in their country of origin, as well as their family members still residing in the country of origin<sup>75</sup>.

Persons who are detected hiding in cars, lorries, boats or ships, in containers, or in between the cargo or goods should be clearly notified of the presence of law enforcement and should be urged to come out of their hiding place.

It is a general rule that the safety of the officer comes first – if he or she is rendered unable to perform his or her duties, most chances for assistance are also lost. General standard operating procedures should provide the necessary safeguards for the border guard's well-being (e.g. communication, backup support). Intercepted persons should be searched as soon as possible for the presence of potential weapons and other harmful objects in their possession. Rubber gloves should be at hand for conducting these searches – they will protect the border guard as well as the material evidence that the border guard might come upon.

<sup>75</sup> Article 12 of the UDHR and Article 8 of the ECHR; also see Module 4 for more information on the right to privacy.

The border guard should be prepared for emotional reactions – he or she may be confronted with persons who may be from countries or cultures where invasive or brutal policing methods are commonly used. After travelling in difficult or even inhumane conditions, the intercepted person may see his or her dream of a better life shattered and may think he or she has nothing to lose anymore. In general, there may be signs of fear, but reactions may also be aggressive or even (self-)destructive. The border guard needs to always aim at de-escalating the situation.

If two or more persons have been apprehended, parties should be separated where necessary; where children are concerned, they should be kept with their family or confirmed guardian. As in all phases of the process, also this step should be based on an active and continuing risk analysis by the border guard. In case of any doubt, the border guard should go for the choice giving the best protection for all concerned parties; in the case of children, act in the best interest of the child.

The border guard should be looking for signs that would indicate any need for medical care<sup>76</sup>. Keeping in mind that the undocumented person may be a victim, the border guard should also be very alert for indicators of any other criminal activity.

The fact of not being able to produce a valid travel or residence document should in itself not be a valid motivation for the use of handcuffs<sup>77</sup>. The use of handcuffs depends on the legislation of each country. However, if the use of handcuffs proves to be necessary – safe and non-harmful materials should be at hand. The responsible border guard should at regular intervals check if handcuffs are not cutting into the skin or blocking the blood circulation.

No person should be handcuffed to fixed points or solid infrastructure such as walls, ceilings, floors, central heating radiators, etc. Individuals who are deprived of their liberty for any reason (e.g. for immigration issues or criminal purposes or for aggressive behaviour) should not be subjected to practices that are unnecessary and /or painful, and amount to inhuman and degrading treatment<sup>78</sup>.

Any interception should be the subject of a formal report that will make detailed mention of any use of force and modes of restraints (searches, handcuffs, etc.)<sup>79</sup>.

<sup>76</sup> Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>77</sup> Address by Bacre Ndiaye, Director, Human Rights Council and Special Procedures Division, Global Forum on Migration and Development, OHCHR, Geneva, December 2011 ([http://www.ohchr.org/Documents/Issues/MHR/StatementBN\\_HRBA\\_Irregular\\_Migration.pdf](http://www.ohchr.org/Documents/Issues/MHR/StatementBN_HRBA_Irregular_Migration.pdf)).

<sup>78</sup> 'The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights', Aisling Reidy, Human rights handbooks No 8, Council of Europe, 2002, p. 27.

<sup>79</sup> 'The CPT Standards', European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf/E(2002) 1 – Rev. 2010, pp. 67 and 83.



Communication and language, including body language, should be de-stressing and de-escalating.

Communication with the apprehended person(s) is of the utmost importance. The right information on the 'here and now' should, on the one hand, give the person a de-stressing 'sense of control' over the situation and, on the other hand, where possible, prevent complications for the border guard<sup>80</sup>.

As far as this does not endanger its desired outcome and / or the safety or security of any person concerned, any use of force should be preceded by a warning.

As much as possible, agents should be able to seek out and understand key sentences in the most prevalent languages of the people more regularly intercepted.

Ensure that all persons rescued or intercepted, including on the high seas, are provided with adequate information about the possibility of requesting international protection. As highlighted by the court in the *Hirsi Jamaa and Others v Italy* case<sup>81</sup>, access to asylum procedures may be severely jeopardised by a lack of information. Thus, access to information should be ensured prior to the adoption of any decision regarding expulsions or other forms of return; each case having being examined and dealt with individually.

### 3.2.3. Transfer to the second line<sup>82</sup>

The border guard will take necessary precautions to ensure that the person's luggage is recuperated and safeguarded during the next steps in the procedure<sup>83</sup>.

In the course of procedures for identifying and other follow-up steps, border guards should always try to keep family groups together, making sure that they are not dispersed<sup>84</sup>.

The border guard should be aware of the need for discretion. Any apprehended person should be kept away from public attention as much as possible – even in the first line. As a minimum, general standard operating procedures should be

<sup>80</sup> For more information on communication, see Module 4 of this manual.

<sup>81</sup> *Hirsi Jamaa and Others v Italy*, Application No 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012 (<http://www.unhcr.org/refworld/docid/4f4507942.html>).

<sup>82</sup> For the purpose of this manual second line is when an individual or group are referred to other officers for further examination of the case or circumstances.

<sup>83</sup> Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20.3.1952), Protection of property: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

<sup>84</sup> Articles 17, 23(1), 23(4) and 24 (1) of the ICCPR; Article 10(1) of the ICESCR.

in place for contacts with the press or third parties, including legal representatives and relevant NGOs.

Escape attempts should be dissuaded, prevented and acted upon. The border guard should be aware of – and even expect – such attempts that could have a hopeless and self-destructive character.

The first-line border guard will make sure that the apprehended person will be taken care of at the moment of transfer to the second line.

Another excellent summary of tasks is provided by the Council of Europe Resolution 1821 (2011) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants:

'... the Assembly calls on Member States, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of *de jure* or *de facto* jurisdiction, to:

9.1. fulfil without exception and without delay their obligation to save people in distress at sea;

9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;

9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc bilateral agreement, or on the high seas;

9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR's interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights;

9.5. carry out as a priority action the swift disembarkation of rescued persons to a "place of safety" and interpret a "place of safety" as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of "safety" extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;

9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;

9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;



9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010)<sup>85</sup> on the detention of asylum seekers and irregular migrants in Europe;

9.9. suspend any bilateral agreements they may have concluded with third states if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;

9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the International Maritime Organisation (IMO) Guidelines on the Treatment of Persons Rescued at Sea;

9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No 197) and the so-called 'Palermo Protocols' to the United Nations Convention against Transnational Organised Crime (2000);

9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, Stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.'

#### Summary of key elements of interception

##### Contact with migrants:

- risk analysis of entire situation;
- in the case of sea interceptions, asking about the situation on the vessel (people on the brink of death or probably dead, pregnant women, children, elderly, people with disabilities);
- prioritisation of victim protection over criminal investigation; the former overrides and prevails over the latter;
- notifying approach by competent authorities;
- assessing the method for a safe rescue and coordinating efforts for this purpose.

##### Rescue:

- assessing the risk involved as a result of climatic conditions;

<sup>85</sup> <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=17813&Language=EN>

- coordinating resources for the purposes of prevention of tragedy;
- using de-escalating gestures and language.

##### Emergency health care<sup>86</sup>:

- first-aid;
- identifying and paying special attention to pregnant women, children, the elderly.

##### Other considerations:

- access to and provision of water and food;
- gender and child-sensitive measures;
- provision of information on rights and the upcoming process / procedures.

<sup>86</sup> Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: 'Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the state concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.'



### 3.3. Fair treatment and non-discrimination, and the prohibition of collective expulsions

#### Notes to the trainer

This part of the training material focuses on how the fair treatment and non-discrimination of migrants is fundamental for a border guard to carry out his/her duties in a professional and legal manner. Similarly, it emphasises the prohibition of collective expulsions.

#### References

- Universal Declaration of Human Rights (1948)
- UN Durban declaration (2001) and outcome document of the Durban Review Conference (2009)
- European Convention on Human Rights (ECHR) (1950)
- FRA annual report 2012 – Fundamental rights: challenges and achievements in 2012 (p.50 CJEU case law on return directive)

#### 3.3.1. Prohibition of collective expulsions<sup>87</sup>

Collective expulsions at interception would prevent the proper identification of people entitled to special protection such as asylum seekers, people who might be subject to torture if returned, children, victims of trafficking, etc.

Article 19(1) of the Charter of Fundamental Rights of the EU reads: 'Collective expulsions are prohibited.' In addition, Article 4 of Protocol No 4 of the ECHR reads: 'Collective expulsion of aliens is prohibited.'

The provision was first defined by the European Commission of Human Rights in 1975 in *Henning Becker v Denmark* (No 7011/75, decision of 3 October 1975). The Commission defined the 'collective expulsion of aliens' as being 'any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group'<sup>88</sup>.

In February 2012, in the *Hirsi v Italy* case, the European Court of Human Rights decided that the prohibition of collective expulsions to a third state also applied in cases involving the removal of foreigners carried out outside territorial waters.

<sup>87</sup> It is important to combine the prohibition of collective expulsions with knowledge on the principle of non-refoulement. The principle of non-refoulement is covered in Module 6.

<sup>88</sup> <http://migrantsatsea.wordpress.com/2012/02/27/hirsi-v-italy-prohibition-of-collective-expulsion-extends-to-extra-territorial-actions>

*'Hirsi Jamaa and Others v Italy* is the first case in which the European Court of Human Rights delivers a judgment on interception-at-sea. In the present context the latter term is a short-hand for referring to the enforced return of irregular migrants to the point of departure of their attempted Mediterranean crossing, without any individual processing, let alone examination of asylum claims. Unanimously, the Grand Chamber found a violation of Article 3 ECHR prohibiting inhuman and degrading treatment on a double count (risk of ill-treatment in Libya and risk of repatriation from Libya to countries where ill-treatment is rife), a violation of Article 4 of Protocol No 4 prohibiting collective expulsion and a violation of Article 13 ECHR guaranteeing a domestic remedy for any arguable complaint of a violation of the convention. These verdicts, reached by the Grand Chamber unanimously on 23 February 2012, undoubtedly put into question the kind of bilateral and multilateral agreements which have been signed by European states in the last decade or so in order to fight clandestine immigration, not to mention the fact that they indirectly require major aspects of European migration policy to be revised'<sup>89</sup>.

In view of these precedents, it is safe to affirm the following:

Judgements of the European Court of Human Rights hold that collective expulsions are unlawful under international and European regional human rights law.

While the methods of expulsion are not specifically mentioned in any relevant international instrument, the general provisions on cruel, inhuman or degrading treatment apply: no one should be expelled in a manner that would put his life or physical integrity at risk.

#### 3.3.2. Fair treatment and non-discrimination

'Discrimination lies at the root of many of the world's most pressing human rights problems. No country is immune from this scourge. Eliminating discrimination is a duty of the highest order.'

Navi Pillay  
UN High Commissioner for Human Rights

The UN Durban declaration<sup>90</sup> pointed out that xenophobia against non-nationals, and in particular migrants, constitutes one of the main sources of contemporary racism.

'All human beings are born free and equal in dignity and rights.'

<sup>89</sup> <http://strasbourgoobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy>

<sup>90</sup> [https://www.un.org/en/ga/durbanmeeting201/pdf/DDPA\\_full\\_text.pdf](https://www.un.org/en/ga/durbanmeeting201/pdf/DDPA_full_text.pdf)



These first few famous words of the UDHR clearly illustrate that the grounds on which beliefs and practices that attempt to diminish the worth of those who appear different is totally unacceptable and moreover in violation of the most basic principles enshrined in modern European thinking.

Grounds for discrimination are<sup>91</sup>: sex, 'race'<sup>92</sup>, skin colour, ethnic or social origin, nationality, language, religion or belief, political or any other opinion, legal status<sup>93</sup>, membership of a national minority, property, birth, disability, age or sexual orientation and other status.

Discriminatory profiling is: treating an individual less favourably than another in a same situation (e.g. border checks), when certain border control related action is based only or mainly on ethnicity, etc. (ECHR case-law on this: *Rosalind Williams v Spain*). A generalisation based on looks will lead to putting people of a particular group under a general suspicion, shifting the focus away from real suspects, and is therefore ineffective.

- Are like situations treated in an unlike manner? Are unlike situations treated alike?
- Does the differential treatment pursue a legitimate aim?
- Is it suitable, proportionate and necessary? Is it the least intrusive measure? Are there alternatives?
- You can give other 'absurd' examples of differential treatment (e.g. all those chewing a chewing gum cannot use the subways) to make the differential treatment more visible and to potentially create empathy.
- Professional profiling is based on intelligence, specific characteristics and types of behaviour.



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## MODULE 3

# Reception and assistance

<sup>91</sup> [https://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA\\_full\\_text.pdf](https://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA_full_text.pdf)

<sup>92</sup> The word 'race' is in quotation marks to signify that 'races' are social constructs, rather than any reflection of genetic differences between peoples from different continents or with different skin pigmentation. This underpins the contemporary belief of equality irrespective of place of origin and skin colour.

<sup>93</sup> CESCR General Comment No 20 on non-discrimination.



The aim of this module is to establish awareness among border guards of the importance of fundamental rights in the execution of their duties concerning reception and assistance at the border entry point<sup>94</sup>.

## 1. Learning outcomes

At the end of this module, participants will be able to:

- recognise the responsibilities related to fundamental rights during the reception and assistance phase at the border entry point;
- apply the key provisions of the EU directive on asylum procedures and the EU directive on reception conditions to the reception process;
- proactively identify different groups of persons at the border including those with special needs.

## 2. Lesson plan

Content	Method	Toolkit
1. Introduction to fundamental rights in reception and assistance	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• In-course reading exercise</li> </ul>	<ul style="list-style-type: none"> <li>• Rights at the border point (PowerPoint presentation)</li> <li>• Reception in accordance with human rights (PowerPoint presentation)</li> <li>• Instructions for in-course reading exercise on reception</li> </ul>
2. Reception and assistance	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Exercise</li> <li>• Practice</li> </ul>	<ul style="list-style-type: none"> <li>• Individual with special needs (PowerPoint presentation)</li> <li>• Instructions for non-discrimination activity (exercise)</li> <li>• Power walk exercise</li> <li>• Practice on reception and assistance of migrants</li> <li>• Video clip from 'Borderlands', Frontex</li> <li>• Video clip instructions</li> </ul>
3. Assessment	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>

<sup>94</sup> Communication and interviewing, two key skills for reception and assistance, are covered in Module 2 and in more detail in Module 4. As mentioned in footnote 5, this manual and all the modules are about the interaction with everyone at the entry point only. The particular rights covered are related to this brief moment of contact the border guard has with the person(s) at the entry point. Issues related to the right to housing, accommodation, maintenance, subsistence, education, etc. that come into play at the moment the migrant has crossed the border are not the topic of this manual. This manual does not deal with the asylum application process nor the rights involved in it, but only with those at the entry point (see Introduction).

## 3. Training material

### 3.1. Introduction to fundamental rights in reception and assistance

#### Notes to the trainer

This part of the training material aims to build the capacity of border guards to ensure respect for fundamental rights throughout their interactions with all persons encountered during the reception process, and to meet their needs and provide any assistance required.

#### References

- Geneva conventions (1949) and international humanitarian customary law
- International Covenant on Economic, Social and Cultural Rights (1966)
- European Social Charter (1961)
- Charter of Fundamental Rights of the EU (2000)<sup>95</sup>
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers<sup>96</sup> ('reception conditions directive')
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>97</sup> ('asylum procedures directive')
- Treaty on the Functioning of the European Union (2012)
- Further developing asylum quality in the EU, UNHCR
- UNHCR protection training manual for European border and entry officials, Session 4
- UNHCR manual on building a high-quality asylum system
- FRA and Council of Europe 'Handbook on European law relating to asylum, borders and immigration'

<sup>95</sup> The charter brings together in a single document rights previously found in a variety of legislative instruments, such as in national and EU laws, as well as in international conventions from the Council of Europe, the UN and the International Labour Organisation (ILO). By making fundamental rights clearer and more visible, it creates legal certainty within the EU.

<sup>96</sup> OJ L 31, 6.2.2003, p. 18.

<sup>97</sup> OJ L 326, 13.12.2005, p. 13.



The right to freedom of movement, in human rights law, is captured in Article 13 of the UDHR which provides that 'everyone has the right to leave any country, including his own, and to return to his country'. Article 12(2) of the ICCPR contains a similar provision, reaffirming this right in international law<sup>98</sup>. In addition, Article 2(2) and (3) of Protocol No 4 to the ECHR also upholds the same right<sup>99</sup>.

Therefore, according to international and European human rights law, attempting to cross or crossing a border without the appropriate papers should not be considered a criminal offence. This analysis is brought forward by, amongst others, the Special Rapporteur on the Human Rights of Migrants in his address to the 66th session of the UN General Assembly, Third Committee – item 69 stated that:

'... irregular migration is not a crime. State authorities have increasingly had recourse to the language of crime when they speak of irregular migration, with some states resorting to criminalisation of irregular migration and / or of helping migrants in an irregular situation. Crossing borders may be in violation of the law, but it is an abstract violation of the law, since moving from one country to another does not per se endanger any person, nor affect any property.'

Moreover, Article 5 of the 2000 UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2004 UN Convention against Transnational Organised Crime, expressly proscribes the criminal liability of migrants who have been the object of conduct relating to their being smuggled into a country.

It is also the opinion of the UN Working Group on Arbitrary Detention<sup>100</sup>, which has pronounced that criminalising irregular entry into a country leads to unnecessary detention that does not serve the interests of states<sup>101</sup>.

<sup>98</sup> Article 12 of the ICESCR: '(2) Everyone shall be free to leave any country, including his own. (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant.'

<sup>99</sup> Article 2 of the ECHR, Freedom of movement: '2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>100</sup> The Working Group on Arbitrary Detention comprises Member State representatives and its mandate includes to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the UDHR or in the relevant international legal instruments accepted by the states concerned.

<sup>101</sup> The OHCHR in cooperation with the Global Alliance Against Traffic in Women, 'Expert consultation on human rights at international borders: exploring gaps in policy and practice', March 2012.

The Commissioner for Human Rights of the Council of Europe (1 April 2006 to 31 March 2012), Thomas Hammerberg, stated<sup>102</sup>:

'I have observed with increasing concern a trend to criminalise the irregular entry and presence of migrants as part of a policy of "migration management". Such a method of controlling international movement corrodes established international law principles. It also causes many human tragedies without achieving its purpose of genuine control.'

It is in this context that it is required of border guards not to view the migrant, regardless of his or her legal status, as a criminal engaging in illicit activities.

Border checkpoints are one of the primary locations where individuals in need of protection may declare their circumstances (e.g. claim international protection, ask for help as being a victim of trafficking), thus the processing of new arrivals has to take place in an atmosphere that permits and facilitates the identification of vulnerable individuals and of people with special needs. This will be done most effectively if there is not a view that the movement of people into the country is in itself a negative or a criminal act.

Any migrant, including an undocumented one, should be treated with respect. A primary concern of the border guard is to uphold the human rights and dignity of all individuals under their jurisdiction. Discriminatory profiling with any other discriminatory practices should be avoided as contrary to the fundamental rights of dignity, equality and justice, as enshrined in the Charter of Fundamental Rights of the EU<sup>103</sup>.

To apply fundamental rights in practice, it is necessary to communicate in a language that is understood by the migrant, and this requires gender sensitivity, when relevant child-friendly approaches, in an appropriate room / space with the required attendant. The overall aim must be to facilitate access to information in order to ensure the person feels safe and confident to disclose his or her needs<sup>104</sup>.

In this regard, as the charter applies to all EU institutions, it also applies to EU Member States when they implement EU law. Thus, it is important to be familiar with the content and the spirit of the charter; below you find a summary presenting the most relevant aspects.

<sup>102</sup> [http://www.coe.int/t/commissioner/Viewpoints/o80929\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/o80929_en.asp)

<sup>103</sup> For more information on discriminatory profiling, see Module 2 and view the text of the charter (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>).

<sup>104</sup> See Module 4 for more details on communication and how to carry out an interview respecting fundamental rights.

**Relevant extracts from the of Charter of Fundamental Rights of the EU**

The rights mentioned in the charter are to be enjoyed by and respected for all people, regardless of whether they are or not citizens of the EU.

**TITLE I: DIGNITY****Article 1 Human dignity**

Human dignity is inviolable. It must be respected and protected.

**Article 2: Right to life****Article 3: Right to the integrity of the person**

1. Everyone has the right to respect for his or her physical and mental integrity.

**Article 4: Prohibition of torture and inhuman or degrading treatment or punishment****Article 5: Prohibition of slavery and forced labour****Article 6: Right to liberty and security****Article 7: Respect for private and family life****Article 8: Protection of personal data**

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

**Article 10: Freedom of thought, conscience and religion****Article 18: Right to asylum**

The right to asylum shall be guaranteed with due respect for the rules of the Geneva convention of 28 July 1951 and the protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

**Article 19: Protection in the event of removal, expulsion or extradition**

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

**TITLE III: EQUALITY****Article 20: Equality before the law**

Everyone is equal before the law.

**Article 21: Non-discrimination**

1. Any discrimination based on any ground such as sex, 'race', colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

**Article 22: Cultural, religious and linguistic diversity**

The Union shall respect cultural, religious and linguistic diversity.

**Article 24: The rights of the child**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with, both, his or her parents, unless that is contrary to his or her interests.

**Article 25: The rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

**Article 26: Integration of persons with disabilities**

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.



### 3.2. Reception and assistance

#### Notes to the trainer

This part of the training material presents the legal framework and the role border guards play during the reception of migrants and in providing assistance in full respect of fundamental rights.

#### References

- ♦ International Covenant on Civil and Political Rights (1966)
- ♦ European Social Charter (1961)
- ♦ Unicef reference guide on protecting the rights of child victims of trafficking in Europe (2006)
- ♦ NGOs and UN agencies assisting persons with disabilities, UN High Commissioner for Refugees (2008)<sup>105</sup>
- ♦ Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, UN High Commissioner for Refugees, No 110 (LXI) – 2010
- ♦ Working with persons with disabilities in forced displacement, UN High Commissioner for Refugees (2011)
- ♦ Anti-trafficking training for border guards – Trainers' manual, Frontex (2012)

#### 3.2.1. Border guard responsibilities

Border officials have the positive responsibility to process every migrant going through a crossing or entry point. This task requires the border guard to be able to communicate effectively with a wide variety of people<sup>106</sup>, to be familiar with the legal framework involved in this task, and to know the type of assistance people may require and be entitled to and how to proceed<sup>107</sup>.

Under international law<sup>108</sup>, border guards have the duty to recognise and respond in a protection-sensitive and rights-based approach to persons who present themselves at the border and who may wish and/or need to seek<sup>109</sup> international protection. In addition, border officials have the responsibility to identify

<sup>105</sup> <http://www.unhcr.org/4ec3c78c6.pdf>

<sup>106</sup> Communication includes verbal and body language as well as the setting of the location where the communication takes place. In Module 4, interviewing and communication skills are covered in great detail; Module 2 also covers the function of communication in de-escalation.

<sup>107</sup> Elements of this section have been adapted from the 'UNHCR protection training manual for European border and entry officials', Session 4.7, pp.17–19 (<http://www.unhcr.org/4d944f229.html>).

<sup>108</sup> See *Hirsi v Italy* case of the European Court of Human Rights.

<sup>109</sup> The person(s) may not be aware that such an avenue is open to them, even though they are survivors of torture or fleeing persecution. Under international law, the border guard has the duty to identify such individuals.

persons with other protection needs (i.e. trafficked persons) and take immediate action in that regard. To this end, it is essential that they build links with national referral institutions, that they know their mandates well and that they have their coordinates at hand.

At the border, to assure that the person accesses the necessary assistance, they should be informed immediately, in a language which they can understand, of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations.

The information should be given with enough time to enable them to exercise their rights and in any case to avoid any irreversible limitation of their rights. Accessible information should also be available with regard to their situation and their rights, including protection mechanisms, other available services, NGOs providing support and the processes of family reunification and/or repatriation<sup>110</sup>.

Ideally, there should be brochures at border posts with basic information in a language they understand. These brochures should be available to the public in general passing through that border point. However, people with poor or no literacy skills should also be provided with appropriate opportunities to access this information.

After having assured safety, the border guard in the process of reception and assistance has to keep in mind two concerns: (1) care because of the individuals' conditions, and/or (2) information to access international protection.

Whatever assistance is required, it should be given free of any discrimination or negative profiling and free of charge<sup>111</sup>.

Care because of the individuals' condition:

- ♦ emergency health care<sup>112</sup>;
- ♦ first-aid;
- ♦ identification and special attention to pregnant women;
- ♦ concern for the elderly;
- ♦ access to and provision of water and food;
- ♦ gender-sensitive processes and facilities;

<sup>110</sup> Article 10(1)(a) of the asylum procedures directive: Applicants for asylum 'shall be informed... of the procedure to be followed and of their rights and obligations...'; also mentioned in Article 5 of the reception conditions directive.

<sup>111</sup> To view the definitions of discrimination and negative profiling, see Module 2.

<sup>112</sup> Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: 'Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the state concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.'



- child-sensitive measures;
- concern for individuals suspected of being torture survivors;
- measures and infrastructure for people with disabilities;
- individuals and their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their state of origin or of a state representing the interests of that state, only following the migrant's or family member's request and in respect of the need for confidentiality for asylum seekers<sup>113</sup>.

#### Information to access international protection

All persons needing or seeking protection should be afforded information on organisations or groups of persons that provide specific legal assistance and migrants and organisations that may be able to help or inform them about the available reception conditions, including health care. This includes information on how to contact the UNHCR and national actors working for the protection and assistance of asylum seekers and refugees.

Seekers of international protection should have an interpreter present, translating into a language they can understand. Lack of communication on grounds of language or cultural barriers may result in being unable to explain the circumstances surrounding their cases and to express their wishes to seek international protection.

Seekers of international protection should be granted access to legal assistance, free of charge. Legal assistance and representation can be provided by migrant or refugee associations, bar associations, the UNHCR in some cases and other organisations.

Seekers of international protection should never be interviewed by police or border officials on the substance of their claim. This is the role of other officials (from different ministries or authorities, depending on the country) mandated to take decisions on refugee claims. Among other reasons for such a division of responsibilities is the need to ensure that the seeker of international protection has adequate information about her / his rights before a substantive interview takes place.

<sup>113</sup> Vienna Convention on Consular Relations.

#### 3.2.2. Dublin convention and Dublin II

The Dublin convention<sup>114</sup> was replaced in February 2003 by the Dublin II regulation<sup>115</sup>.

On 15 June 1990, the European Community Member States agreed upon a convention determining the state responsible for examining applications for international protection lodged in the Member State. As the agreement was concluded in Dublin, the convention became known as the Dublin convention.

The provisions of the convention entered into force on 1 September 1997 between the 12 original signatory states. It entered into force one month later (on 1 October 1997) for Austria and Sweden and on 1 January 1998 for the last state, Finland.

#### The Dublin convention

The convention laid down a set of criteria for determining Member States' consideration of international protection applications. The hierarchical approach was based on the basic principle that the Member State most responsible for the applicant's presence in the territory of the EU should be responsible for dealing with the international protection claim.

- Article 4 provided that the state where the refugee's family was legally resident should be responsible for examining the international protection application, providing that the persons concerned gave their consent.
- Article 5 determined responsibility on the basis of the previous issue of a residence permit or a visa to the individual applicant.
- Article 6 provided that where an applicant for international protection entered the territories of the EU illegally across the external border, the Member State in which this happened would be responsible, unless the person had been living in the Member State where the application had been lodged for at least 6 months, in which case the latter would be responsible.
- Article 7 provided that the Member State responsible for controlling the lawful entry of the international protection applicant into the EU territory would be responsible, unless the individual concerned was not a visa national for that particular Member State. However, if the individual then moved on to another Member State where he or she did not require a visa and lodged an international protection claim, then the latter state would be responsible. Article 7 also provided that where an application for international protec-

<sup>114</sup> Convention 97/C 254/01 determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 19.8.1997.

<sup>115</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p. 1).



tion was lodged in transit in an airport of a Member State, then that Member State would be responsible.

- Where no Member State could be identified as being responsible on the basis of the preceding criteria, Article 8 provided that the responsible Member State should be the first one with which the application had been lodged.
- Finally, Article 9 permitted any Member State, even where not responsible under the criteria, to exercise discretion to take responsibility for an applicant for humanitarian reasons.

### The Dublin II regulation

The Treaty of Amsterdam called for a replacement mechanism to determine responsibility for international protection applicants within the EU. As a result, Council Regulation (EC) No 343/2003 (known as 'Dublin II') was adopted on 18 February 2003.

This instrument established criteria and mechanisms for determining the Member State responsible for examining an international protection application lodged in one of the Member States by a third-country national.

Subject to certain transitional arrangements, the provisions of the Dublin II regulation entered into force 1 September 2003 for all EU Member States except Denmark (see Dublin states below).

The Dublin regulation applied to all new Member States when they acceded to the EU on 1 May 2004. Additional rules on practical implementation are set out in Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national<sup>116</sup> (known as the 'Dublin II implementation regulation').

Basic criteria of Dublin II in descending order of priority are as follows.

- Article 6:
  - provides that where an applicant for international protection is an unaccompanied minor, the responsible Member State will be that where a member of his or her family is legally present, provided that this is in the best interest of the minor; the definition of 'family members' is provided in Article 2(i) of Dublin II;
  - is limited to the nuclear family insofar as this existed in the country of origin, it refers to the spouse or the unmarried partner in a stable relation-

<sup>116</sup> OJ L 222, 5.9.2003, p. 3.

ship, the minor children of the couple on condition that they are unmarried and dependant (without distinction to whether they were born in or out of wedlock or adopted) or the parents or guardian of an unmarried minor.

In the absence of such a family member, the responsible state is the one where the minor had lodged his or her application for international protection. This means that the provisions of Article 16 of Dublin II may where otherwise appropriate, be applied and that it is possible to request the Member State where an earlier application for international protection had been lodged to take back the unaccompanied child.

- The state which is responsible for examining the application for asylum is as follows.
  - The state in which a family member of the applicant has been allowed to reside as a refugee (Article 7) provided that the persons concerned so desire. This provision (unlike the other on family unity) applies whether or not the family was previously formed in the country of origin.
  - The state in which a family member of the applicant has an international protection application which is not the subject of a first decision (Article 8).
  - The state that granted the applicant a visa or residence permit (Article 9). (This article contains detailed clarification for situations where there is more than one visa or residence permit and/or where such documents may no longer be valid.)
  - The state where the applicant first entered the EU illegally, responsibility ceasing after 12 months (Article 10(1)).
  - The state where the applicant has been previously living ('illegally present') for a continuous period of at least 5 months (Article 10(2)).
  - The state the applicant entered without the need to hold a visa (Article 11).
  - The state in which the application for international protection was made when in an international transit zone of an airport (Article 12).
  - The first state where the applicant made an application for international protection (Article 13).

In addition to the criteria within the 'responsibility hierarchy' set out above, the Dublin II regulation also specifically includes a provision allowing Member States to accept responsibility for cases in the wider family reunion or for other humanitarian reasons, provided the persons concerned agree (Article 15). The humanitarian provision in Article 15 is discretionary, but evidence put forward should be taken into account along with relevant human rights case-law.



### Dublin states

The current Member States of the EU are: Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom.

The Dublin II and Eurodac regulations (see below Eurodac regulations) could not immediately apply to Denmark due to the terms of a protocol on the position of Denmark annexed to the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU) by the Treaty of Amsterdam. Denmark's protocol meant that separate legal steps were needed to secure Denmark's participation. As a result, Denmark's participation is with effect from 1 April 2006. Between 1 September 2003 and 31 March 2006, the transfer of seekers of international protection to and from Denmark continued to be subject to the Dublin convention.

The United Kingdom (like Ireland) was not bound to participate in the Dublin II and Eurodac regulations, due to the terms of a protocol on the position of the United Kingdom and Ireland, also annexed to the TEC and TEU by the Treaty of Amsterdam. However both the United Kingdom and Ireland decided to participate ('opt-in') as provided by the terms of the protocol.

Since 1 April 2001, Iceland and Norway have also operated under the terms of the Dublin arrangements by virtue of a separate agreement between those countries and the Member States of the EU. The need to conclude this 'parallel agreement' was linked to the removal of internal frontier controls between Iceland, Norway and the Schengen states.

### 3.2.3. Eurodac

On 15 January 2003, the EU-wide fingerprint database of international protection applicants and certain other third-country nationals, established by Council Regulation EC No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin convention<sup>117</sup> went live. Additional rules on Eurodac implementation are set out in Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin convention<sup>118</sup> (known as the 'Eurodac implementing rules').

<sup>117</sup> OJ L 316, 15.12.2000, p. 1.

<sup>118</sup> OJ L 62, 5.3.2002, p. 1.

Eurodac allows for the computerised exchange of fingerprints solely in order to support the application of the Dublin arrangements by identifying those applicants already known to other participating States. The Eurodac database cannot be accessed for the purposes of law enforcement reasons nor can its data be used to support prosecutions.

### 3.2.4. Non-Dublin safe third-country cases

Outside of the Dublin arrangements, applicants are generally returned either to a safe third country of embarkation or, more rarely, to another safe third country if evidence exists that the applicant would be admitted to that state.

Examples of countries to which such returns have taken place are Canada, Switzerland and the United States.

There are no binding agreements so these should be considered on a case-by-case basis. However, the principle of non-refoulement must be respected (including its corollary of duty of individual examination of the case), including when dealing with migrants/asylum seekers from so-called 'safe third countries' or 'safe European countries'.

The Charter of Fundamental Rights of the EU clearly illustrates the rights that have been agreed to be protected, respected and fulfilled within Europe, as illustrated in Module 1. However, to operationalise these rights during the process of receiving migrants, the EU has recognised minimum standards on reception<sup>119</sup>.

### 3.2.5. Minimum standards on the reception of applicants for international protection in Member States

Council Directive 2003/9/EC, in principle, applies only to applicants for international protection. This directive does not relate to family reunification. Family members include spouses and unmarried partners if the provisions of the host state treat unmarried couples in the same way as married couples. Children of a married or unmarried couple or adopted children and other members of the family are considered part of the family if they are dependent on an international protection applicant or if they have undergone particularly traumatic experiences or require special medical treatment.

The directive applies to all nationals of third countries as well as to stateless persons who have requested international protection at the border or on the terri-

<sup>119</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33150\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33150_en.htm)



tory of a Member State. In addition, the directive will apply to family members accompanying the applicant. The directive does not apply to third-country nationals or stateless persons who submit their requests for diplomatic or territorial asylum to the representations of Member States.

Member States are free to apply more favourable conditions of reception and they may apply the same conditions to applicants for forms of protection other than those provided for by the Geneva convention.

### 3.2.6. Provisions relating to reception conditions

Applicants for international protection must be informed of their rights and the benefits they may claim, as well as the obligations they have to comply with. They will receive a document certifying their status as applicants for international protection, which will be renewable until they are notified of the decision on their application for international protection. Moreover, the Member State may provide a travel document when serious humanitarian reasons arise that require their presence in another state.

Member States must guarantee:

- certain material reception conditions, in particular accommodation, food and clothing, in kind or in the form of a financial allowance; allowances must be such that they prevent the applicant from becoming destitute;
- family unity;
- medical and psychological care;
- access to the education system for minors and language courses to enable them to attend ordinary school.

Material reception conditions and medical and psychological care are to be guaranteed during all types of procedures (regular, admissibility, accelerated and appeal procedures), in order to ensure a standard of living adequate for the health and well-being of the applicants and their families. If his/her economic situation permits it, the Member State could decide that the applicant should contribute partially or totally to the cost of the material reception conditions and the medical and psychological care.

Moreover, special medical and psychological care must be given to pregnant women, minors, the mentally ill, the disabled, and victims of rape and other forms of violence.

Member States must provide lodgings in a house, accommodation centre or hotel, in order to protect family life and privacy. In all cases, applicants must have

the possibility of communicating with legal advisers, NGOs and the United Nations Refugee Agency (UNHCR).

Member States must pay special attention to the situation of children, disabled people, elderly people and victims of violence, discrimination or exploitation.

As soon as possible, a guardian will be appointed for each unaccompanied minor (i.e. social services). In addition, the Member States will endeavour to trace the members of his/her family.

Victims of torture or violence will have access to rehabilitation programmes and post-traumatic counselling.

Following is a summary of key elements to guarantee a fair reception process:

- the person has to be treated with respect, and his or her dignity guaranteed;
- the principle of family unity has to be safeguarded at all moments;
- communicate in a language that is understood;
- take on board considerations of gender and age and the situation of persons with special needs when allocating housing facilities;
- make appropriate gender considerations when communicating with individuals;
- facilitate access to information;
- reception does not mean detention;
- reception should be respectful of the communication/social skills of the migrant;
- access to international protection procedures is a primary safeguard of protective border-control mechanisms;
- access to legal assistance;
- referral to relevant outside agencies that could provide support;
- respect diversity.

### People with special needs should be given specific attention

Special attention should be given to children and other vulnerable groups such as victims of torture and sexual violence, elderly and disabled persons. Procedures should be established to identify people with special needs. The detention of unaccompanied children should be prohibited, in order to ensure that children benefit from protection and care as early as possible.

It is important to be aware of the proposal for a directive of the European Parliament and of the Council of 1 June 2011 laying down minimum standards for the



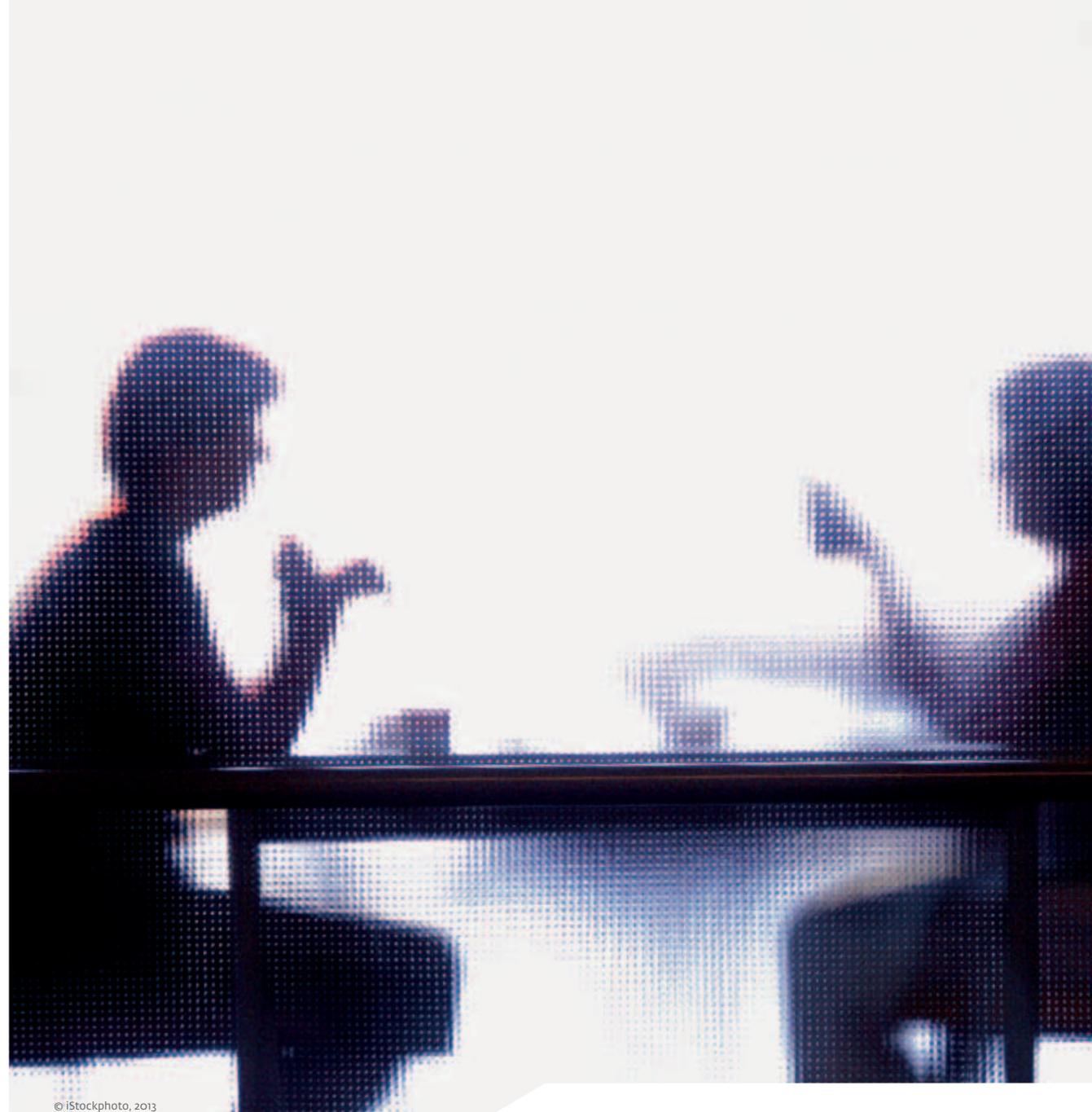
reception of asylum seekers<sup>120</sup> (recast), and check if it has been approved to update the training. This proposal aims to replace Council Directive 2003/9/EC in order to address the deficiencies in the national reception conditions, as identified in the evaluation report below and in the consultation launched by the Green Paper on the common European asylum system<sup>121</sup> (CEAS). The approval of the directive should take place during 2013.

The new directive will guarantee higher standards of reception conditions that will be in line with international law and harmonise national reception policies so that the secondary movements of applicants for international protection are further limited. In particular, the proposal concerns the following:

- The scope of the directive, extending it to also include applicants for subsidiary protection. The directive will apply to all types of international protection procedures, notwithstanding the geographic areas or facilities hosting the applicants.
- Access to the labour market, which is facilitated by allowing applicants to access employment after a maximum period of 6 months from lodging an international protection application and by obliging Member States to not restrict this access through national labour market conditions.
- Access to material reception conditions, which must provide an adequate standard of living for applicants for international protection. Member States will need to take into account the level of social assistance allocated to nationals when providing financial support to applicants for international protection and the gender, age and special needs of the applicants when assigning housing facilities. At the same time, the situations in which the reception conditions could be withdrawn entirely will be restricted.
- Persons with special needs: Member States will need to put in place measures to identify these needs and to design reception conditions accordingly. Particular attention needs to be placed on access to health care, housing facilities and the education of minors.
- Implementation and improvements of national systems, which must be ensured via monitoring and controlling the national reception systems and through continued reporting at both the Community and national levels.

<sup>120</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF>

<sup>121</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l14561\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l14561_en.htm)



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## MODULE 4

# Interviewing



The aim of this module is to enable border guards to interact and conduct interviews with migrants according to fundamental rights standards and principles.

## 1. Learning outcomes

At the end of this module, participants will be able to:

- adopt communication and interviewing styles that reflect fundamental rights;
- collect relevant information in a way that is compliant with fundamental rights;
- protect the confidentiality of personal data and balance this with the obligation to disclose information as required by law.

## 2. Lesson plan

Content	Method	Toolkit
1. Introduction	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Exercise</li> </ul>	<ul style="list-style-type: none"> <li>• Examples of body language</li> <li>• Body language photo gallery</li> <li>• Scenarios exercise to practice interviewing</li> </ul>
2. The PEACE model	<ul style="list-style-type: none"> <li>• Presentation</li> </ul>	<ul style="list-style-type: none"> <li>• PEACE PowerPoint presentation</li> <li>• Notes for PEACE PowerPoint presentation</li> </ul>
3. Follow-up	<ul style="list-style-type: none"> <li>• Presentation</li> </ul>	
4. Assessment	<ul style="list-style-type: none"> <li>• Role-play</li> </ul>	<ul style="list-style-type: none"> <li>• Interview role-play instructions</li> </ul>

## 3. Training material

### 3.1. Introduction to fundamental rights issues involved in interviewing and communication

#### Notes to the trainer

This section introduces the border guards to the important aspects of communication and interviews at the border, the preparation and the follow-up needed to ensure the respect of fundamental rights of migrants as part of the EU border culture.

#### References

- Geneva conventions (1949) and international humanitarian customary law
- Dublin II (2003)
- Sirene, Eurodac and SIS
- Unicef guidelines for interviewing children
- Separated, asylum-seeking children in European Union Member States, FRA (2010)
- UNHCR protection training manual for European border and entry officials, Session 5
- Building in quality: A manual on building a high-quality asylum system, UNHCR, September 2011, p. 79
- Interpreting in a refugee context – Self-study Module 3, UNHCR (2009)
- More on children at: <http://fra.europa.eu/en/publications-and-resources/publications?title=children&=Apply>
- Further developing asylum quality in the EU, UNHCR
- Anti-trafficking training for border guards – Trainers' manual, Frontex (2012), Module 3: Interviewing
- The duty to inform applicants about asylum procedures: The asylum seeker perspective, FRA (2010)



An initial interview is part of the duties a border guard at the entry post will undertake. The interview should be carried out in full respect of fundamental rights; the communication should be as fluid as possible, open and non-threatening. Border guards have to show high standards of professionalism as part of the EU border-guard culture as they are in most cases the first contact migrants have with EU authorities.

The objective of an interview is to gather information to identify the migrant and be able to refer them through the appropriate channels. For these purposes, border guards need to have knowledge of the diversity of people involved (places of origin, beliefs, language, etc.); the vast range of potential reactions during the first encounter and during a more formal interview; and the possibility that the migrant may be a bona fide traveller, a victim of trafficking, someone needing international protection, a trafficker, a smuggler, etc.

### 3.1.1. Before the interview

#### Ensuring fluid and fair communication

If needed, the border guard should secure the services of an interpreter. Any communication should take place in a language that the migrant is able to understand and to express himself or herself in without difficulties.

Before initiating communication with the migrant, the border official should ensure the following.

- That the individual and the interpreter understand one other. Ask them to talk a little. If the interpreting arrangement is not satisfactory, then the interview should not proceed.
- That the interpreter is unprejudiced and impartial, not closely related to the applicant through family or other ties and from the examining authority. Be aware of any factors that may influence the migrant's ability or willingness to communicate, such as gender, culture or religious elements or belonging to an ethnic group in conflict with that of the interpreter.
- That the interpreter is trustworthy and that his intervention will not endanger or potentially harm the migrant.

#### Access to legal counsel

Where national legislation provides for the participation of legal or other counsel to assist an applicant in presenting his/her claim, it is essential to allow such counsel to participate in the interview.

The presence of a legal representative or other counsel, who is familiar with asylum and migration legislation and local jurisprudence, is helpful not only to the applicant but also to the border officials, as they will help explain the relevant and applicable laws and procedures, including their rights under national and international human rights law.

#### Communication and interviewing

Communication cannot be established if there exists a fear of being overheard by others. Border guards should therefore ensure that the area where they carry out the interview is private and that the area and the procedure assure confidentiality. Then, border guards should build a rapport and maintain a two-way communication.

#### Asking the right questions

When communicating with people at the border/entry point, border guards should be prepared to follow up with questions on all relevant issues that can indicate the possibility of a protection concern. No effort should be spared in trying to identify the persons' immediate needs and utilising the relevant referral mechanism. Priority should be given to medical and any other urgent assistance that may be needed. This requires that border officials maintain an open attitude and remain alert and intellectually active during the interview process. The border guards should explain clearly and in a language accessible to the migrant or person requesting international protection the procedure they are going to follow.

Questions should be specific and in accordance with the purpose of the interview; border officials should be able to alternate between open and closed questions, on the basis of their effectiveness, to improve communication at each stage of the interview.

- Open-ended questions are questions that are worded in a way that allows the interviewee to provide an unrestricted response and to control the flow of information. This type of questioning minimises the risk that interviewers will impose their view of what happened. Such questions usually specify a general topic which allows the person considerable freedom in determining what to reply.
- Closed questions are questions that provide the interviewee with a limited number of alternative responses, the simplest ones being 'yes' or 'no'. As long as the question provides a number of sensible and equally likely alternatives, it would not be considered suggestive. Some vulnerable witnesses may find closed questions particularly helpful. However, at the beginning of the use of closed questions, try to avoid using ones that contain only two



alternatives (especially yes / no questions) unless these two alternatives contain all possibilities (e.g. 'Was it day time or night time?').

### Awareness of barriers for effective communication

In any type of discussion or conversation between different persons, there are a number of potential barriers for effective communication. This is particularly true in the context of communications between border authorities and people wanting to cross a country's border. Such barriers may include the following.

- Stereotypical assumptions on both sides: stereotypes are generalisations, or assumptions, which people make about the characteristics of all members of a group, based on an image (often wrong) about what people in that group are like.
- More subtle forms of biases: such as those based on people's ethnic origin, socioeconomic background (class), legal status or occupation. Such biases are more difficult to recognise, yet are a fact of life. These biases can affect how border guards see undocumented migrants or asylum seekers, smuggled people or trafficked individuals. They can also affect how migrants see themselves, and so lead to self-defeating expectations. Migrants may expect to be the object of others' prejudices, and so may expect to be ignored or dismissed.

These prejudices and biases can be dangerous when interacting with irregular migrants at the border. If border officials are not fully aware of such assumptions, they can view migrants in general as a problem, to the detriment of their fundamental rights.

Stereotypes are especially likely to be wrong in tense or complex situations, such as in the midst of larger group arrivals or dangerous sea operations. When people are under pressure and confronted with problems beyond their capacities, their image of the people they have to deal with tends to become more and more hostile. Where communication is minimal, people make generalisations and assumptions based on very sketchy and often erroneous information.

In this context, it is easy to 'project' the perceived faults of the border control system's capacity to help onto the migrants, preferring to believe that they are aggressive, self-serving or deceitful. They may worsen with reduced communication and heightened emotions and tension. This is a formula for disaster, mistakes and unfair treatment of people who may be in great need

of receiving the assistance of the border guard and international protection from the state.

Recognising that we might hold or be the victim of biases is the first and most crucial step in combating prejudice.

It is essential to focus on the particular individual, rather than on their ethnic or national background. It is important to remember that there are often greater differences within a group than between groups.

It is also important to remind oneself that border control will not bring the solution for migratory pressure or abuse of asylum procedures, nor will it save all victims of torture, smuggling or trafficking. Border officials should try to avoid putting too much pressure on themselves and remain realistic about their own self-expectations and focus on the concrete situation at hand.

### Active listening

The goal is to understand the person in front of you as well as you understand yourself. Pay close attention to what they are saying: ask them to clarify or repeat anything that is unclear or seems unreasonable (maybe it isn't, but you are interpreting it wrongly).

Attempt to repeat their narrative, as they have presented it, back to them. This shows that you are listening (suggesting that you care about what they have to say) and that you understand what they have said. It does not indicate that you agree with what they said – nor do you have to. You just need to indicate that you do understand what they are trying to convey to you.

Avoid developing a 'selective ear' that listens but does not 'hear' indications of the need for international protection. For example, when there are clear indications that the person may be a survivor of torture, don't avoid asking the question: 'have you been tortured?' to avoid having to hear a terrible story of suffering and then having to refer the individual or family to further assistance services<sup>122</sup>.

### Retaining a respectful and professional attitude

In accordance with the principles of non-discrimination and human dignity, respectful treatment should be the norm in all circumstances, being sensitive to gender, age and other diversity components.

<sup>122</sup> When covering this topic, it is important that the trainers make reference to the session of taking care of oneself due to the stresses of the duties carried out by border guards.



To respect and not infringe the 'do no harm' principle, border guards should treat each woman, man or child as if the potential for harm is obvious until there is evidence to the contrary.

To maintain a professional attitude, there are two major pitfalls to avoid:

- appearing judgemental or mistrustful: the border guard is there to hear about the migrants' situation in a neutral way;
- being overly sympathetic: border guards work within a legal framework that imposes certain specific conditions when it comes to border control and assistance of migrants and asylum seekers.

No matter what they think of the migrant, if they are treated with respect and dignity, communication will be much more successful, and it will be easier to understand the possible protection or other needs of the persons involved. This means that personal attacks and insults should be avoided, as should verbal or non-verbal signs of disdain.

#### Body language

- Maintaining a steady and friendly visual expression and keeping eye contact with the migrant suggests that you are paying careful attention to what is being said.
- The eye contact and overall communication in general should be with the applicant, not with the interpreter or the legal counsel. However, be aware of cultural and gender differences in communication, especially regarding non-verbal communication. This is particularly important in the context of cross-cultural communication.
- Avoid reading papers while the migrant is speaking. If you need to check on a document, wait until there is a pause.

### 3.1.2. Factors that may affect communication

#### Culture

Generally speaking, communication with another involves predicting or anticipating their responses.

- As a first step in developing cross-cultural awareness, border guards should recall that many of the arriving migrants and asylum seekers have limited knowledge of their new environment, including its norms and values.
- In the same way, they need to bear in mind when communicating with them that they, as border guards, may not have much knowledge of the culture, beliefs or habits of the person who has just arrived. Therefore, in cross-cultural exchanges, it is essential to maintain self-awareness of possible cultural

differences (misunderstandings) and make every effort not to predict possible behaviours or responses.

- Border officials should react slowly and carefully to statements by persons at the border, not jumping to the conclusion that they understand the speaker's words or intentions.
- Active listening can sometimes be used to check this: by repeating what one thinks he or she heard, one can confirm that one understands the communication accurately.

#### Gender

Very much related to cross-cultural communication, gender issues are likely to arise during border control. Issues such as women's physical distance from others and dress code differ across cultures. Again, it is very important that border officials develop as much self-awareness as possible, particularly regarding their own possible stereotypes or biases.

Women should not always be labelled as vulnerable or especially fragile. In many situations of displacement, they have proven extraordinary levels of strength and resilience, including the capacity to sustain the whole family. Yet, they do have specific needs related to the fact that they are migrant women, particularly if they are undocumented.

It is therefore vital to identify possible protection concerns that female asylum seekers or migrants may have, even prior to going into issues related to their migratory status. To do this, when family units arrive at a border, and border guards identify issues that require a closer examination, it is important to communicate separately with all members of the family. In particular, it is important to ensure that the female members of the family are given an opportunity to be interviewed separately. This will greatly facilitate the identification of possible protection concerns related to them.

Women should not be pushed to talk about problems related to sexual violence nor to provide any details on the substance of their claim for international protection. If border officials suspect that a woman has been a victim of sexual violence, or if she is unable or unwilling to discuss certain events relating to such an incident, they should ask discreet and indirect questions that could enable them to identify what appropriate protection measures could be taken and to what specialised agency they should be referred to.

It is important to ensure the presence of female border guards in field control operations and in the course of routine border tasks. Research has shown that increasing the presence of female officers improves the law enforcement re-



sponse to violence against women. It also reduces problems related to sex discrimination and harassment.

Women migrants should be provided with information directly – there is a risk that information is provided to the male relatives due to cultural assumptions. This may deprive her of vital information when needed and the ability to take independent decisions, and to request protection or assistance.

Border guards should also make every effort to ensure that migrants can have an interviewer and an interpreter of the same sex. People may feel more at ease if they can speak to persons of the same gender; however, border guards should check in case they prefer to speak to a person of the opposite sex. Also in this context, the interviewer should always check that there are no barriers, as illustrated above, related to ethnic, religious or other conflicts.

### Age<sup>123</sup>

If a young person claims to be a child (under 18), border guards should always give them the benefit of the doubt and treat them as such, whatever their personal opinion on the age the person appears to be (it should be recalled that some children of different backgrounds and children who have gone through traumatic experiences will sometimes look older).

The child should be entitled to be heard in a child-friendly language. However the border guard should specifically remain aware of the needs / fatigue of the child, and where possible limit the duration and depth of the interview. After careful examination that there is no conflict of interests or any potential threat to the child, it is usually to his / her benefit that he / she is interviewed in the presence of a trusted adult, preferably a parent or legal guardian.

Issues to clarify to ensure the safety of the child:

- number of children and number of documents (passports, visas, supporting documents);
- in case of several children in one single family, compare the dates of birth and the age of the adult(s);
- verify legal relationships between the child and accompanying person;
- query questions on flight itinerary / reasons for travel;
- check the Schengen information system (SIS) database (if non-EU, or if both parents are not present).

<sup>123</sup> For further information refer to:  
– Unicef guidelines for interviewing children ([http://www.unicef.org/esaro/5440\\_guidelines\\_interview.html](http://www.unicef.org/esaro/5440_guidelines_interview.html))  
– ‘Separated, asylum-seeking children in European Union Member States’, FRA, December 2010  
– More on children at: <http://fra.europa.eu/en/publications-and-resources/publications?title=children&=Apply>

Unaccompanied and separated<sup>124</sup> children should always be ensured access to a procedure including the referral to a specialised centre where more in-depth child-friendly interviews can be conducted and other appropriate steps taken.

Unaccompanied and separated children must be provided with information, in a language that they fully understand, on their rights and entitlements, support and services available to them, including international protection mechanisms. Information should be provided promptly, taking into account the age of the child.

The views and wishes of unaccompanied and separated children must be sought and taken into account whenever decisions affecting them are being made, and in relation to their age and maturity. Children should have the opportunity to be heard in all proceedings affecting them.<sup>125</sup>

### Article 24 of the Charter of Fundamental Rights of the EU:

The rights of the child

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Convention on the Rights of the Child

Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9(1): ...a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...

There are some basic rules to be followed in the case of children, including unaccompanied and separated children.

- Border guards should be aware of standard referral procedures and immediately liaise with the national and / or local childcare institution to ensure the assignment of a legal representative and a guardian.
- Principles: best interest of the child, non-discrimination and participation.

<sup>124</sup> Unaccompanied is a child who is travelling alone; separated is a child who started his or her travel with an adult, but due to circumstances has lost contact with said adult and is now alone (Convention on the Rights of the Child, General Comment 6).

<sup>125</sup> Article 12 of the Convention on the Rights of the Child.



- No separation from families as a rule, except in the case of conflicting interests where it is in the best interest of the child not to stay with the parent (e.g. the parent has an infectious illness).
- Prior to interviewing children, or anyone for that matter, access should be provided to any medical aid or assistance needed by the child and the interviewer should check if the child is hungry or thirsty, needs the toilet or wants to sleep. In all such cases, the needs of the child should be met before any interview commences.
- The assigned legal representative / advocate / guardian should be given access to, and be able to be present at, all interviews with the child, which need to be conducted by specialists with training and expertise in interviewing separated children.
- Special, child-friendly environments should be created as 'safe' locations for children during the interview process.

#### Older persons and persons with disabilities

Generally there should be a friendly and non-threatening environment at the border for everyone, including for older persons and persons with disabilities, who should not be discriminated against in any way due to potential physical and mental vulnerabilities.

Border guards should be mindful of identifying older persons who may need specialist support, facilities or health care.

Border guards should also take care to proactively identify persons arriving at the border with disabilities and ensure any specific needs are communicated and met.

#### 3.1.3. Psychological and emotional needs of migrants, including asylum seekers

Migrants can experience many different stresses but, again, it is important not to stereotype them. Experiences and reactions differ. Most cope, some are vulnerable and a few may display disturbed behaviour.

They may have lost family, friends, home, belongings, familiar surroundings and lifestyle. They may also have experienced war, separation, a shortage of necessities and fear of discovery, as well as hostility, violence, exploitation and material deprivation on their journey. Changes that affect them include language, lifestyle, living standards, status and relationships with parents and children.

Border officials should be aware of the effects that traumatic experiences may have on communication during border controls. For instance:

- they may fear speaking honestly about their situation to state officials, particularly those in uniform, and other symbols of authority as a result of the persecution suffered in their country of origin; they may lack confidence in the ability of state officials to help them and even fear that they will do them harm;
- a traumatised individual may feel and become helpless because he/she experiences the world as unpredictable, threatening and assaulting, which fundamentally threatens the individual's sense of self; in this context, traumatised asylum seekers and migrants may refuse to talk about experiences of distress and trauma;
- this may be a result of a denial mechanism to protect their own psychological balance, a lack of awareness of their right to be treated with respect and dignity, or the fear of reprisals by smugglers or traffickers;
- incoherence may occur because of fatigue or strong feelings, or because of poor command of language; in serious cases, there can be total confusion in relation to reality and alterations of identity – disassociation<sup>126</sup> from the present reality may occur;
- individuals suffering severe post-traumatic stress disorder<sup>127</sup> may have serious memory gaps, to the point that questions may arise on the credibility of their claims for international protection; there have been cases where asylum seekers have not been able to remember their children's names, ages, nor even face when questioned about especially traumatic events;
- such psychological effects, instead of being used against them, should be seen as a sign for urgent need of rest, support, counselling and potentially specialised treatment.

<sup>126</sup> Dissociation is a psychological term used to describe a mental departure from reality, especially when experiencing times of frustration, fear, uncertainty, hardship or/and grief (<http://outofthefog.net/CommonBehaviors/Dissociation.html>). See the glossary for more information.

<sup>127</sup> Post-traumatic stress disorder (PTSD): a psychological reaction occurring after experiencing a highly stressing event (such as wartime combat, physical violence, or a natural disaster) that is usually characterised by depression, anxiety, flashbacks, recurrent nightmares and avoidance of reminders of the event. Also called post-traumatic stress syndrome (<http://www.merriam-webster.com>). See the glossary for more information.



### Trauma

It is very difficult to provide precise advice on how to interview or communicate with victims of trauma. Persons experience trauma and react to interviewing in very different ways.

A trauma survivor should only be interviewed at a border point if there is an absolute need to do so. In this case, a few basic tips drawn from experience with asylum seekers and victims of trauma are as follows.

Persons who experience torture or other human rights abuses should be treated as survivors, rather than victims. Looking at their past should be done with the help of professional counsellors; otherwise, it can contribute to increasing their trauma (the 'do no harm' principle of not producing any traumatisation).

The interviewer should actively encourage the interviewee to participate in the interview. In this context, the interviewer should develop a rapport with the interviewee by personalising the interview, expressing empathy and listening actively. When creating a personal bond in this way, the interviewer may give some personal and biographical information about him- or herself (without compromising privacy) to which the interviewee can relate.

The interviewee should be assured that anxiety is natural, and that retelling their experiences does not mean that the event will occur again.

A border guard is often the first state official a traumatised survivor meets. Officials are, therefore, in a unique position to set in train a healing process. Specialised counselling should take place as soon as possible after the traumatising event has occurred, and in ensuing weeks subsequent counselling sessions should follow.

Border authorities should designate a liaison officer for such counselling institutions, who can ensure quick access and early referral.

### Interviewing (potential) victims of human trafficking

As part of the anti-trafficking trainers' manual (see references), Frontex has developed a training module on interviewing (potential) victims of trafficking in human beings and a follow-up reference mechanism. It is based on the so-called Pegasus model and the new Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA<sup>128</sup>. The directive states that Member States, with the basic principles of their legal systems, should take the necessary measures to 'ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit'. If anyone should be involved in the smuggling of persons and travelling on a forged passport, the fact that the border guard identifies her or him as a victim of trafficking in human beings (THB) will have a decisive impact on the approach to the rest of the case.

<sup>128</sup> OJ L 101, 15.4.2011, p. 1.

### Ensuring protection

When first encountering a border guard, or even during subsequent interviews, some persons that are eligible for international protection do not explicitly express a formal application for it. They may not know it is possible, or may choose not to because of their specific situation, e.g. victims of torture, crime or trafficking, that render disclosure of their needs difficult. Therefore, to safeguard the principle of non-refoulement<sup>129</sup>, border officials need to make every effort to identify persons who may need protection and ensure access to the necessary procedures.

The border official should make every effort to provide information about relevant procedures to any undocumented person or irregular migrant they may have stopped or apprehended, including on international protection.

### Referral

During the interview, the person should be informed about what is going to happen next and what is expected of him / her. If there are reasons to consider that the person may be a victim of trafficking, an unaccompanied or separated minor, or a person in need of international protection or further (medical) assistance, they should be referred to the relevant professionals within the government agencies and civil society organisations which will provide them with assistance and support and direct them through the procedures applicable to them.

The trainer should be aware of the national referral mechanism if available in her / his country.

<sup>129</sup> For detailed information on non-refoulement, see Module 2.



### 3.2. The PEACE model

#### Notes to the trainer

It is essential that border guards take account of the individual circumstances and expressed needs and wishes of each interviewed person. Therefore, the following should not be regarded as a checklist to be rigidly worked through, but rather a helpful tool in planning and conducting interviews. Out of the many possible interviewing models, we will highlight the PEACE model as it is not only a model used in a number of countries around the world, but it is also applicable to interviewing suspects, witnesses and victims. Furthermore, in the context of this manual, it will be clear that our comments will concisely focus on a fundamental rights based approach and process. The combination of the Ungift (for victims) and Interpol (for suspects) manuals that comprehensively cover the phenomenon of trafficking in human beings provides a solid basis for this approach.

#### References

- Anti-human trafficking manual for criminal justice practitioners, Ungift, Module 8
- Trafficking in Human Beings, best practice guiding manual for investigators, Interpol, second edition (2008)

#### 3.2.1. Introduction

The PEACE model is a model used in a number of countries around the world and is applicable to interviewing suspects, witnesses and victims. It is easy to use, and it will in many cases and ways facilitate the work of the border guard and optimise his/her results. PEACE is an acronym that stands for:

- Planning and preparation
- Engage and explain
- Account
- Closure
- Evaluate

#### 3.2.2. 'P' for planning and preparation

The techniques explored here can be used in any environment regardless of the technical equipment you have access to. An honest assessment of what you can achieve with the resources available, followed by planning to use what you actually have (not what you might wish to have) will help produce interviews of high quality.

The second line will in general bring out the specific strengths of a model more effectively. You cannot plan for an interview if you know nothing about the circumstances of the case. Your first step must be to find out as much as you can about the case or the situation before you start to plan the interview.

Written plans do not have to be complex. It is important to be flexible once the interview starts as you may be told things that change the plan completely. A suggested structure of a plan is to list the stages of the interview (planning and preparation, engage and explain, account, closure and evaluation). At each stage of the plan, you can then record points to remind you to do certain things, tell the interviewee something or ask particular questions. Listing the key points to be covered in an interview help maintain the focus of the interview which can be particularly helpful if the interviewee gives a very wide-ranging account that contains a lot of detail not relevant to the investigation. A list prevents the interviewer(s) becoming lost in the details.

It should be remembered that the interviewer's task is to establish the facts through skilled questioning – not to establish guilt or innocence, which is the task of the judicial process.

#### Venue and equipment

As part of the preparation phase, the venue(s) for the interview should have been identified and checked to ensure that:

- the room is clean and tidy and represents a professional approach (i.e. the need for privacy) to the task;
- privacy is an essential condition for effective confidentiality; communication cannot be established if there is a fear of being overheard by others;
- any necessary equipment is in full working order if the interview is to be audio- and / or video-recorded;
- an ample supply of tapes has been placed in the interview room;
- if the interview is to be recorded in writing, the interviewers should ensure that they have adequate supplies of forms and pens.

To have to break off from questioning to obtain additional supplies of items is unprofessional and, where this does happen, the problem always seems to occur at absolutely critical junctures in the interview.

#### How is the interview going to be recorded?

Interviews can be recorded in three basic ways: video, audiotape and a written record. Whatever method is used, depending on the case and the local policy, the



person that is going to be interviewed should fully understand what is going to happen and how the record will be used, and must consent to it, in accordance with privacy rights (Article 8 of the ECHR and of the EU charter).

#### **The use of video for the interview of (potential) victims.**

- For video recording, the guiding principle is to conduct the video interview in the best interest of the victim and in accordance with domestic legal requirements.
- Video is the preferred choice for interviewing vulnerable victims where the facilities are available. It has the advantage of showing the condition of the witness, revealing non-verbal signs and, in many cases, helps obtain a free-flowing, natural account from a victim while reducing the number of interviews. This helps reduce the 'secondary victimisation' of the investigation process.

#### **Video interviewing does have some disadvantages even where it is available.**

- Victims of trafficking or torture may react in unpredictable ways; some investigators have reported that this can involve inappropriate 'humour' that victims use as an emotional release. If used very shortly after recovery from a sexually exploitive situation, a victim may relate to interviewers in ways their experience has taught them to. Examples include hostility and aggression to the interviewer or sexually inappropriate comments.
- Victims may not be happy to be videoed for a number of reasons. A common fear is that the traffickers or their associates or the authorities who tortured them in the country of origin will obtain the tape and identify them.
- Some objections may stem from religious or other beliefs held by victims.
- It is possible to electronically disguise the person being interviewed, but this may be both expensive and time consuming.

#### **Who should do the interview?**

Many jurisdictions have legislation and established practice that will determine who should interview victims or children. In case the chosen interviewer is not able to establish rapport with the person, it is preferable to change the interviewer immediately.

#### **Victims of trafficking and persons in need of international protection**

If at all possible, interviewers trained in working with vulnerable witnesses should be used to interview victims of trafficking<sup>130</sup> and persons in need of international protection.

<sup>130</sup> For more details on how to interview victims of trafficking, refer to the 'Anti-trafficking training for border guards – Trainers' manual', Frontex, 2012.

#### **Gender of interviewers**

The gender of an interviewer does not guarantee particular qualities. Both men and women may be compassionate, motivated and professional; equally, both may be disinterested, rude and incompetent. The rule should for the interviewer to be of the same sex as the interviewee. However, the question should be posed in case the interviewee prefers to be interviewed by someone of the opposite sex.

#### **Social support / use of intermediaries at interviews**

The role of a 'social supporter' or intermediary is likely to be determined by your legislation. Intermediaries in some jurisdictions are there to assist the migrant in understanding the interviewer, and the interviewer to understand the migrant. This is not a translation role but one of assisting communications where a person may not be capable of understanding due to mental or physical impairment or because he or she is young. In other jurisdictions, intermediaries may be restricted in the support they can give. Whatever the precise role, intermediaries should not interfere in the interview, change what is being said or persuade interviewees to change their story.

If possible, you should find out if the person wants someone present prior to the interview and, if so, who this person should be. The interviewer must explain to the interview supporter that he or she should not prompt or speak for the migrant, especially on any matters relevant to the case.

#### **Decisions based on (risk) assessments**

There may be circumstances where an examiner concludes a person is either not fit to interview or the interview would cause significant further traumatization. The rule in these circumstances is that the interests of the person concerned should come first, otherwise the person may be at risk of having their human rights to physical and mental integrity violated. Under no circumstances should space for violations of the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 3 of the ECHR) be allowed. It should be stressed that any trauma that could amount to cruel, inhuman or degrading treatment, taking into account the vulnerability of the person, must always be avoided, regardless of the situation.



### 3.2.3. 'E' for engage and explain

#### Interviewer behaviour

When you meet people you do not know, you may behave differently from how you usually would. Vulnerable people can often sense the unusual behaviour and may identify the behaviour as a sign of discomfort. Monitor your behaviour throughout the interview, and to try to keep it as normal as circumstances allow. Interviewers should particularly think about how they will manage the opening minutes of the interview.

#### Starting an interview

- Say who you are and what your position is.
- Explain the 'here and now' situation. Explain the purpose of the interview, the legal powers under which it is conducted and the role of others who may be present in the interview, e.g. the interpreter, other police officers, etc.
- Explain the person's legal rights in relation to the process.
- An explanation should be given about how the interview will be recorded. This may be as simple as saying, 'I will speak to you and my colleague will note what we say,' or it could be explaining the use of technical equipment used such as video, in this case seek the consent of the migrant.
- In cases where you have very limited information, you may decide to run an initial interview with the objective of finding out enough information in order to develop a plan for further interviews.

If a person has been stopped or apprehended at the border:

- go over the evidence;
- repeat the reasons for which he has been stopped / apprehended / arrested and is to be interviewed about;
- read the contents of the notes and search records to the interviewee;
- record the person's agreement or disagreement with the contents of them.

Not only is this fair to the person because it allows him / her a second opportunity to raise any issues on what he / she is being informed about, but this also provides the interviewer with an opportunity to assess the interviewee's demeanour and responsiveness.

The interviewer should keep his / her speed of speaking at a proper pace, adapted to the individual, the case and its circumstances. The interviewee should be allowed the time to take in what has just been said and to prepare his / her answer. The interviewer should be patient and allow breaks where necessary or indicated by the person in front of him / her. Breaks should be allowed for religious observance.

### 3.2.4. 'A' for account

#### Free narrative

If you have been unable to establish rapport with the person, there is little point in continuing and you should consider terminating the interview. Other reasons for terminating the interview include the health (physical and mental) of the person, risks you have identified to the person and others, that the person is either unable or reluctant to provide you with any useful information, or you have realised that the person is a minor and a guardian should be present. After closing the interview, you should evaluate what has happened, identify any action that needs to be taken and review how the case should proceed.

On the other hand, if you have been able to establish rapport with the person, he / she should be asked, wherever possible, to provide in his / her own words an account of the relevant event(s). In the free narrative phase, the interviewer should encourage witnesses to provide an account in their own 'words' by the use of non-specific prompts such as 'Did anything else happen,' 'Is there more you can tell me?' 'Can you put it another way to help me understand better?' Verbs such as 'tell' and 'explain' are likely to be useful.

#### Vulnerable people

Research has found that improper questioning of vulnerable people is a greater source of distortion of their accounts than memory deficits; thus it is essential to use appropriate questioning from the early stages of an interview. Make every effort to obtain spontaneous information from the witness that is not contaminated by you as the interviewer.

#### What if the person chooses to remain silent and gives no response?

There is no general rule. Changing to another interviewer might be one option. However, when interviewing a person that has said nothing relevant to, you should consider whether or not to continue to the next phase of the interview. When making this decision, the needs of the person and the law (including human rights) must be considered.

#### Additional specific questioning

The first phase can be rounded off by giving the interviewee the opportunity to agree or disagree with the points noted so far by the interviewer. The interviewer or interviewing team may now choose to insert a break here. When en-



tering the second phase, the interviewer should change his / her approach from general matters to one of specific questioning about specific events or issues.

### 3.2.5. 'C' for closure

At the conclusion of the questioning, the interviewer should:

- go through the contents of it;
- invite the interviewee to add any final points, make any corrections or alterations, or clarify any points of ambiguity;
- upon closure of an interview, summarise for the last time the allegation(s) and invite him / her for the final time to either admit or deny the truth of them;
- in accordance with national procedures, ask the interviewee to check the record of the interview in the presence of his / her lawyer and then invite him / her to sign it as being correct; if the interview has been audio- or video-recorded, the interviewee should be invited to observe the sealing of the tape(s) and to countersign any label or seal that is attached to the tape(s);
- explain to the interviewee (and his / her lawyer, if present) what is going to happen to him / her next;
- provide for a contact name and / or telephone number;
- where applicable, interviewed persons should be offered information as to where rapid help and support can be obtained; a leaflet listing names, addresses and telephone numbers of relevant individuals and agencies will prove to be of great help; where possible, law enforcement officers should assist migrants in accessing such support and be familiar with how to make referrals in this regard;
- ask if there are any questions and, where possible, answer them appropriately.

### 3.2.6. 'E' for evaluation

At this stage, the interviewer should consider whether the aims and objectives of the interview have been achieved, how the knowledge discovered in the interview affects the investigation and whether further steps are necessary.

The evaluation should / could also comprise a review of the performance of the interviewing officers, how well they conducted the interview and what improvements could be made in future. It is a key part of learning and improving the art of interviewing; assessing the preparation and conduct of the interview, identifying what worked well and what didn't and learning from any mistakes or parts of the performance that could be improved.

## 3.3. Follow-up

### Notes to the trainer

It is essential that the gathering, sharing and dissemination of intelligence and intelligence management be carried out in strict compliance with the law. This section aims at building the capacity of border guards to carry out data collection and processing in full respect of fundamental rights, and thus in compliance with the law.

### References

- Charter of Fundamental Rights of the EU (2000)
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC<sup>131</sup>
- The Schengen area and cooperation (2009)
- Sirene (supplementary information request at the national entry)
- Sirene manual<sup>132</sup>
- Legal instruments governing migration from SIS 1+ to SIS II
- Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)<sup>133</sup>
- Council Decision 2007/533/JHA
- European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice<sup>134</sup>
- Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism<sup>135</sup>
- Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism<sup>136</sup>
- 'Eurodac' system (Council Regulation (EC) No 2725/2000 and Council Regulation (EC) No 407/2002)
- Communication on 'Strengthened practical cooperation new structures, new approaches: Improving the quality of decision making in the common European asylum system' (COM(2006) 67 final of 17 February 2006)
- Data protection in the European Union: [http://ec.europa.eu/dataprotectionofficer/useful\\_information\\_en.htm](http://ec.europa.eu/dataprotectionofficer/useful_information_en.htm)

<sup>131</sup> OJ L 158, 30.4.2004, p. 77.

<sup>132</sup> OJ C 38, 17.2.2003, p. 1.

<sup>133</sup> OJ L 381, 28.12.2006, p. 4.

<sup>134</sup> <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/agency>

<sup>135</sup> OJ L 162, 30.4.2004, p. 29.

<sup>136</sup> OJ L 68, 15.3.2005, p. 44.

**cd. references**

- Council Regulation (EC) No 343/2003
- The Dublin II regulation: A UNHCR discussion paper, UN High Commissioner for Refugees, April 2006
- Building in quality: A manual on building a high quality asylum system, UNHCR, September 2011, p. 77
- UNHCR Dublin II recast comments Debriefing – The UK model – A targeted investigative technique, United Kingdom Border Agency, H. M. Inspector Ben Nicholls, Intelligence Manager Europe and Mediterranean

The information the border guard gathers during an interview will mainly be of a specific nature, relating to the individual case of a person that has been stopped or apprehended. However, this specific information will be added to, or enriched by, tactical and strategic information that may help counter illegal activities of people smugglers and traffickers of persons.

- Tactical information might point at safe houses, meeting points or suppliers of forged documents.
- Strategic information will teach more about modus operandi, trends, routes, or push and pull factors.

This information can assist in protecting the rights of the migrants. International law does not criminalise or penalise the migrant for the fact of being smuggled; however, information provided by the irregular migrant can contribute to identifying the smugglers. Thus, the irregular migrant should not be treated as a criminal when questioned.

**Debriefing**

Where allowed and when aiming at the tactical and strategic information, debriefing might be a good and very often underestimated alternative to a formally processed interview.

Debriefing is 'to interview informally and confidentially for the purposes of obtaining knowledge or information'.

It is not part of any formal process or evidence.

It is voluntary and fully based on trust.

Records themselves are kept fully confidential. The information they contain is filtered, integrated and shared in reports.

Information gathered from an irregular migrant can be used for three main purposes, namely an 'administrative', 'social-humanitarian' or 'judicial law enforcement' purpose.

- Administrative information is used within as well as outside the border guard organisation. Data can be used to determine the legal character or the sta-

tus of the migrant, to lead to decisions regarding his/her entry or residence, for operational or strategic analysis, etc.

- The judicial law enforcement purpose has a mostly repressive character as it aims at detecting and investigating crimes, collecting evidence, catching the perpetrators and having them convicted.
- The 'social-humanitarian' communication flux covers the contacts with help and support organisations, shelters, social services (including child protection units), medical and health care, etc.

The need for a 'specified purpose' returns in the Charter of Fundamental Rights of the EU, where Article 8 states that personal data must be processed:

- fairly;
- for specified purposes; and
- on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him/her, and the right to have it rectified.

The charter continues to say that compliance with these rules shall be subject to control by an independent authority. Eurodac for example, as mentioned in Module 3, allows for the computerised exchange of fingerprints solely in order to support the application of the Dublin arrangements by identifying those applicants already known to other participating states. The Eurodac database cannot be accessed for the purposes of law enforcement reasons nor can its data be used to support prosecutions.

Where law enforcement is concerned, the process of gathering, using and sharing data – the so-called hard as well as soft information – is usually very strictly organised and limited, both in a preventive, proactive context as well as in a repressive and reactive context. However, as modern (information) technology provides opportunities, it also presents border guard services, law enforcement and society in general with new challenges (e.g. the issue of systematic data-mining).

As such, there should not be much room for discretion<sup>137</sup> of the border guard. Outside this well-organised, mostly legal framework, the first questions should be whether any use of information will not endanger or harm the person and whether there is the right balance between the 'need to know' and the 'nice to know'. Reality and practice, however, prove not to be that simple. The information the border guard is willing to share with the person responsible for a local shelter, for example, will sometimes differ from place to place, as cooperation may be the result of building a trusting partnership over many years. The border guard should be well prepared and armed with a national framework of acceptable

<sup>137</sup> The word 'discretion' should be understood here as the room for 'having an individual choice or judgment', 'the power of free decision or latitude of choice within certain legal bound' (derived from Merriam-Webster online dictionary).



solutions for challenges that will not unexceptionally occur when different data fluxes interfere. Details of a medical intervention might also be included in a report to the judiciary and give away the address of the safe place where a victim of trafficking has found refuge. Or, returning to the issue of Eurodac mentioned earlier, how is the question being resolved when a case of smuggling of migrants also requires those same fingerprints as for a national (criminal) database?

The EU requires all Member States to legislate to ensure that people have a right to privacy, through directives such as Directive 95/46/EC of the European Parliament and of the Council. However, in 1980, in an effort to create a comprehensive data protection system throughout Europe, the Organisation for Economic Co-operation and Development (OECD) issued its 'Recommendations of the Council concerning guidelines governing the protection of privacy and trans-border flows of personal data.' The seven principles governing the OECD's recommendations for the protection of personal data are:

1. notice – data subjects should be given notice when their data is being collected;
2. purpose – data should only be used for the purpose stated and not for any other purposes;
3. consent – data should not be disclosed without the data subject's consent;
4. security – collected data should be kept secure from any potential abuses;
5. disclosure – data subjects should be informed as to who is collecting their data;
6. access – data subjects should be allowed to access their data and make corrections to any inaccurate data; and
7. accountability – data subjects should have a method available to them to hold data collectors accountable for following the above principles.

Privacy is an essential condition for effective confidentiality. None of the information provided by migrants, including information provided when lodging an application for international protection, should routinely be shared with authorities of the country of origin without the consent of the migrant. For many, including asylum seekers, victims of trafficking and other migrants, this could not only endanger themselves, but also their families. Procedures need to be set in place so that border guards can and actually do reassure them of this guarantee.

All data, including personal data, facts surrounding travel and any other relevant information, should be kept under strict confidentiality, and those handling such data must abide by relevant national and EU laws on data protection. These also impose restrictions on disclosing or requesting information from the alleged persecutors in such a way which might reveal that an application for international protection has been made<sup>138</sup>.

<sup>138</sup> Article 22 of Council Directive 2005/85/EC.



## MODULE 5

# Deprivation of liberty



This module aims to enable border guards to effectively carry out deprivation of liberty according to fundamental rights standards and principles.

This module should be used in combination with Module 2 when explaining the use of force in the process of depriving someone of their liberty. It should be made clear that the limitations guiding the use of force also apply when depriving someone of their liberty, if and when there is a justifiable need.

## 1. Learning outcomes

At the end of this module, participants will be able to, in accordance with fundamental rights:

- recognise the circumstances under which it is permissible to deprive someone of their liberty;
- explain the rights of persons deprived of their liberty;
- recognise the fundamental rights implications relevant to the detention of groups with particular / special needs and identify the actions that need to be taken.

## 2. Lesson plan

Content	Method	Toolkit
1. Introduction to fundamental rights in the deprivation of liberty	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Case-law research</li> </ul>	<ul style="list-style-type: none"> <li>• Deprivation of liberty (PowerPoint presentation)</li> <li>• Instructions for research and analysis of case-law</li> </ul>
2. Deprivation of liberty of some groups and individuals requiring special attention	<ul style="list-style-type: none"> <li>• Presentation</li> <li>• Scenario</li> </ul>	<ul style="list-style-type: none"> <li>• Child protection and deprivation of liberty</li> </ul>
3. Assessment	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>	<ul style="list-style-type: none"> <li>• Multiple-choice questions</li> </ul>

## 3 Training material

### 3.1. Introduction to fundamental rights in the deprivation of liberty

#### Notes to the trainer

The aim of this section is to introduce the right to liberty in the context of the deprivation of liberty, in order to enable participants to develop the necessary skills to carry out a detention with full respect for fundamental rights.

This section covers the conditions, duration and fundamental rights related to the deprivation of liberty.

The authors of this manual chose to use the term 'deprivation of liberty' and not 'arrest' or 'detention' as these last two have connotations that do not exactly apply to the condition of migrants when stopped for questioning. Furthermore, they are aware of the importance not to criminalise what is often an administrative misdemeanour in the case of migrants entering a country irregularly.

#### References

- International Covenant on Civil and Political Rights (1966)
- European Convention on Human Rights (ECHR) (1950)
- Charter of Fundamental Rights of the EU (2000)
- Reception conditions directive (2003)
- Dublin II regulation (2003)
- Asylum procedures directive (2005)
- Twenty guidelines on forced returns, Council of Europe Committee of Ministers (2005)
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), The CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2010
- FRA annual report 2011 – Fundamental rights: Challenges and achievements in 2011 (1.2.3. Alternatives to detention, p. 48)
- Detention of third-country nationals in return procedures, FRA (2010)
- Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention, UNHCR (2012)<sup>139</sup>
- UNHCR protection training manual for European border and entry officials, page 14 and Annex 4 of Module 7
- Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24 (2012)<sup>140</sup>
- International detention coalition report 'Captured childhood' (2012)
- Global detention project working paper on detention and proportionality
- FRA annual report 2011 – Fundamental rights: Challenges and achievements in 2011 (1.2.3. Alternatives to detention, p. 48)
- FRA annual report 2012 – Fundamental rights: challenges and achievements in 2012 (1.3.3. Alternatives to detention, p.52)

<sup>139</sup> <http://www.unhcr.org/505b10ee.html>

<sup>140</sup> [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf)



### 3.1.1. The right to liberty and permissible limitations

In his 2012 annual submitted to the UN Human Rights Council, the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, states:

'Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language and therefore understand why they are detained, or be aware of ways to challenge the legality of their detention. The Special Rapporteur has been made aware that migrants in detention are frequently denied key procedural safeguards, such as prompt access to a lawyer, interpretation / translation services, necessary medical care, means of contacting family or consular representatives and ways of challenging detention.'

In both international and European human rights law, detention must not be arbitrary, and any decision to deprive someone of their liberty must be based on an assessment of the individual's particular circumstances, according to the following<sup>141</sup>:

- detention is an exceptional measure and can only be justified for a legitimate purpose (Guideline 4.1.);
- detention can only be used as last resort when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose (Guideline 4.2.);
- alternatives must always be considered before resorting to detention (Guideline 4.3.).

The deprivation of liberty is something that is likely to have a direct and long-term adverse effect on the migrant who has risked his or her life fleeing persecution in search of protection and to reach a new land in the hope of a better future.

Moreover, it curtails the enjoyment of many other rights, from the right to family life, to the right to freedom of assembly, association and expression, to the right to freedom of movement. Deprivation of liberty may put the person affected into a vulnerable position, exposing him or her to the potential of being subjected to inhuman and degrading treatment<sup>142</sup>.

The increasing use of detention to restrict freedom of movement of migrants on the grounds of their irregular entry is a matter of major concern. While the

<sup>141</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012.

<sup>142</sup> 'The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights', Monica Macovei, Human rights handbooks No 5, Council of Europe, 2002.

deprivation of liberty may aim to address particular interests of states, it should not undermine those fundamental rights standards<sup>143</sup>.

There is no EU legislation regulating alternatives to detention. It is left to Member States to decide how to implement alternatives. However, under international human rights law, Member States have an obligation to provide alternatives to detention, which must be a measure of last resort, and consider its use before envisaging the use of such a measure.

There are various alternatives to detention to address irregular migration that take due account of the concerns of governments as well as the particular circumstances of the individual involved. In fact, there is no evidence that detention has any deterrent effect on irregular migration<sup>144</sup>. The UN Special Rapporteur on the Human Rights of Migrants provides useful guidance on the different types of alternatives to detention, and how to apply them, in his 2012 report to the Human Rights Council (A/HRC/20/24) (see footnote 146).

Types of alternative forms of detention<sup>145</sup>:

- bond / bail;
- registration and / or deposit of documents;
- designated residence or other freedom of movement restrictions;
- community release / supervision;
- reporting conditions;
- electronic tagging;
- home curfew.

'States should avoid criminalising persons moving irregularly through imposing penal sanctions or conditions of treatment that are not suitable to persons who have not committed a crime'<sup>146</sup>.

There are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security<sup>147</sup>.

<sup>143</sup> Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council and UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers.

<sup>144</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012.

<sup>145</sup> All forms of detention, including alternative means, should be assessed in order to ascertain possible negative effects to each individual in question.

<sup>146</sup> 'Global roundtable on alternatives to detention of asylum seekers, refugees, migrants and stateless persons: Summary conclusions', UNHCR and the OHCHR, July 2011, p. 2. (<http://www.unhcr.org/refworld/docid/4e315b882.html>). See also Module 3, Introduction.

<sup>147</sup> Ibid and report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council.



### 3.1.2. The right to liberty and security

The 'right to liberty and security' in the ECHR is a unique right, as the expression has to be read as a whole; 'security of a person' must be understood in the context of physical liberty.

The guarantee of 'security of person' serves to underline a requirement that the authorities have to ensure that liberty is intrinsically linked to security. One is more secure when not deprived of one's own liberty.

Hence, the duration of the administrative detention of a migrant should be as short as possible, and the decision to keep the person detained must be judicially reviewed regularly. The deprivation of liberty should not continue beyond the period for which the state can provide appropriate justification.

Under no circumstances should administrative detention of migrants be indefinite. A maximum period of detention should be set by law, and the custody may in no case be unlimited or of excessive length.<sup>148</sup>

Personal liberty is a key fundamental right, which everyone is entitled to enjoy. This right constitutes the condition for the protection of each individual and its deprivation affects the enjoyment of other rights such as the freedom of movement<sup>150</sup>, right to family and private life<sup>151</sup> and right to assembly<sup>152</sup>. Liberty is the rule, and detention is the exception.

The 'right to liberty and security' is a unique right which extends the protection of a person, from his/her physical liberty to his/her personal security. In the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the deprivation of one's liberty is defined as follows:

'... deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'<sup>153</sup>.

<sup>148</sup> Article 5 of the ECHR; Article 6 of the Charter of Fundamental Rights of the EU and Article 9(1)–(5) of the ICCPR.

<sup>149</sup> 'The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights', Monica Macovei, Human rights No 5, Council of Europe, 2002.

<sup>150</sup> Article 2 of Protocol No 4 as amended by Protocol No 11 of the ECHR.

<sup>151</sup> Article 8 of the ECHR.

<sup>152</sup> Article 11 of the ECHR.

<sup>153</sup> Article 4.2 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This definition refers to any form of deprivation, i.e. search, detention, interviewing.

Additionally, the European Court of Human Rights stresses the importance of both key elements – physical liberty and personal security – in the *Kurt v Turkey* case<sup>154</sup>, in its interpretation of Article 5 of the ECHR:

'... What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection'<sup>155</sup>.

The deprivation of liberty when extending to personal security puts at risk fundamental guarantees contained in other articles of the convention, such as the right to life<sup>156</sup> and the prohibition of torture<sup>157</sup>. The loss of or the limitations on this right put a person at risk of being subjected to torture, inhuman and degrading treatment. The European Court of Human Rights acknowledges this risk and draws the attention in prompt judicial review so as to ensure that any deprivation of Article 5 would not lead to further violations as stated earlier:

'Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the convention'<sup>158</sup>.

### 3.1.3. The lawfulness of the deprivation of one's liberty

The deprivation of liberty must be objectively justified and the duration of the deprivation of liberty as such must be absolutely necessary. The wording of Article 9 of the ICCPR and Article 5.1 of the ECHR underlines that any limitations on it should be permitted only in exceptional circumstances based on justified grounds.

'Both the ICCPR and the ECHR require that the length of detention must be as short as possible, and the more the detention is prolonged, the more it is likely to become arbitrary'<sup>159</sup>. Excessive length of detention, or uncertainty as to its duration, may also raise issues of cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use

<sup>154</sup> *Kurt v Turkey*, Appl. No. 15/1997/799/1002, Council of Europe: European Court of Human Rights, 25 May 1998 (<http://www.unhcr.org/refworld/docid/49997ae512.html>).

<sup>155</sup> *Kurt v Turkey*, para. 123.

<sup>156</sup> Article 2 of the ECHR.

<sup>157</sup> Article 3 of the ECHR.

<sup>158</sup> *Kurt v Turkey*, para. 123.

<sup>159</sup> 'Annual report 1998', WGAD, op. cit., fn. 598, para. 69, Guarantee 10; 'Annual report 1999', WGAD, op. cit., fn. 598, Principle 7; and 'Annual report 2008', WGAD, op. cit., fn. 580, paras 67 and 82.



of prolonged or indefinite detention in the immigration context<sup>160</sup>. Prolonged detention of minors calls for particularly strict scrutiny and may violate obligations under the CRC (Articles 3 and 37) as well as Article 24 ICCPR<sup>161, 162</sup>

#### Article 9 of the ICCPR

'1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

#### Article 5 of ECHR

##### '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:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

<sup>160</sup> 'Consideration of reports submitted by states parties under Article 19 of the convention: Concluding observations of the Committee against Torture – Sweden', CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12: 'detention should be for the shortest possible time'; 'Consideration of reports submitted by states parties under Article 19 of the convention: Concluding observations of the Committee against Torture – Costa Rica', CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 expressed concern at failure to limit the length of administrative detention of non-nationals. The CAT recommended: 'the state party should also set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite.'

<sup>161</sup> 'Consideration of reports submitted by states parties under Article 40 of the convention: Concluding observations of the Committee against Torture – Czech Republic', CCPR, UN Doc. CCPR/C/CZE/CO/2, 9 August 2007, para. 15: the committee expressed concern at legislation permitting the detention of those under the age of 18 for up to 90 days, in light of obligations under Articles 10 and 24 ICCPR, and recommended that this period should be reduced.

<sup>162</sup> Migration and international human rights law, Practitioners Guide No 6, International Commission of Jurists, p. 153.

(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.'

The lawfulness of the deprivation of one's liberty is stipulated in the wording of Article 5.4 of the ECHR:

'Everyone who is deprived of his / her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

And according to Article 9.4 of the ICCPR:

'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

Therefore, the lawfulness of any deprivation of liberty is met by the principles of legality, proportionality and necessity. Any action taken for the limitation of this right should be viewed through these principles and be supported by them; otherwise, any action (arrest, detention, etc.) taken to deprive one's liberty is regarded as illegal and the duration of the deprivation (detention) cannot be justified by any means.

### 3.1.4. Pertinent rights in relation to the deprivation of liberty

Article 5.2 of the ECHR ensures that the authorities provide, without delay, information to the arrestee / detainee for the reasoning of his / her arrest/detention promptly and in a language that he / she understands or to provide the necessary means to him / her in time, so that he / she could exercise those rights within a reasonable time. These rights would be meaningless if, for example, the arrestee / detainee is informed one year after the deprivation of his / her liberty about the reasoning of his / her arrest, or that he / she could contact the outside world (a lawyer, his / her relatives, etc.).

Timing plays a key role, on the one hand for eliminating the possibilities of the arbitrary arrest / detention or indefinite and secret detention, tortures, forced disappearances, etc., and, on the other hand, for guaranteeing the right of the



arrestee to exercise his / her rights promptly, the right to take proceedings with regard to the lawfulness of his / her detention<sup>163</sup> and the right to compensation<sup>164</sup>.

In the context of the principles of necessity and legality, these rights should be applied promptly and properly.

After the deprivation of his / her liberty which should be conducted only on justified and specific grounds, the arrestee / detainee should enjoy a number of human rights (basic protection):

- Article 1 of the Charter of Fundamental Rights of the EU about human dignity, 'Human dignity is inviolable. It must be respected and protected', and Article 1 of the UDHR, 'All human beings are born free and equal in dignity and rights'.
- Articles 6 and 7 of the ECHR and Article 14 of the ICCPR: fair trial, presumed innocence, etc. Further, international law prohibits secret detention on any grounds.

The 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families expressly states that if migrants are detained for violating provisions relating to migration, they should be held separately from convicted persons or persons detained pending trial. They should not be seen as criminals<sup>165</sup>.

As regards interviewing and investigations which could be referred to as other forms of deprivation of liberty according to the definition provided by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>166</sup>, these must be carried out in line with the human rights standards. Relevant rights involved in the interviewing / investigations:

- Article 3 of the ECHR and Article 7 of the ICCPR: prohibition of torture.
- Article 10(1) of the ICCPR: 'All persons deprived of their liberty shall be treated with humanity and with respect...'
- Article 14 of the ECHR (prohibition of discrimination) and Article 2 of the UDHR: 'Everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

<sup>163</sup> Article 5.4 of the ECHR, right to judicial review.

<sup>164</sup> Article 5.5 of the ECHR, right to compensation.

<sup>165</sup> Article 17(3) of the convention.

<sup>166</sup> See footnote 151.

- Article 8 of the Charter of Fundamental Rights of the EU on the protection of personal data.
- Article 8 of the ECHR and Article 17(1) of the ICCPR on the respect of private and family life.

Length of detention, conditions and related human rights while deprived of liberty

Under no circumstances should administrative detention of migrants be indefinite. A maximum period of detention should be set by law, and the custody may in no case be unlimited or of excessive length.



### 3.2. Deprivation of liberty of some groups and individuals requiring special attention

#### Notes to the trainer

The aim of this section is to introduce rights involved in the deprivation of the liberty of individuals requiring particular attention.

#### References

- UN Convention on the Rights of the Child (1989)
- UN Convention on the Rights of Persons with Disabilities (2006)
- Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006)
- UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok rules), A/C.3/65/L.5 (2010)
- Council Directive 2003/9/EC (reception conditions directive)
- UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers (1999)
- Global roundtable on alternatives to detention of asylum seekers, refugees, migrants and stateless persons: Summary conclusions (Global roundtable summary conclusions), UNHCR and the Office of the High Commissioner for Human Rights (OHCHR) (2011)<sup>167</sup>
- Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention, UNHCR (2012)

'The detention of asylum seekers is, in the view of UNHCR, inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs'<sup>168</sup>.

In considering the prescription of detention, it is important to observe the principle of minimum intervention or last resort<sup>169</sup> and pay close attention to the specific situation of each individual to determine if they require particular attention such as accompanied and unaccompanied children, pregnant women, the elderly, persons with disabilities, survivors of torture, victims of crime or violence, or other persons exhibiting symptoms of trauma or psychological conditions. In these cases, it is recommended to find alternative forms to custodial

<sup>167</sup> <http://www.unhcr.org/refworld/docid/4e315b882.html>

<sup>168</sup> UNCHR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, 1999.

<sup>169</sup> On the recommendation of the Eighth Congress, the General Assembly, in its Resolution 45/110 of 14 December 1990, adopted the United Nations' standard minimum rules for non-custodial measures and approved the recommendation of the committee that the rules should be known as 'the Tokyo rules'.

detention, but if this is unavoidable and justified by national law, rigorous guarantees, as outlined below, need to be secured.

#### People with disabilities and the elderly

The Convention on the Rights of Persons with Disabilities establishes that:

Article 14(2)

'States parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this convention, including by provision of reasonable accommodation.'

Article 16 '2. states parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. States parties shall ensure that protection services are age-, gender- and disability-sensitive.

'3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, states parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.'

The UNHCR recommends 'a swift and systematic identification and registration of such persons is needed to avoid arbitrary detention and any alternative arrangements may need to be tailored to their specific needs, such as telephone reporting for persons with physical constraints'<sup>170</sup>.

The UNHCR's Detention Guideline 9.6<sup>171</sup> emphasises that, in the case of elderly individuals seeking international protection, they 'may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions. Without such care and assistance, their de-

<sup>170</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012.

<sup>171</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012.



tention may become unlawful. Alternative arrangements would need to take into account their particular circumstances, including physical and mental well-being<sup>172</sup>.

### Women

In co-sex facilities, men and women should be separated, unless they belong to the same family. Ideally, the majority of guards looking after women detainees should also be female. The specific hygiene needs of women should be met<sup>173</sup>.

The detention of pregnant women and breastfeeding mothers should be avoided<sup>174</sup>.

Rule 25 of the UN rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules) provides that:

1. Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.
2. Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.
3. In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members<sup>175</sup>.

### Lesbian, gay, bisexual, transgender and intersex individuals

The placement in detention of lesbian, gay, bisexual, transgender or intersex people should not put them at risk of violence, ill-treatment or physical, mental or sexual abuse. Moreover, any member of staff working in public or private detention facilities has to be trained in international human rights standards and principles of equality and non-discrimination, including in relation to sexual ori-

<sup>172</sup> See, for example, Article 17(1) of Council Directive 2003/9/EC.

<sup>173</sup> UN rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules), A/C.3/65/L.5, 6 October 2010.

<sup>174</sup> Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24, para. 72(g).

<sup>175</sup> Though Rule 25 of the UN rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules) applies to women who have been convicted of a criminal offence or awaiting trial, its best practice is transferrable to the administrative detention of migrant women.

entation or gender identity<sup>176</sup>. When security to their physical and mental integrity cannot be guaranteed in detention, their release or alternatives to detention need to be contemplated. Solitary confinement is not an appropriate alternative<sup>177</sup>.

### Survivors of torture

Survivors of torture should be deprived of their liberty only in exceptional cases, as the incarceration may well bring back and augment their physical and psychological suffering.

People suspected of suffering from trauma need to be monitored regularly so as to ascertain the safety of their detention. Personnel need to be trained to identify symptoms of trauma, to ensure that particular behaviours are understood and the individual in question is not punished, but rather referred for the appropriate care. As isolation can bring back memories of the torture experienced in the past, it is strongly advised to avoid such practices.

### Minors<sup>178</sup>

Article 37 of the Convention on the Rights of the Child provides for the protection of children:

'States parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right

<sup>176</sup> Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006, Principle 9: The right to treatment with humanity while in detention.

<sup>177</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012, p. 39.

<sup>178</sup> Adapted from the 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012.



to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

Moreover, the Convention on the Rights of the Child also calls for the following.

- Article 2 which requires that states take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members.
- Article 3 which provides that in any action taken by states parties concerning children, the best interests of the child shall be a primary consideration.
- Article 9 which grants children the right not to be separated from their parents against their will.
- Article 22 which requires that states parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance.

Unaccompanied and separated minors should not, as a general rule, be detained. Where possible, they should be released into the care of family members who already have residency. Where this is not possible, alternative care arrangements should be made by the competent childcare authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster-care placements may provide the necessary facilities to ensure that appropriate care, both physical and mental, is provided while longer term solutions are being considered.

If none of the alternatives can be applied and states do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation

of their education upon release. Provision should be made for their recreation and play, which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained benefit from the same minimum procedural guarantees (listed under Guideline 9.2 of the UNCHR detention guidelines) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.

Legislation should not allow for the detention of unaccompanied children, and the detention of children should be permitted only as a measure of last resort and only when it has been determined to be in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realisation of the rights enshrined in the Convention on the Rights of the Child<sup>179</sup>.

### Families

If special facilities for families do not exist, this should not mean that they are placed in solitary confinement wings.

'All appropriate alternative care arrangements should be considered in the case of children accompanying their parents, not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, inter alia, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child'<sup>180</sup>.

The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit; instead, alternatives to detention should be applied to the entire family<sup>181</sup>.

<sup>179</sup> Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24, para. 72(h).

<sup>180</sup> 'Detention guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention', UNHCR, 2012, p. 35.

<sup>181</sup> Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24, para. 72(h).



## Glossary

**Applicant:** A person who formally requests some government or legal action, such as the granting of refugee status, a visa or working permit.  
(Glossary on migration, IOM)

**Application:** A request (usually written) submitted to the government by a person or organisation seeking some governmental action.  
(Glossary on migration, IOM)

**Related term:** [claim](#)

**Arbitrary:** In an unreasonable manner, related to the concepts of injustice, unpredictability, unreasonableness and capriciousness.  
(Glossary on migration, IOM)

**Armed conflict:** All cases of declared war or of any other armed conflict which may arise between two or more states, even if the state of war is not recognised by one of them (see Article 2, Geneva conventions I–IV, 1949 – international armed conflict). An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state (Tadic case No IT-94-1-AR 72, p.35, Appeals Chamber, ICTY – non-international armed conflict).  
(Glossary on migration, IOM)

**Asylum:** The granting, by a state, of protection on its territory to persons from another state who are fleeing persecution or serious danger. Asylum encompasses a variety of elements, including non-refoulement, permission to remain on the territory of the asylum country and humane standards of treatment.

**Asylum applicant, asylum seeker:** An asylum seeker is an individual who is seeking international protection. An asylum seeker is someone whose claim has not yet been decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognised as a refugee, but every refugee is initially an asylum seeker.

**Best practice:** Means to further the application of existing norms and principles, both at the international and the national levels. Best practices may be translated into operational directives, codes of conduct or other manifestations of soft law, but should not lead to a weakening or erosion of positive law. They are characterised by: being innovative, developing creative solutions; showing a positive impact on

the level of implementation of migrants' rights; having a sustainable effect, especially by involving migrants themselves; and having the potential for replication.  
(Glossary on migration, IOM)

**Border:** Line separating the land territory or maritime zones of one state from another.  
(Glossary on migration, IOM)

**Border control:** Means the activity carried out at a border, in accordance with and for the purposes of Regulation (EC) No 562/2006, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance.  
(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))

**Border crossing:** Means the physical act of crossing a border (as defined above) either at a border crossing point (as defined elsewhere) or another point along the border, in case entry is likely to be illegal.  
(Asylum and migration glossary, European Migration Network)

**Border crossing point:** Means any crossing point authorised by the competent authorities for crossing external borders.  
(Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data<sup>182</sup>)

**Border guard:** A generic term describing those officials whose primary task is to guard the border and enforce the immigration (and possibly customs) laws of the state.  
(Glossary on migration, IOM)

**Related terms:** [border officials](#), [border police](#)

**Border management:** Integrated border management is a concept consisting of the following dimensions.

- Border control (checks and surveillance) as defined in the Schengen borders code, including relevant risk analysis and crime intelligence.
- Detection and investigation of cross-border crime in coordination with all competent law enforcement authorities.
- The four-tier access control model (measures in third countries, cooperation with neighbouring countries, border control, control measures within the area of free movement, including return).

<sup>182</sup> OJ L 261, 6.8.2004, p. 24.



- Inter-agency cooperation for border management (border guards, customs, police, national security and other relevant authorities) and international cooperation.
  - Coordination and coherence of the activities of Member States and institutions and other bodies of the Community and the Union.
- (Council conclusions on integrated border management, December 2006)

**Border official:** See 'border guard'

**Capacity building:** A process by which individuals, institutions and societies develop abilities, individually and collectively, to perform functions, solve problems and set and achieve their goals.

**Charter of Fundamental Rights of the European Union:** Reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention on Human Rights (ECHR), the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

(Asylum and migration glossary, European Migration Network)

**Checkpoint:** A location (on the land border or at an airport or seaport) where persons are stopped by border officials for inspection and clearance, in order to enter the state.

(Glossary on migration, IOM)

**Related terms:** border, border control, border official, border guard

**Child:** Any person below 18 years of age.

(Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA)

**Related term:** minor

**Child (separated):** Means a child under 18 years of age who is outside their country of origin and separated from both parents and their previous legal/customary primary caregiver. Some may be totally alone while others may be living with extended family members. All such children are separated children and entitled to international protection under a broad range of international and regional instruments.

(Study on separated, asylum-seeking children in EU Member States, European Union Agency for Fundamental Rights (FRA))

**Child (unaccompanied):** Persons under the age of majority who are not accompanied by a parent, guardian, or other adult who by law or custom is responsible for them. Unaccompanied minors present special challenges for border control officials, because detention and other practices used with undocumented adult aliens may not be appropriate for minors.

(Glossary on migration, IOM)

**Citizen:** A person, who, either by birth or naturalisation, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil and political rights and protection; a member of the state, entitled to all its privileges. A person enjoying a nationality of a given state.

(Glossary on migration, IOM)

See also 'National'

**Civil and political rights:** Commonly used to describe the various rights contained in the International Covenant on Civil and Political Rights (1966) (e.g. right of self-determination; of free disposition of natural wealth and resources; of non-discrimination; of equal rights of men and women; right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment; of freedom from slavery and servitude; of freedom from arbitrary arrest or detention; of freedom of movement within a state; right to liberty and security of the person; equality before the courts; right to a fair and public hearing by an impartial tribunal in respect of criminal charges; prohibition of retroactive criminal liability; right of privacy of the family, the home or correspondence; freedom of thought, conscience and religion; freedom of expression; right to peaceful assembly; freedom of association and of participation in public affairs).

(Glossary on migration, IOM)

**Claim:** An assertion made to a government agency or court seeking an action or determination of a right or benefit, such as refugee status or the right to compensation or legal redress in civil proceedings.

(Glossary on migration, IOM)

**Related term:** application

**Clandestine migration:** Secret or concealed migration in breach of immigration requirements. It can occur when a non-national breaches the entry regulations of a country; or having entered a country legally overstays in breach of immigration regulations.

(Glossary on migration, IOM)

**Related terms:** irregular migrant, irregular migration, regular migration

**Code of conduct:** A common set of principles or standards that a group of agencies or organisations have agreed to abide by while providing assistance in response



to complex emergencies or natural disasters. For example, the principles of conduct for the International Red Cross and Red Crescent Movement and non-governmental organisations in disaster response programmes, and the IASC core principles of a code of conduct for protection from sexual abuse and exploitation.

**Combatant:** A person who takes an active part in hostilities, who can kill, and who, in turn, is a lawful military target. She / he can be a member of the armed forces, other than medical personnel and chaplains, or of an organised group. Under international humanitarian law, armed forces are subject to an internal disciplinary system which, inter alia, must enforce compliance with the rules of international law applicable to armed conflict.

**Complementary protection:** Formal permission, under national law or practice, to reside in a country extended by that country to persons who are in need of international protection even though they do not qualify for the 1951 refugee convention status.

**Convention:** Formal international agreements among nations (to which states become party), which create binding legal obligations. Such agreements may have different names: treaty, convention, covenant or pact. Conventions are one of two main types of UN human rights instruments, the other being UN standards. See 'Treaty'

**Convention grounds:** The definition of refugee in the 1951 convention requires that the fear of persecution be linked to one or more of the following five grounds: race, religion, nationality, membership of a particular social group or political opinion.

**Convention on the Reduction of Statelessness:** A convention that provides for the acquisition of nationality by those who would otherwise be stateless and who have an appropriate link with the state through birth on the territory or through descent from a national. The convention also provides for the retention of nationality by those who would become stateless if they were to lose the state's nationality. The convention was adopted in August 1961 and came into force in December 1975. The UNHCR has been mandated with specific functions under Article 11 of the 1961 Convention on the Reduction of statelessness.

**Convention on the Rights of the Child (CRC):** Adopted in 1989, this treaty sets comprehensive standards for the protection of the rights of children. It is underpinned by four guiding principles, one of which is non-discrimination in the application of its standards to all children. Therefore, refugee children come fully within its scope. The other guiding principles are the 'best interest' of the child, the right to life, survival and development, and the right to participation.

**Country of destination (destination country):** The country that is a destination for migratory flows.  
(Glossary on migration, IOM)

**Country of origin (source country):** The country (or countries) which are a source of migratory flows and of which a migrant may have citizenship. In the refugee context, based on Council Directive 2004/83/EC, this means the country (or countries) of nationality or, for stateless persons, of former habitual residence. (Derived by EMN, based on the IOM definition)  
(Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted<sup>183</sup>)

**Synonym:** state of origin

**Narrower terms:** Country of origin information, safe country of origin

**Related terms:** country of nationality, country of transit

Note: In some cases, a migrant may enter the EU from another country, which is not his / her country of origin. See 'Country of transit'.

**Country of transit (transit country):** The country through which migratory flows (legal or illegal) move. This is taken to mean, the country (or countries), different from the country of origin, which a migrant passes through in order to enter a country of destination.  
(Glossary on migration, IOM)

**Related terms:** Country of origin, country of destination

**Culture:** Should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.  
(Asylum and migration glossary, European Migration Network)

**Custody:** Responsibility for the care and control of an individual. A court might assign custody of a minor to a relative or other guardian. A person who is detained by authorities is 'in custody'.  
(Glossary on migration, IOM)

**Customary law, international:** A source of international law. The two criteria for a norm to be recognised as 'customary law' are state practice and *opinio juris* (a conception that the practice is required by or consistent with the prevailing law).  
(Glossary on migration, IOM)

<sup>183</sup> OJ L 304, 30.9.2004, p. 12.



**Custody:** Responsibility for the care and control of an individual. A court might assign custody of a minor to a relative or other guardian. A person who is detained by authorities is 'in custody'.

(Glossary on migration, IOM)

**Degrading treatment:** Degrading treatment or punishment has a broader definition than inhuman treatment, and what is degrading may depend on the particular attributes of the person in question. For treatment to be deemed degrading, other people sharing the same characteristics as that individual would have to find it degrading.

(<http://www.abouthumanrights.co.uk>)

The notion of 'degrading treatment' has been defined by the European Commission of Human Rights as treatment or punishment that 'grossly humiliates the victim before others or drives the detainee to act against his / her will or conscience'. European Commission of Human Rights, Greek case (cited in Vol. II, Ch. 32, § 1339).

**Dependant:** In general use, one who relies on another for support. In the migration context, a spouse and minor children are generally considered 'dependants', even if the spouse is not financially dependent.

(Glossary on migration, IOM)

**Deportation:** The act of a state in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain.

(Glossary on migration, IOM)

**Derogation:** The restriction or suspension of rights in certain defined situations (for example the International Covenant on Civil and Political Rights (1966) permits a state to derogate from its obligations under the covenant 'in time of public emergency which threatens the life of the nation.'). The partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force.

(Glossary on migration, IOM)

**Detention:** Restriction on freedom of movement through confinement that is ordered by an administrative or judicial authority(ies) in order that another procedure may be implemented. In an EU asylum context, this means confinement of an asylum applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

There are two types of detention: criminal detention, having as a purpose punishment for the committed crime; and administrative detention, guaranteeing that another administrative measure (such as deportation or expulsion) can be implemented. In the majority of the countries, irregular migrants are subject to

administrative detention, as they have violated immigration laws and regulations, which is not considered to be a crime.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. (Adapted by the EMN based on the definition given in UNESCO's 'People on the move' handbook, Council Directive 2003/9/EC in the EU asylum context and Directive 2008/115/EC of the European Parliament and of the Council in the EU return context.)

**Detention facility:** A specialised facility – different from prison accommodation – used for the detention of a third-country national in accordance with national law. (Guidelines for risk analysis units, Frontex)

**Discrimination (direct):** Occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation.

(Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

Article 21 of the Charter of Fundamental Rights of the EU asserts that any discrimination based on grounds such as 'sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

**Discrimination (indirect):** Occurs where an apparently neutral provision, criterion or practice would put persons... at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Council Directive 2000/43/EC)

**Displacement:** A forced removal of a person from his/her home or country, often due to armed conflict or natural disasters.

(Glossary on migration, IOM)

**Dissociation:** Your sense of reality and who you are depend on your feelings, thoughts, sensations, perceptions and memories. If these become 'disconnected' from each other, or don't register in your conscious mind, your sense of identity, your memories and the way you see things around you will change. Dissociation is also a defence mechanism that can help us survive traumatic experiences (e.g. persecution, torture, war) and it can be related to post-traumatic stress disorder. There are five types of dissociation.

- Amnesia

This is when you can't remember incidents or experiences that happened at a particular time, or when you can't remember important personal information.



- **Depersonalisation**  
A feeling that your body is unreal, changing or dissolving. It also includes out-of-body experiences, such as seeing yourself as if watching a movie.
- **Derealisation**  
The world around you seems unreal. You may see objects changing in shape, size or colour, or you may feel that other people are robots.
- **Identity confusion**  
Feeling uncertain about who you are. You may feel as if there is a struggle within to define yourself.
- **Identity alteration**  
This is when there is a shift in your role or identity that changes your behaviour in ways that others could notice. For instance, you may be very different at work from when you are at home.

(Mind UK website, 2013)

**Documented person:** A person who entered a country legally and remains in the country in accordance with his/her admission criteria.

(Glossary on migration, IOM)

**Dublin convention:** An agreement between EU Member States (adopted in 1990, entered into force in 1997) determining which Member State of the European Union is responsible for examining an application for asylum lodged in one of the contracting states. The convention prevents the same applicants from being examined by several EU Member States at the same time, as well as ensuring that an asylum seeker is not redirected from state to state simply because no one will take the responsibility of handling his/her case.

(Glossary on migration, IOM)

**Dublin regulation:** Regulation which lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

(Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national)

**Empowerment:** A process that allows people to take greater control over the decisions, assets, policies, processes and institutions that affect their lives.

**Entry:** Any entrance of an alien into a foreign country, whether voluntary or involuntary, legally or illegally.

(Glossary on migration, IOM)

**Entry (irregular):** In the EU context, this means the entry of a third-country national into an EU Member State which does not satisfy Article 5 of the Schengen Border Code.

In a wider context, this means crossing borders without complying with the necessary requirements for legal entry into the receiving State.

(Council Regulation (EC) No 562/2006 – Schengen Border Code; United Nations Convention against Transnational Organised Crime and its Protocols).

**Entry (legal):** Entry of a third-country national into an EU Member State which satisfies Article 5 of the Schengen Border Code.

(Council Regulation (EC) No 562/2006 – Schengen Border Code)

**Entry into force:** When a treaty or convention becomes a functioning and enforceable legal document. Conventions 'enter into force' after the required number of ratifications (by states) have been received.

**Entry point:** See 'border crossing point'

**Eurodac:** This is the name given to an informatics system, the purpose of which, via the collection, transmission and comparison of fingerprints, is to assist in determining which Member State is to be responsible pursuant to the Dublin convention for examining an application for asylum lodged in a Member State, and otherwise to facilitate the application of the Dublin convention under the conditions set out in the regulation establishing Eurodac.

(Asylum and migration glossary, European Migration Network)

**European Convention on Human Rights (ECHR):** Signed in Rome under the aegis of the Council of Europe on 4 November 1950, the convention established an unprecedented system of international protection for human rights, offering individuals the possibility of applying to the courts for the enforcement of their rights. More formally referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

**Evaluation:** A systematic and objective analysis and assessment of the organisation's policies, programmes, practices, training programmes, partnerships and procedures, focused on planning, design, implementation and impacts achieved.

**Exclusion clauses:** Legal provisions that deny the benefits of international protection to persons who would otherwise satisfy the criteria for refugee status. In the 1951 convention, the exclusion clauses are found in Articles 1D, 1E and 1F. These clauses apply to the following categories: persons who are receiving protection or assistance from UN agencies other than the UNHCR; persons who are recognised by the authorities of the country as having the rights and obligations at-



tached to the possession of nationality of their country of residence; and persons in respect of whom there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, or acts contrary to the purposes and principles of the UN.

**Expulsion:** An act by an authority of the state with the intention and with the effect of securing the removal of a person or persons (aliens or stateless persons) against their will from the territory of that state.  
(Glossary on migration, IOM)

**Family unity, right to:** A family's right to live together and, as a fundamental unit of a society, to receive respect, protection, assistance and support. This right is not limited to nationals living in their own state and is protected by international law (e.g. Article 16 of the Universal Declaration of Human Rights, 1948; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Article 16 of the European Social Charter, 1961; Articles 17 and 23 of the International Covenant on Civil and Political Rights, 1966; Article 1 of the International Covenant on Economic, Social and Cultural Rights, 1966; Article 17 of the American Convention on Human Rights, 1969).  
(Glossary on migration, IOM)

**Forced return:** The compulsory return of an individual to the country of origin, transit or third country, on the basis of an administrative or judicial act.  
(Glossary on migration, IOM)

**Forged document:** See fraudulent document.

**FRA (European Union Agency for Fundamental Rights):** The FRA serves to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. Its tasks include information and data collection, research and analysis; advice to EU institutions and Member States; cooperation with civil society and awareness-raising.  
(Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights<sup>184</sup>)

**Fraudulent document:** Any travel or identity document that has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a state;

<sup>184</sup> OJ L 53, 22.2.2007, p. 1

or that has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or that is being used by a person other than the rightful holder (Article 3(c) of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (2000)).

**Frontex:** The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union is a specialised and independent body tasked to coordinate the operational cooperation between Member States in the field of border security. The activities of Frontex are intelligence driven. Frontex complements and provides particular added value to the national border management systems of the Member States. Its tasks include carrying out risk analysis; coordination of operational cooperation between Member States in the field of management of external borders; assistance to Member States in the training of national border guards, including the establishment of common training standards; following up the development of research relevant for the control and surveillance of external borders; assistance to Member States in circumstances requiring increased technical and operational assistance at external borders; and providing Member States with the necessary support in organising joint return operations.  
(Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union<sup>185</sup>)

**Fundamental rights:** Refers to the Charter of Fundamental Rights of the EU (OJ C 83, 30 March 2010, p. 389) where these rights, freedoms and principles are set out. The term is used interchangeably with human rights.

**Gender:** Gender refers to the socially constructed attributes, roles, activities, responsibilities and needs predominantly connected to being male or female in given societies or communities at a given time.  
(Asylum and migration glossary, European Migration Network)

**Good practice:** An innovative, interesting and inspiring practice that has the potential to be transferred in whole or in part to other national contexts.

<sup>185</sup> OJ L 349, 25.11.2004, p. 1.



**Guardian:** One who has the legal authority and duty to care for another's person or property, usually because of the other's incapacity, disability or status as a minor. (Glossary on migration, IOM)

**Health:** A state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity. (Glossary on migration, IOM)

**Human rights:** Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. (OHCHR)

**Human rights law:** The body of customary international law, human rights instruments and national law that recognises and protects human rights. Refugee law and human rights law complement each other.

**Humanitarian assistance (relief):** Aid that addresses the immediate needs of individuals affected by crises and is provided mainly by non-governmental and international organisations.

**Humanitarian law:** Rules of international law especially designed for the protection of the individual in time of war or armed conflict. (Glossary on migration, IOM)

**Humanitarian principles:** Ethical standards applicable to all humanitarian actors, which have their underpinnings in international human rights and humanitarian law, and seek to protect the integrity of humanitarian action. The first explicit statement of humanitarian principles is found in the 'Fundamental principles of the Red Cross and Red Crescent' adopted in 1965. (Glossary on migration, IOM)

**Identification of victims of trafficking:** (In the context of this manual) the combination of the profile, the presence of specific indicators and / or material evidence and the interview of a person leading to the detection of a (possible) victim of trafficking in human beings. (Anti-trafficking training for border guards, Frontex, 2012)

**Illegal entry:** See 'entry (illegal)'

**Inalienable:** Not transferable or assignable or removable.

**Indicator:** This refers to a single data item that acts as a pointer or clue conveying a sense of suggestion, condition or status. For example, an indicator can be suggestive of a particular event or activity taking place, or of a set of conditions for such an event to occur, or suggestive about the possible intentions of a target. To be useful and persuasive, indicators are best developed, gathered and assessed as 'sets'. (Guidelines for risk analysis units, Frontex)

**Inhumane treatment:** Physical or mental cruelty so severe that it endangers life or health. (Glossary on migration, IOM)

**Instrument:** A formal or legal document in writing such as a contract or treaty. In the case of ratification, acceptance, approval or accession to a treaty, it is the document which establishes the consent of the state to be bound by the treaty. (Glossary on migration, IOM)

**Intelligence:** Information that has been considered and interpreted in the light of interests or needs and that is related to one of the components of risk (i.e. related to a threat, the vulnerability to this threat and the impact of the threat). An intelligence product is generated by the collection, evaluation, integration, analysis and interpretation of all available information which is immediately or potentially significant to planning, policy and operations personnel and decision-makers. (Guidelines for risk analysis units, Frontex)

**Intergovernmental organisation (IGO):** An organisation made up of state members. Examples include the United Nations organisation (UN) and its agencies, the Organisation of African Unity (OAU), the Organisation of American states (OAS), the European Union (EU) and the Commonwealth of Independent States (CIS).

**International humanitarian law (or law of armed conflict):** The body of law, regulations and principles that governs situations of international or non-international armed conflict. The core instruments of international humanitarian law are the four Geneva conventions of 12 August 1949 and their two additional protocols of 8 June 1977. Virtually every state is a party to the Geneva conventions of 1949.

**International law:** The legal principles governing the relationships between states. More modern, the law of international relations embraces not only states but also such participants such as international organisations, and even individuals (such as those who invoke their human rights or commit war crimes). Also termed law of nations, public international law, *jus gentium*.



**International protection:** In the EU asylum *acquis*, it means the refugee (third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country) and subsidiary protection status (third-country national or a stateless person who does not qualify as a refugee but... if returned to his or her country of origin / former habitual residence, would face a real risk of suffering serious harm). (UNHCR)

**International refugee law:** The body of customary international law and international instruments that establishes standards for refugee protection. The cornerstone of refugee law is the 1951 convention and its 1967 protocol relating to the status of refugees.

**Interview:** The process of questioning or talking with a person in order to obtain information or determine the personal qualities of the person. An interview is a common step in the adjudication of an application for refugee or other immigration status. (Glossary on migration, IOM)

**Investigation:** Refers in this context to a thorough and systematic inquiry into criminal activities. (Glossary on migration, IOM)

**Irregular migrant:** '[E]very person who, owing to undocumented entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorised to remain in the host country.' (International migration and human rights – Challenges and opportunities on the threshold of the 60th anniversary of the Universal Declaration of Human Rights, Global Migration Group, Geneva, 2008, p. 7)

**Irregular migration:** Movement that takes place outside the regulatory norms of the sending, transit and receiving countries.

There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is illegal entry, stay or work in a country, meaning that the migrant does not have the necessary authorisation or documents required under immigration regulations to enter, reside or work in a given country. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the adminis-

trative requirements for leaving the country. There is, however, a tendency to restrict the use of the term 'illegal migration' to cases of smuggling of migrants and trafficking in persons. (Glossary on migration, IOM)

**Judicial review:** A court's power to invalidate legislative and executive actions as being unconstitutional or being contrary to law; a court's review of lower court's or an administrative body's factual or legal findings. (Glossary on migration, IOM)

**Legal remedies:** The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a state has adopted the cause of its national whose rights are claimed to have been disregarded in another state in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the state where the violation occurs should have an opportunity to redress it by its own means, within the framework of its own domestic legal system (Interhandel case (preliminary objections), International Commission of Jurists, 1959). (Glossary on migration, IOM)

**Mental health:** A term used to describe either a level of cognitive or emotional well-being or an absence of a mental disorder. (Webster's online dictionary)

**Migrant:** A broader term for an immigrant and emigrant, referring to a person who leaves one country or region to settle in another, often in search of a better life. Note: In the EU asylum and migration policy context, this is understood to refer to a third-country national entering (or within) the EU. (Asylum and migration glossary, European Migration Network)

**Migration:** In the EU context, migration is a broader term for an immigration and emigration, i.e. the action by which a person either: establishes his or her usual residence in the territory of a Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another Member State or a third country; or having previously been usually resident in the territory of a Member State, ceases to have his or her usual residence in that Member State for a period that is, or is expected to be, of at least 12 months. In a global context, this refers to a process of moving, either across an international border (international migration) or within a state (internal migration). It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, uprooted people, and economic migrants.



(Glossary on Migration, IOM)  
(Derived by the European Migration Network on the basis of definitions for immigration and emigration; Glossary on migration, IOM)

**Narrower terms:** [emigration](#), [immigration](#)

**Migration management:** A term used to encompass numerous governmental functions and a national system of orderly and humane management for cross-border migration, particularly managing the entry and presence of foreigners within the borders of the state and the protection of refugees and others in need of protection.

(Glossary on migration, IOM)

**Minor:** See 'child'

**Minority:** Although there is no universally accepted definition of minority in international law, a minority may be considered to be a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language.

(Glossary on migration, IOM)

**Mixed flows:** Complex population movements including refugees, asylum seekers, economic migrants and other migrants.

(Glossary on migration, IOM)

**Related term:** [mixed migration](#)

**Movement, the right to freedom of:** This right is made up of three basic elements: freedom of movement within the territory of a country (Article 13(1) of the UDHR (1948): 'Everyone has the right to freedom of movement and residence within the borders of each state'), right to leave any country and the right to return to his or her own country (Article 13(2) of the UDHR: 'Everyone has the right to leave any country, including his own, and to return to his country.')

(Glossary on migration, IOM)

**National:** A person recognised to have the status of a legal bond with a state as provided for under law. Some states use the word 'nationality' to refer to this legal bond, while other states use the word 'citizenship'.

**National referral mechanism:** A cooperative framework through which state actors fulfil their obligations to protect and promote the human rights of migrants, coordinating their efforts in a strategic partnership with civil society.

('National referral mechanisms: Joining efforts to protect the rights of trafficked persons – A practical handbook', OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2004)

**Nationality:** The status of being a citizen of a particular nation or country.

**Non-derogable rights:** While most human rights are not absolute and can be limited in their application, some rights are not derogable, i.e. know no limitations or exceptions under any conditions, including the following: the right to life; the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; freedom of thought, conscience and religion.

**Non-discrimination:** The refusal to apply distinctions of an adverse nature to human beings simply because they belong to a specific category. Discrimination is prohibited by international law, for example in Article 26 of the International Covenant on Civil and Political Rights (1966), which states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

**Related terms:** [discrimination](#), [humanitarian principles](#)

(Glossary on migration, IOM)

**Non-governmental organisation (NGO):** An organised entity that is functionally independent of, and does not represent, a government or state. This term is normally applied to organisations devoted to humanitarian and human rights causes, many of which implement their refugee-related programmes in partnership with the UNHCR and other agencies.

**Non-refoulement:** A principle laid down in the Geneva Convention relating to the Status of Refugees (1951) according to which '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.' This principle cannot be 'claimed by a refugee, whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

(Article 33(1) and (2), Geneva convention relating to the status of refugees, 1951)  
(Glossary on migration, IOM)



**Perpetrator:** A term commonly used by law enforcement officers to designate a person who actually commits a crime.

(Legal dictionary, the free dictionary by Farlex)

**Persecution:** The core concept of persecution was deliberately not defined in the 1951 convention, suggesting that the drafters intended it to be interpreted in a sufficiently flexible manner so as to encompass ever-changing forms of persecution. It is understood to comprise human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element.

(UNHCR)

**Post-traumatic stress disorder:** Post-traumatic stress disorder (PTSD) is an anxiety disorder caused by very stressful, frightening or distressing events. PTSD can develop immediately after someone experiences a disturbing event or it can occur weeks, months or even years later.

PTSD can develop in any situation where a person feels extreme fear, horror or helplessness.

(National Health Service UK website, 2013)

**Prohibition of torture:** Torture is prohibited by numerous international documents, such as the UDHR (1948) (Article 5), American Declaration of Rights and Duties of Man (1948) (Article 26), UN International Covenant on Civil and Political Rights (1966) (Article 7), ECHR (1950) (Article 3) and various UN resolutions. Torture is an international crime; the protection against torture is an obligation of states and is seen as a fundamental human right. The prohibition of torture is generally viewed as having reached the level of *jus cogens*, a peremptory norm of international law.

(Glossary on migration, IOM)

**Related terms:** [jus cogens](#), [fundamental human rights](#), [torture](#)

**Prosecution:** [A criminal proceeding in which an accused person is tried.](#)

(Glossary on migration, IOM)

**Protection:** A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and / or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation.

(Master glossary of terms, UNHCR)

**Protection (person eligible for subsidiary):** Means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned,

if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 of Council Directive 2004/83/EC, and to whom Article 17(1) and (2) of said directive do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (Article 2(e) of Council Directive 2004/83/EC).

(Asylum and migration glossary , European Migration Network)

**Protection (subsidiarity):** Refers to the protection given to a person eligible for subsidiary protection (see 'Protection (person eligible for subsidiary)')

**Pull factor:** Refers to the condition(s) or circumstance(s) that attracts a migrant to another country. This can be for a specific or variety of reasons, e.g. expanding economic opportunities and potential for advancement in the country of destination. (Derived by the EMN working group, based on definitions given by the project 'European reintegration networking' and in the Glossary on migration, IOM)

**Push factor:** Refers to the condition(s) or circumstance(s) in a country of origin that impel or stimulate emigration. This can be for a specific or a variety of reasons, e.g. declining economic opportunities or political instability may stimulate emigration. (Derived by the EMN, based on definitions given by the project 'European reintegration networking' and in the Glossary on migration, IOM)

**Referral:** An act of referring (sending) someone or something for consultation, review, or further action. (Oxford dictionary)

**Refoulement:** The return by a state, in any manner whatsoever, of an individual to the territory of another state in which he or she may be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or would run the risk of torture. Refoulement includes any action having the effect of returning the individual to a state, including expulsion, deportation, extradition, rejection at the frontier, extra-territorial interception and physical return.

(International thesaurus of refugee terminology, UNHCR)

**Related term:** [Forced return](#)

**Refoulement (non-):** A core principle of international refugee law that prohibits states from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened. The principle of non-refoulement is a part of customary international law and is therefore binding on all states, whether or not they are parties to the 1951 Geneva convention. (Article 33 of the Geneva convention, 1951)



**Refugee:** According to the Geneva convention, a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it.

Within an EU context, this refers specifically to a third-country national or stateless person within the meaning of Article 1A (above) of the Geneva convention and authorised to reside as such on the territory of a Member State and to whom Article 12 (exclusion) of Council Directive 2004/83/EC does not apply.

(Geneva convention; Article 2(c) of Council Directive 2004/83/EC)

A person who meets the eligibility criteria under the applicable refugee definition, as provided for in international or regional refugee instruments, under the UNHCR's mandate, and/or in national legislation.

**Broader term:** [Forced migrant](#)

**Refugee status determination procedures:** Legal and administrative procedures undertaken by the UNHCR and/or states to determine whether an individual should be recognised as a refugee in accordance with national and international law. (UNHCR)

**Return (including repatriation, involuntary/voluntary return):** Broadly, this refers to the movement of a person returning to his/her country of origin, country of nationality or habitual residence usually after spending a significant period of time (i.e. excluding holiday visits, business meetings and typically considered to be for a period of time of more than three months) in another country. This return may or may not be voluntary.

In the context of the return directive (2008/115/EC), this means the process of going back – whether in voluntary compliance with an obligation to return, or enforced – to:

- ♦ one's country of origin; or
- ♦ a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or
- ♦ another third country, to which the third-country national concerned voluntarily decides to return and in which he/she will be accepted.

(Glossary on Migration, IOM; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals)

**Synonym:** [Return migration](#)

Note: From the IOM definition, this could be within the territorial boundaries of a country, as in the case of returning internally displaced people (IDPs) and demobilised combatants; or from a host country (either transit or destination)

to the country of origin, as in the case of refugees, asylum seekers and qualified nationals. There are subcategories of return which can describe the way the return is implemented, e.g. voluntary, forced, assisted and spontaneous return.

**Risk:** The potential that a chosen action or activity (including the choice of inaction) will lead to a loss (an undesirable outcome). The notion implies that a choice having an influence on the outcome exists (or existed).

(Wikipedia)

For the management of the external borders, risk is defined as the likelihood of a threat occurring at the external borders, given the measures in place at the borders and within the EU, which will impact the EU internal security and/or security of the external borders.

More generally, risk can be understood as:

- ♦ a measure of the probability and severity of an adverse effect to law, enforcement, public safety, national security or the environment;
- ♦ a measure of uncertainty. Such uncertainty may be about the achievement of organisational objectives and may involve positive or negative consequences. Most positive risks are known as opportunities and negative risks are simply called risks.

(Guidelines for risk analysis units, Frontex)

**Rule of non-discrimination:** This is a basic concept underlining international human rights law. The prohibition of discrimination means that, as a general rule, the rights and freedoms recognised by international human rights law apply to everyone and states may not make distinctions (for example, on the basis of race) between different individuals in protecting these rights.

**Safe third country:** A country in which an asylum seeker could have had access to an effective asylum regime, and in which he/she has been physically present prior to arriving in the country in which she/he is applying for asylum.

**Schengen Agreement:** Intergovernmental agreement signed in 1985 to create a European free-movement zone without controls at internal land, water and airport frontiers. In order to maintain internal security, a variety of measures have been taken, such as the coordination of visa controls at external borders of Member States. Although the Schengen Agreement was concluded outside the context of the EU, it has been brought into the realm of the European Communities/EU under the Amsterdam Treaty (1997).

**Secondary trauma:** Secondary trauma is the stress resulting from working with traumatised persons or persons undergoing distressing situations. Vicarious trauma



is the term used to describe the cumulative transformative effect of working with survivors of trauma.

(‘Guide to compassion fatigue and secondary trauma in human services’, L. Goossen, 2011)

**Related term:** [secondary victimisation](#)

**Shelter:** ... a wider group of facilities providing accommodation and assistance to victims of trafficking, such as medical rehabilitation centres, transit shelters and halfway houses, unless otherwise specified...

(‘Handbook on direct assistance for victims of trafficking’, IOM)

The state of being covered and protected; protection; security.

(Webster’s online dictionary)

**Stateless person:** A person who is not considered as a national by any state under the operation of its law (Article 1 of the UN convention relating to the Status of Stateless Persons (1954)). As such, a stateless person lacks those rights attributable to nationality: the diplomatic protection of a state, no inherent right of sojourn in the state of residence and no right of return in case she/he travels. (Glossary on migration, IOM)

**Slavery:** The status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised (Article 1 of the Slavery Convention (1926) as amended by the 1953 protocol). Slavery is identified by an element of ownership or control over another’s life, coercion and the restriction of movement and by the fact that someone is not free to leave or to change employer (e.g. traditional chattel slavery, bonded labour, serfdom, forced labour and slavery for ritual or religious purposes).

(Glossary on migration, IOM)

**Smuggler:** An intermediary who is moving people in furtherance of a contract with them, in order to illegally transport them across an internationally recognised state border.

(Glossary on migration, IOM)

**Smuggling:** The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident (Article 3(a) of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (2000)). Smuggling contrary to trafficking does not require an element of exploitation, coercion or violation of human rights.

(Glossary on migration, IOM)

**Smuggling, of people, of migrants:** The transportation – for financial or other material benefit – of people to countries for which they lack the necessary visas or entry permits. Normally takes place at the initiative of the smuggled person or with their consent.

(the European Commission’s anti-trafficking website glossary)

(also see ‘smuggling of migrants’)

**Source country:** See ‘Country of origin’

**Third-country national:** A person not being a citizen of an EU Member State.

**Torture:** Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

‘1. For the purposes of this convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

**Torture survivor:** A person who has experienced torture and has not died from it. See definition of torture above.

**Trafficker, human:** An intermediary who is moving people in order to obtain an economic or other profit by means of deception, coercion and/or other forms of exploitation. The intent *ab initio* on the part of the trafficker is to exploit the person and gain profit or advantage from the exploitation.

(Glossary on migration, IOM)

**Trafficking in human beings:** The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. (Directive 2011/36/EU of the European Parliament and of the Council)

**Trafficking of children:** The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.

(derived from Directive 2011/36/EU of the European Parliament and of the Council)



A child has been trafficked if she or he has been moved within a country, or across borders, whether by force or not, with the purpose of exploiting the child. (<http://www.unicef.org>)

**Transit country:** See 'Country of transit'

**Treaty:** An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2.1(a) of the Vienna Convention on the Law of Treaties (1969)).

**Victim of human trafficking:** An individual who is a victim of the crime of trafficking in persons.  
(Glossary on migration, IOM)

**Violence against women:** Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.  
(Article 1 of the Declaration on the Elimination of Violence against Women (1993))

**Vulnerable person:** Refers to minors, unaccompanied minors, separated minors, people with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.  
(Article 17(1) of Council Directive 2003/9/EC; Article 3(9) of Directive 2008/115/EC of the European Parliament and of the Council).

**Well-founded fear of persecution:** See also 'persecution'. A key element of the 1951 convention's definition of a refugee. Well-founded fear contains both a subjective element (fear of persecution) and an objective element (the fear must have an objectively justifiable basis). According to the 1951 convention, persecution must be linked to any one of the five specified grounds: race, religion, nationality, membership of a particular social group and political opinion.  
(UNHCR)



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