

Guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries



Purpose of the guidance

This guidance on how to reduce the risk of *refoulement* in border management situations aims to support the EU and its Member States when implementing integrated border management measures with the assistance of third countries. It also intends to mitigate possible risks of being held accountable. It is not comprehensive, and Member States have to comply with all applicable obligations both within as well as beyond the scope of these guidelines, including those set forth in international, European and national law.

The guidance focuses on border management situations where the responsibility for possible violations of fundamental rights are unclear, in particular on activities that are carried out with the assistance of third countries. It does not cover situations where the law is settled. The guidance sets out 10 suggestions for practical measures.

The European Union Agency for Fundamental Rights (FRA) developed this guidance based on its report on the *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*. Both the report and the guidance benefited greatly from expert input at a meeting held in Vienna on 14 March 2016.

Principle of *non-refoulement*

The principle of *non-refoulement* is a central piece of the EU's fundamental rights regime, reflected in Article 78 (1) of the Treaty on the Functioning of the EU. Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (Charter) also encompass the prohibition of *refoulement*, which is further specified in secondary EU law. Essentially, these provisions mirror international human rights obligations by EU Member States.

For refugees, the principle of *non-refoulement* as laid down in Article 33 of the 1951 Convention relating to the Status of Refugees is the cornerstone of the international legal regime for their protection. It prohibits the return of refugees to a risk of persecution. It covers also people seeking asylum until a final decision is made on their application.

For all persons, regardless of their legal status, the principle of *non-refoulement* is a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the 1966 International Convention on Civil and Political Rights, Article 3 of the 1984 United Nations Convention against Torture and Article 3 of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights. Such provisions do not allow for any derogation, exception or limitation.

The EU asylum *acquis* also prohibits the return of a person to real risk of serious harm deriving from indiscriminate violence in situations of armed conflict.

The principle of *non-refoulement* not only prohibits the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct *refoulement*) but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect *refoulement*).

The prohibition of *refoulement* applies also to conduct at borders and at sea.

Conduct that may trigger *refoulement* may also engage violations of other fundamental rights, such as the right to be heard, the right to an effective remedy or the prohibition of collective expulsion.

Integrated border management

The concept of integrated border management guides the action of the EU and its Member States on external border control. It promotes a four-tier access control model, including:

- measures in third countries (such as the provision of advice and training);
- cooperation with neighbouring countries;
- measures at the external border itself;
- measures within the territory, including return.

When implementing integrated border management measures in or together with third countries, EU Member States may become involved in activities where the application of fundamental rights obligations deriving from the Charter and specifically from the prohibition of *refoulement* is not fully settled.

State responsibility

The Charter applies to the EU as well as to Member States when they act within the scope of EU law. This includes also conduct at the border or outside the EU territory.

Under Article 1 of the ECHR, states have to secure the rights of the convention to everyone within their jurisdiction. States may exceptionally also exercise jurisdiction when they operate outside their territory.

Under international law, an internationally wrongful act of a state entails international responsibility. Conduct is wrongful when it breaches an international obligation of the state and when it is attributable to

the state. State responsibility may exceptionally arise when a state aids or assists, directs and controls or coerces another state to engage in conduct that violates international obligations.

The possible legal consequences for EU Member States of requesting the assistance of third countries to prevent the arrival of migrants to the EU depend on the individual circumstances of each operation and factors such as the exercise of *de jure* or *de facto* control over a person or the degree of leverage exercised by the EU Member State on the conduct of the third country. Although exceptional, responsibility by EU Member States cannot be fully excluded.

Ten suggestions for practical measures in border management situations

1. Conduct a prior assessment and monitor the human rights situation in the third country

When considering the deployment of document experts or liaison officers to third countries or where operational cooperation with a third country is envisaged which may involve the interception of migrants and/or their disembarkation in a third country, EU Member States should conduct a careful assessment of the human rights situation in that country. Such assessment would enable EU Member State to evaluate possible fundamental rights implications and calibrate its planned activities so as to avoid or reduce the risk of participation in conduct which could violate human rights.

Such assessment should be based on a full range of sources and include information on access to asylum and on the treatment of persons in need of international protection. The principles set out in Article 4 (2) of Regulation (EU) No. 656/2014 on Frontex-coordinated operations at sea may be used as a guidance. Regular monitoring of the situation would allow to adjust the operational involvement in case of changes.

2. Clarify responsibilities and procedures in arrangements concluded with third countries

Arrangements concluded with third countries could include rules on allocation of responsibility, paying attention to the fact that third countries may not be bound by the same human rights obligations as EU Member States. Arrangements on deploying document experts or immigration liaison officers at third-country airports to support airlines in deciding whether to allow a passenger to board an aircraft or not could



include guidance on where to refer people who are not allowed to board an aircraft and express a fear of serious harm or persecution and/or if there are clear indications of a real risk of *refoulement*.

3. Refrain from asking third countries to intercept migrants in case of real risk of harm

Third countries should not be requested to intercept people on the move before they reach the EU external border, when it is known or ought to be known that the intercepted people would as a result face persecution or a real risk of other serious harm.

4. Provide fundamental rights training to staff deployed in third countries

Staff deployed as liaison officers or as document experts to third countries should be trained and equipped with the necessary knowledge and skills to understand if and how the principle of *non-refoulement* may be engaged in operations in which they are involved.

5. Offer human rights training to third-country officials

Third-country officials who act as a contact point or support operationally integrated border management measures carried out in third countries should be made aware of human rights requirements, in particular those deriving from the principle of *non-refoulement*. This is important, for example, when third-country officials operate on board of EU Member State assets deployed to enhance third countries' border surveillance capacity.

6. Clarify responsibilities in operational plans

Operational plans and other documents guiding joint operations or patrols with third countries should be drafted in such a way as to reduce as much as possible the risk of fundamental rights violations. In particular, they should have clear provisions on the use of force, the prohibition of torture, inhuman or degrading treatment or punishment and respect for the principle of *non-refoulement*.

7. Embed fundamental rights in capacity-building activities

Training and other capacity-building activities offered to third countries in the field of border management should include and mainstream human rights and refugee law. When assets and equipment are donated to third countries, this should be accompanied by training the authorities of the receiving country to underscore their proper use in accordance with applicable human

rights law. Donors should monitor how third countries use the assets and equipment they provide and discuss any inappropriate use and the consequences thereof at meetings, training or through other channels.

8. Take decisions on an individual basis applying appropriate safeguards

EU law requires an individual assessment before a decision is taken authorising or not the entry of a third-country national on the territory of an EU Member States. Although the depth of such examination depends on the specific procedure, basic safeguards, such as linguistic and legal assistance as well as access to effective remedies, must be respected in all cases. To achieve this, the individual assessment should be carried out on land, as the necessary pre-conditions to identify protection needs and vulnerabilities can usually not be met on board a vessel.

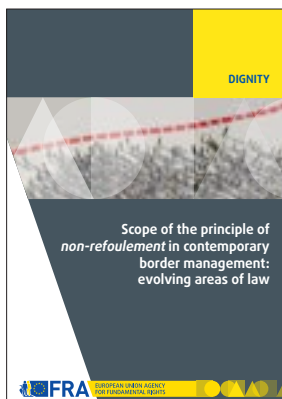
9. Disembark people rescued at sea in a place where they are safe

To the extent that it does not endanger people's lives, vessels requested to rescue migrants at sea should not be instructed to disembark them in countries where their lives and freedoms would be threatened, as suggested in the guidelines on the treatment of persons rescued at sea drawn up in 2004 by Maritime Safety Committee of the International Maritime Organisation. Where needed, the good offices of the United Nations Commissioner for Human Rights (UNHCR) could be used in the identification of a place of safety.

10. Facilitate access to international protection at borders

In line with the EU Schengen and asylum acquis, border guards must be trained and provided with the relevant information on asylum. This will ensure that people arriving at the external border who may be in need of international protection are informed and those who wish to seek international protection are referred to the relevant national authorities – mindful that international protection needs are not limited to certain nationalities only. Full use should be made of existing training modules and practical tools developed by the European Asylum Support Office (EASO), in cooperation with FRA, Frontex and UNHCR, such as the tool for first contact officials on access to asylum procedures.

Access to asylum procedures must exist in law and in practice. Where EU Member States have erected fences at the border, there must be accessible points where people can safely apply for international protection.



EU Member States are increasingly involved in border management activities on the high seas, within – or in cooperation with – third countries, and at the EU's borders. Such activities entail risks of violating the principle of *non-refoulement*, the cornerstone of the international legal regime for the protection of refugees, which prohibits returning individuals to a risk of persecution.

This guidance outlines specific suggestions on how to reduce the risk of *refoulement* in these situations – a practical tool developed with the input of experts during a meeting held in Vienna in March of 2016.

The guidance is also presented in *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, a new FRA report on the topic.

Further information:

For the FRA report incorporating this guidance – *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* – see <http://fra.europa.eu/en/publication/2016/non-refoulement-scope>.

Other relevant FRA publications include:

- FRA (2016), *Asylum and migration into the European Union in 2015*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2016/asylum-and-migration-european-union-2015> (available in English and French)
- FRA-ECtHR (2014), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration> (available in 24 languages)
- FRA (2014), *Fundamental rights at airports: border checks at five international airports in the European Union*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2014/fundamental-rights-airports-border-checks-five-international-airports-european> and its summary, <http://fra.europa.eu/en/publication/2014/fundamental-rights-airports-border-checks-five-international-airports-european-o> (available in Dutch, English, French, German and Italian)
- FRA (2014), *Fundamental rights at land borders: findings from selected European Union border crossing points*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2014/fundamental-rights-land-borders-findings-selected-european-union-border-crossing> and its summary, <http://fra.europa.eu/en/publication/2015/fundamental-rights-land-borders-findings-selected-european-union-border-crossing> (available in Bulgarian, English, French, German, Greek, Hungarian, Polish, Slovakian and Spanish)
- FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders> and its summary, <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders-summary> (available in English, French, German, Greek, Italian and Spanish)

For an overview of FRA activities in the field of asylum, migration & borders, see <http://fra.europa.eu/en/theme/asylum-migration-borders>.

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