

# Ethics of Border Security Draft Deliverable 1

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## Introduction

This Draft Deliverable falls into three sections. The first explains in simple terms the distinction between ethics, law and voluntary codes of conduct adopted by different professional groups. The second section reviews codes of conduct in Schengen and non-Schengen countries of Europe. Areas of overlap and commonly included provisions are described. In the third section, gaps in these codes of conduct are indicated. The gaps are of two kinds. First, many codes are not specific to border guard activity and do not reflect precisely enough or systematically enough the Schengen Code and some of the emphases of the Schengen Handbook. Second, many codes do not reflect norms of international law and practice recommended for border guards by recent EU policy documents. In particular, refugee matters and trafficking might be more explicitly addressed.

### I. Ethics vs Law vs Codes of Conduct

Ethics is concerned with right and wrong actions. Not all areas of our everyday conduct necessarily raise ethical questions but many do. In our personal lives we might face choices between being honest with our friends and not unduly upsetting them. Our professional lives may throw up a range of different moral challenges. Business people face conflicts between the goal of maximising profits and satisfying customers. Doctors sometimes have to choose between maximising the chances of a patient's recovery and enabling them to make decisions about their treatment for themselves. Ethics provides principles which justify doing some things and avoiding others. The ethics of border security applies principles to questions about entry to national and supranational territory. Some of the principles are to do with the fair privileges of citizenship and legitimate differences between decent treatment of citizens and non-citizens; other principles are to do with the special vulnerabilities of non-citizens if not granted entry, or, differently, the consequences of misrepresentation.

The ethics of border security should be contrasted with the law of border security, because ethics and law are distinct. Although laws are often consistent with ethical principles, there is no contradiction in the notion of an unjust or immoral law. This shows that ethical standards can be used to criticize law, and therefore that ethical standards are more fundamental than legal ones. For example, women used to be excluded by law from voting or property ownership throughout the world. The question ethics asks is, what difference, if any, between men and women justifies this legal difference? The answer ethics has developed is that there is no relevant difference—women are not inferior in intelligence or honesty or in any other characteristic that is relevant to property ownership—and so it is wrong or unjust for women to be prevented by law from owning property. The law of border security is sometimes criticisable as well. For example, if a country legalizes behavioural profiling, and travellers are routinely held for questioning because they are perceived as unusually nervous, or because they visit the toilets frequently, that is discriminatory: being nervous or going to the toilet often may and probably usually does mean nothing at all, and is a questionable ground for stopping travellers, who are usually nervous for other reasons—such as whether they will leave on time, or whether there will be any seats left on a train.

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In a democracy, the law operates as a series of rules amended over time by parliamentarians. Enforcement of the law resides with the government and its officials, but it is subject to the interpretation of legislation by an independent judicial system. Although law prohibits many actions which would clearly be immoral to perform, much immoral action is outside the scope of the law. For example, lying to friends or family is usually immoral, but probably never illegal. Law often operates outside the circle of friends or family and recognizes that some sources of dispute and conflict can arise between strangers with different interests or between strangers whose activities are uncoordinated. People with children often want expenditure on schools, while childless people may not. Legislators are supposed to balance these interests, sometimes by facilitating the policies that represent the interests of the majority. Law also *co-ordinates* behaviour where the interests of people coincide, but where it is important that everyone behave in the same way to satisfy those interests. For example nearly all countries have laws governing which side of the road to drive on. This is a matter of convention, but once the convention is fixed it is very important to observe it.

Codes of conduct lie somewhere between laws and ethical principles. First of all, they are voluntarily adopted. Second, and unlike ethics, they are not addressed to everyone, but only to people involved in a certain profession or trade. Third, violations are not always punished in the way that breaking the law is. Instead of being put in prison, someone who breaks a code of conduct may be excluded from a profession. Thus, doctors who treat patients while drunk might lose their license to practice medicine but keep their freedom. Violations of codes of conduct can usually be related to immorality. For example, many codes of conduct rule out kinds of dishonesty or disrespect that arise in special kinds of transactions. In some professions people have unusual access to money and so are tempted to steal. In others, they are able to form strong personal relationships that can turn sexual. And so on. Commonly, codes of conduct will be supervised by a non state organization, like a professional association, which hears complaints from clients. The non state organization can respond to complaints in ways that *resemble* judicial institutions, but with a range of penalties that mostly involve exclusion or fines rather than the loss of liberty. So codes of conduct are weaker than laws but with ethical content.

Codes of conduct are sometimes prompted by scandals in which the reputations of relevant trades or professions are damaged. For example, the abuses of prisoners at Abu Ghraib in Iraq was very damaging to the reputation of the US military, and probably contributed to the Iraqi insurgency. This led to a rethinking of norms for holding prisoners of war in Iraq. Cases of border guard misbehaviour have also regularly prompted damaging publicity. Recent cases have included corruption, for example amongst border guards accused of smuggling immigrants across the US/Mexico border for money,<sup>1</sup> drunkenness and other inappropriate behaviour while off duty, reported for example among young Canadian border guards,<sup>2</sup> discrimination, as seen in the case of a Polish border guard insisting a Sikh remove his hat,<sup>3</sup> invasions of privacy, as can be seen in cases of Canadian border guards who subjected travellers to 'illegal and humiliating' strip searches and used information acquired in border checks to harass them in private life and finally involvement in racist

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<sup>1</sup> See <http://www.nytimes.com/2008/05/27/us/27border.html>

<sup>2</sup> See <http://www.cbc.ca/canada/british-columbia/story/2007/10/01/bc-borderguards.html>

<sup>3</sup> See <http://humanrightshouse.org/Articles/14904.html> and

<http://www.emgonline.co.uk/news.php?news=9493>

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political organisations, as was alleged with two British border guards in 2009.<sup>4</sup> A minimal requirement on a model code of conduct for border guards is that it contain rules with the effect of prohibiting the behaviour that produced these scandals.

But a model code of conduct could go further. We can distinguish between behaviour that merely conforms to a code of conduct and behaviour that applies imagination to carry out professional obligations *well*. Behaviour of the second kind is called *good practice*. For example, in business, it is good practice not only to sell something on the basis of accurate and relevant information, but to allow the purchaser to change his mind and get a refund. This encourages the customer to trust the seller, and to believe that the quality of the product is good enough that there are in fact very few requests for refunds. If the product *is* good, there will in fact be very few refunds, because few will be asked for. In police investigations of rape, it is good practice not only to record details of the alleged offence and investigate, but to interview the victim in a special suite that is more relaxing and homely than an ordinary police interview room. It is good practice to show sympathy, and to have specially trained interviewers and medical staff that are the same gender as the rape victim. Practices that depart from good practice are not necessarily unacceptable or wrong or illegal, but they are not as good as they could be, and they probably get less information and co-operation from rape victims than good practice.

A code of conduct for border guards would go beyond the legal requirements mentioned in the Schengen Handbook, and would suggest good practice in the light of some of the moral challenges facing border guards, some of the concerns of civil society groups and citizens, and some of the principles that ethics would apply in this area. Some existing codes of conduct for border guards within the Schengen area acknowledge the challenges of corrupt payments, the disclosure of secret information and the scope for disrespect of foreigners. International law acknowledges the special vulnerabilities of refugees and displaced persons as well as international obligations on state parties to treaties to help such people. National minorities are sometimes subject to discrimination in their home countries and at borders when they travel. Codes of conduct that stress impartiality indirectly address the risk of discrimination, and Schengen Handbook rules on refugees indirectly address other challenges, without necessarily indicating relevant good practice.

Existing codes of conduct for border guards sometimes differ between jurisdictions, and can conflict. So there is a problem of harmonizing existing codes of conduct. There is also a problem of making the code of conduct for border guards specific to that role. Certain codes of conduct for border guards are addressed to all employees of an interior ministry, for example, even though the border guard role and other roles may differ. Often in Europe border guards are a branch of the police or military, operating by codes that apply to a much wider range of challenges than those faced at borders.

Codes of conduct are often addressed to members of a profession, but they are also available to the public, so that clients of professionals know what behaviour they should be able to expect and what behaviour to complain about. Accordingly, codes of conduct are usually written in relatively simple language and are distributed to the public so that they can hold professionals to account.

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<sup>4</sup> See <http://www.independent.co.uk/news/uk/home-news/bnp-links-to-immigration-service-staff-1334236.html>

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Sometimes codes explicitly spell out what the law requires or permits: for example, that gifts cannot ever be properly accepted by officials. Sometimes they draw on ethical principles to regulate behaviour not necessarily touched on in the law: for example, when they stipulate that officials should at all times respect the dignity and religious beliefs of others. As is the case with law they represent an attempt at codifying good behaviour through a series of explicitly stated rules. Yet unlike the law they are not cases of top down direction from government but are rather typically cases of self regulation voluntarily adopted by a given profession. Self-regulation, as this is called, has the danger that professionals will sometimes be overly sympathetic to their own kind and less sympathetic to clients. Perhaps they will respond leniently to complaints, even when the complaints are justified. This danger sometimes leads to the independent oversight of officials. Instead of a code of conduct operated by the profession itself, an independent ombudsman or complaint settling personality acts. In this way, codes of conduct start to move closer to the administration of law.

## **II. Overview of EU Codes of Conduct Governing Border Guard Officials**

This section surveys the codes of conduct used by border guard services in both Schengen and non-Schengen EU countries. Of the 23 countries that provided information, only Poland, Lithuania, and Latvia have codes of conduct specifically addressed to border guard officials. One country, Malta, uses the Schengen Border Code. Finland has a Border Guard Act, a section of which is devoted to the regulation of border guard conduct. Both Bulgaria and Denmark use codes of conduct that apply to all officials of the ministry of the interior. The Netherlands uses a code of conduct for military officials.

All of the remaining codes of conduct examined are for the police more broadly. This is reflected in the kinds of ethical values and principles the documents emphasise. For example, most of the codes declare that the primary aims of the profession are the protection of security, property, law and order and the maintenance of peace. None of the codes mention the protection of borders.

There are few significant differences between the values and principles declared in the police codes of ethics, and the codes for border guards or military officials or civil servants more generally. Indeed, as is illustrated in Table 1, the majority of the codes reflect and confirm each others' ethical concerns.

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Table 1

Flag	State	Type of document	Fundamental Rights	Non-discrimination	Incorruptibility	Confidentiality/ Privacy	Use of force	Prohibition of inhuman and degrading treatments	Reputation	Other rules
	<a href="#">Austria</a>									
	<a href="#">Belgium</a>	Federal Police Code of Ethics came into force May 2006; info here is from introductory document about federal police	√ (p.10)							Integrity; flexibility; open-mindedness; customer-tailored service; pride (p.23) Loyalty to democratic institutions; honesty; restraint; 'service spirit' (p.10)
	<a href="#">Bulgaria</a>	Code of Ethics for Officials of Ministry of Interior	√ (pt.2.26)	√ (pt.2.25)	√ (Pt3)	√ Privacy (pt.2.24) confidentiality & data (pt.4)	√ Necessity and proportionality (pt.5)	√ (pt.iv)	√ No drunkenness	Pt. 1.7 Loyalty to institution; Limitations of rights of officials (Ch. 4, p. 11)
	Cyprus	Police Code of Ethics	√ (Art.2)	√ Assistance to all on Cypriot territory (Art.2)	√ (Art.12)	√ respect for private life (Art.8)	Only necessary use of force (Art.6)	√ (Art.5)		

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	<a href="#">Czech Republic</a>	Police Code of Ethics	√ (3.b, 3.e)	√ (3.c)	√ (3.h;3.i)	√ Confidentiality (3.g)		√ (Art.3e)		Accountability; responsibility
	<a href="#">Denmark</a>	Legal code governing all government officials							√ Must behave in manner worthy of honour and confidence position demands	
	<a href="#">Estonia</a>									
	<a href="#">Finland</a>	Border Guard Act (Declaration of Values)	√	√	√	√ Privacy			√ Act so as to maintain public trust even off duty	
	<a href="#">France</a>	Code of Conduct of French National Police	√ (Art.11)	√ (Art.5)	√ (Art.6)	√ Confidentiality (Art.11)	√ Must be necessary and proportionate (Art.9)	√ (Art.10)		Officers can speak freely within limits of rules of professional confidentiality and secrecy; police must take measures to protect lives and health of those in custody
	<a href="#">Germany</a>									
	<a href="#">Greece</a>	Code of Police Ethics	√	√	√ (Art.6)	√ Confidentiality and privacy (Art.2&4)		√ (Art.3)	√ Not take part in activities when off duty that harm status of police (Art.6)	Special care for vulnerable groups, minors in particular (Art.5)

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	<a href="#">Hungary</a>	Code of Ethics of Police Profession	√ (Art.4)	√ (Art.4)	√ (Art.2)	√ Professional secrecy (Art.9)	√ Only in exceptional circumstances (Art.3)	√ (Art.5)	√ Not pursue activities incompatible with profession; exemplary private life (Art.12)	Empathy & humanity, help & protection; seek to remedy consequences of wrong decisions
	<a href="#">Iceland</a>	Police Code of Ethics		√ (Art.5)	√ (Art.11, 13)	√ Confidentiality and privacy	√ Only when necessary (Art.8)		√ Never cast doubt on objectivity	No unauthorised expression in media; minimise 'damage, loss or inconvenience'; International law; responsibility; police shall equally investigate evidence of guilt as well as evidence of innocence
	<a href="#">Italy</a>	No Border Guards CoC. Police CoC. Professional Ethics as part of courses	?							
	<a href="#">Latvia</a>	Code of Ethics for Border Guards	√ (Art.7.5)		√ (Art.12)	√ (Art.8)			√ Refrain from actions damaging reputation	Loyalty to institution
	Liechtenstein									
	<a href="#">Lithuania</a>	Code of Conduct for Border Guards	Respect for rights and freedoms	√ (6.2)	√ (6.7)	√ Balancing public knowledge and confidentiality				Justice, fairness, responsibility,

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	<a href="#">Luxembourg</a>	Code of Police Values	√ Respect for fundamental rights (Art.3)	√ (Art.5)	√ (Art.6)	√ Professional secrecy and discretion (Art.7)	√ Only when necessary (Art.11)	√ (Art.11)		
	<a href="#">Malta</a>	Uses the Schengen Border Code								
	<a href="#">Netherlands</a>	Dutch Military Code of Conduct	√ Respect	√	√				√ Alcohol must never influence work	Team work; protection of the interests of the military even off duty,
	<a href="#">Norway</a>									
	<a href="#">Poland</a>	Code of Conduct for Border Guard Officers	√	√ Respects cultural and other differences	√				√ No activities that conflict with official duties	No party affiliation; No strikes; Does not publicize political opinions,
	<a href="#">Portugal</a>	To be adopted soon								
	Romania	Police Ethics and Code of Conduct	√	√	√ (Art.19)	√ Confidentiality with personal data (A.17)	√ Must be necessary and proportionate	√ (Art.18)	√ Must behave in a civilised, polite, firm manner and avoid all conduct which could affect public trust	International law (Art.7)
	<a href="#">Slovakia</a>	Code of Ethics of Police Force Members	√ Respectfulness	√ (Art.2)	√ (Art.5)					

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	<a href="#">Slovenia</a>	Code of Police Ethics	√ (Art.2)	√	√ (Art.5)	√ Confidentiality		√ (Art.2)	CoC adopted and amended by police trade union; ; responsibility; bravery; integrity
	<a href="#">Spain</a>	Code of Ethics for Law Officers	√ Correct treatment	√	√ (1.c)	√ Professional secrecy (Art.5)	√ Respect physical integrity of arrestee		Full information provided
	<a href="#">Sweden</a>	Core Values of Swedish Police	√ Respect	√ Equal value of everyone	√ (Art.11)				helpful and supportive
	<a href="#">Switzerland</a>								
	UK								
	Ireland	National Police Service Standards	√	√	√ No personal gain	√ Confidentiality & privacy (Art.7)			Openness and accountability; establish and report all facts; necessity; challenge illegal and unethical behaviour; accept responsibility; Partnership with community

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As Table 1 illustrates, there are seven main areas of overlap between the ethical values articulated in the codes taken as a whole. These are:

- Respect for and protection of fundamental rights and freedoms
- Non-discrimination, or equal treatment of persons
- Incorruptibility
- Confidentiality and respect for privacy
- A prohibition on torture and cruel, unusual or degrading treatment
- Reputational issues
- Restraint in the use of force

1. **Respect for and protection of fundamental rights and freedoms.** Almost all of the codes state that officers must respect the rights of people. Some state that the protection of such rights is one of the primary aims of the police service. Some list these rights in detail, while others refer to the legal documents in which they are encoded, such as the European Convention on Human Rights.

2. **Non-discrimination, or equal treatment of persons.** Many of the codes list the specific kinds of discrimination, such as racial, ethnic, or sexual discrimination, that are unacceptable. These are the kinds of discrimination outlawed by the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and other international human rights treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Liberties.

3. **Incorruptibility** is a value that is also articulated in nearly all of the codes of conduct we examined, many of which give detailed explanations of what kind of behaviour is illegal and what kinds of conflicts of interest should be avoided or reported. Bribes are a central focus of the provisions on incorruptibility.

4. **Confidentiality and respect for privacy.** This is stressed in all but 4 of the codes. Some of these include details about how data and information should be handled, while others simply state the need to respect the private life of individuals. Discretion and professional secrecy are related qualities promoted by a number of codes.

5. The majority of the codes prohibit officers from engaging in **torture or cruel, inhuman and degrading treatment.** This prohibition is often expressed in a way that echoes EU and international human rights treaties such as those mentioned above.

6. **Reputational issues.** The duties of officers to honour their profession and avoid bringing it into disrepute, and to maintain high standards of behaviour and conduct even when not on duty, are emphasised in about half of the codes. Some of these specify particular kinds of conduct that should be avoided, such as drunkenness. Others stress the need to maintain public trust in the objectivity and integrity of the profession, which probably overlaps with the value of equal treatment.

7. About a third of the codes emphasise the importance of exercising **restraint in the use of force**, with many stating that force should be used only when necessary or only in exceptional circumstances and only to the extent that is proportionate with the goals of the action.

Other values articulated less often in the codes include honesty, integrity, impartiality (again closely related to equal treatment), openness, professionalism and responsibility. The importance of building good relationships with the community is also mentioned by more than one code.

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Some codes include unique duties or prohibitions. For example, the Polish code prohibits officers from engaging in political activities and strikes. None of the codes, including those directed specifically to border guards, mention the protection of borders or the enforcement of border regulations.

### **III. Gaps**

There are important areas of overlap as well as difference between the values expressed most often in the codes and those articulated in EU legal documents relevant to border control, in particular the Schengen Code and Schengen Handbook.<sup>5</sup> Table 2, below, illustrates these areas of overlap and difference by listing the 8 values and principles expressed in the Schengen Code and Handbook, and highlighting the codes of conduct that reflect them.

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<sup>5</sup> The principle of non-discrimination is emphasised in Article 14 of the European Convention on Human Rights and in Article 21 of the Charter of Fundamental Right of the European Union. It is also expressed in Art.3 of the International Covenant on Civil and Political Liberties and Art.2 of the Universal Declaration of Human Rights.

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Table 2

Flag	State	Type of document	3. No restriction on non-refoulement obligations under international law	3. Community right to freedom of movement	Schengen Code Articles/Handbook		Prohibition of inhuman and degrading treatments	10. No stamp if might cause 'serious difficulties' to person	13. Refusal of entry must be substantiated
					6.1 Human Dignity	6.2 Non-discrimination			
	<a href="#">Austria</a>								
	<a href="#">Belgium</a>	Federal police Code of Ethics came into force May 2006; info here is from introductory document about federal police			√ (p.10)				
	<a href="#">Bulgaria</a>	Code of Ethics for Officials of Ministry of Interior			√	√ (pt.2.25)	√ (pt.iv)		
	Cyprus	Police Code of Ethics			√ Fundamental rights and freedoms	√ Assistance to all on Cypriot territory	√ (Art.5)		
	<a href="#">Czech Republic</a>	Police Code of Ethics			√ (3.b, 3.e)	√ (3.c)	√ (Art.3e)		
	<a href="#">Denmark</a>	Legal code governing all							

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		government officials							
	<a href="#">Estonia</a>								
	<a href="#">Finland</a>	Border Guard Act (Declaration of Values)			√	√			Under the Act all measures must be justified (S.8)
	<a href="#">France</a>	Code of Conduct of French National Police			√ (Art.11)	√ (Art.5)	√ (Art.10)		
	<a href="#">Germany</a>								
	<a href="#">Greece</a>	Code of Police Ethics			√	√	√ (Art.3)		
	<a href="#">Hungary</a>	Code of Ethics of Police Profession			√	√	√ (Art.5)		
	<a href="#">Iceland</a>	Police Code of Ethics				√ (Art.5)			
	<a href="#">Italy</a>	No Border Guards CoC. Police CoC. Professional	?		?				

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		Ethics as part of courses							
	<a href="#">Latvia</a>								
	Liechtenstein								
	<a href="#">Lithuania</a>	Code of Conduct for Border Guards			√ Respect for rights and freedoms				
	<a href="#">Luxembourg</a>	Code of Police Values			√ Respect for fundamental rights (Art.3)		√ (Art.11)		
	<a href="#">Malta</a>	Uses the Schengen Border Code							
	<a href="#">Netherlands</a>	Dutch Military Code of Conduct			√ Respect	√			
	<a href="#">Norway</a>								
	<a href="#">Poland</a>	Code of Conduct for Border Guard Officers			√	√ Impartiality			
	<a href="#">Portugal</a>	To be adopted soon							

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	Romania	Police Ethics and Code of Conduct			√	√	√ (Art.18)		
	<a href="#">Slovakia</a>	Code of Ethics of Police Force Members			√ Respectfulness	√ (Art.2)			
	<a href="#">Slovenia</a>	Code of Police Ethics			√ (Art.2)	√	√ (Art.2)		
	<a href="#">Spain</a>	Code of Ethics for Law Officers			√ Correct treatment	√			
	<a href="#">Sweden</a>	Core Values of Swedish Police			√ Respect	√ Equal value of everyone			
	<a href="#">Switzerland</a>								
	UK								
	Ireland	Professional Values and Ethical Standards	√		√	√			

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As Table 2 illustrates, there are 8 main areas of concern in the Schengen Code and Handbook. These are:

- Human dignity
- Equal treatment or non-discrimination
- Non-refoulement obligations under international law
- Community right to freedom of movement
- Prohibition of torture and inhuman and degrading treatment
- No need to stamp passport if might cause 'serious difficulties' to person
- Need to substantiate refusal of entry

Both respect for human dignity and equal concern or non-discrimination are values strongly promoted by the Schengen Code and the Handbook, as well as other EU documents related to border control, such as the 2010 EU Action Plan Implementing the Stockholm Programme, and the 2008 Updated Schengen Catalogue on External Borders Control, Return and Readmission.<sup>6</sup> Respect for human dignity and equal concern for all are fundamental European and international values, which now govern all types of officials working in and with state institutions, including border guards. Similarly, the prohibition on torture and cruel, inhuman and degrading treatment is found in the Schengen Handbook, and all EU and international human rights treaties and conventions.<sup>7</sup> Given the importance of human dignity, non-discrimination, and the prohibition of torture, it is unsurprising that these three principles are articulated in most of the codes of conduct.

A number of other rules stated in the Schengen Code and Handbook, and the Updated Schengen Catalogue are *not* widely reflected in the codes. These include the European Community right to freedom of movement, the rights of refugees to non-refoulement,<sup>8</sup> the right of individuals to be informed of the reason why their entry into a territory has been refused, and, more specifically, the freedom of border guards to decide not to affix a stamp to a passport if this would cause 'serious difficulties' for a person.

The right to non-refoulement is particularly significant here – especially when one considers the corresponding right against chain-refoulement – being sent back to a country that is likely to return a refugee to a country of origin where rights are likely to be abused. All Schengen states are bound by the principle of non-refoulement, and these obligations apply extraterritorially – governing the conduct of representatives acting outside the bounds of their jurisdiction.<sup>9</sup> Border guards have been criticised for neglecting these obligations, for example in some activities in the Mediterranean.<sup>10</sup> The practices of widening surveillance further and further from the physical border even as far as the territory of other

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<sup>6</sup> *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme*. Brussels, 20.4.2010 COM(2010) 171; and Updated Schengen catalogue on External borders control, Return and readmission - 3rd draft 15250/2/08, REV 2, LIMITE SCH-EVAL 85, COMIX 786.

<sup>7</sup> Insert ref to HR documents

<sup>8</sup> Updated Schengen Catalogue, part 2.

<sup>9</sup> These extraterritorial obligations derive from the 1951 Convention relating to the status of refugees and Article 3 of the European Convention on Human Rights - see Ahumada 'Border Control and Internal Security in the European Union' DETECTOR deliverable 14.1 p 10-11

<http://www.detector.bham.ac.uk/D14.1BorderControlInternalSecurity-2.doc>

<sup>10</sup> Ahumada *Ibid* p.5N refers to Derek Lutterbeck 'Policing Migration in the Mediterranean'. *Mediterranean Politics*, Vol. 11, No. 1, 59-82, March 2006.

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countries<sup>11</sup> coupled with deployment of heavily armed police forces, characterised as ‘externalising the border’, may make it impossible to reach the border without proper documentation. This may represent a physical obstruction of a refugee’s legitimate access to protection.<sup>12</sup>

The commitment to non-refoulement may also have implications for information-sharing practices. Information gathered in border crossing processes can be highly sensitive. Access to sensitive databases such as the Eurodac records of fingerprints, is increasingly being extended to more authorities in member states. In some cases accessing of this information by the country of origin may pose a threat to individual asylum seekers if they return to that territory. It is also noteworthy that even when it does not violate non-refoulement provisions by posing a threat to the asylum seeker crossing a border, lax information-sharing with human rights abusing states can pose a threat to the family and friends of refugees.<sup>13</sup>

Why do some codes of conduct fail to reflect the norms of recent European policy documents? One possible reason may be that the majority are codes of ethics for the police in general, and not border guards. Even the two codes of conduct we examined that are directed specifically to border guard officers miss some international and European norms on borders. The explanation may be that despite their titles, they also appear to be based on codes of ethics for police officers in general, and do not reflect either the Schengen code or the Schengen Handbook.

Some of the principles that we saw articulated in many of the codes of conduct, such as incorruptibility and confidentiality and privacy, are not reflected in the Schengen Code or the Handbook, although they are strongly emphasised in both the Action Plan Implementing the Stockholm Programme and the Updated Schengen Catalogue.<sup>14</sup>

These two latter documents as well as other EU policy papers might be useful sources of information and guidance for any border agency seeking to establish or revise a code of conduct for border guards, as they cover many of the ethical issues that arise in relation to activities of border control, issues that may be left out by either the existing codes of conduct or the Schengen Code and Handbook, or both. For example, neither the individual codes of conduct nor the Schengen Code or Handbook mention the prevention of human trafficking and illegal immigration. Neither do they mention the protection of children and the victims of trafficking (with the exception of the Greek code, which calls for special treatment of vulnerable groups, especially minors). The Action Plan, the Updated Schengen Code, and other relevant EU documents all point out that both children and the victims of trafficking are particularly vulnerable to exploitation and other forms of harm, and the point at which they cross a border is one opportunity to identify them and ensure that their rights are being protected.

A recently published European Commission *Action Plan on Unaccompanied Minors* recognises that border guards have a role to play in such protection, and provides useful guidance to member states on how to deal with children crossing borders alone. According to the EU Charter of Fundamental Rights and the UN Convention on the Rights of the Child, ‘the best interests of the child’ must be the primary

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<sup>11</sup> Ahumada Ibid. p.5N refers to European Council on Refugees and Exiles (ECRE), *Defending Refugees’ Access to Protection in Europe*, December 2007, p.9.

<sup>12</sup> See Ahumada Ibid p.5-6 and 24

<sup>13</sup> See Ahumada Ibid p.20-1

<sup>14</sup> Stockholm Action Plan, on privacy and right to data protection see Section 2 p.2, 6, 11, on corruption p.35, 64 and 65. Updated Schengen Catalogue on access to personal data p.10 and on corruption Section 13, p.44.

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consideration in all action related to children taken by public authorities.<sup>15</sup> It also provides some guidance on best practice, for example, by recommending that “wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation”.<sup>16</sup>

Further and more extensive guidance on best practice with regard to children has been provided by the UK Border Agency in their Code of Practice for Keeping Children Safe from Harm, which has governed the UKBA’s dealing with children since 2009.<sup>17</sup> This document gives detailed and very useful guidance to border guards, such as the tone they should adopt when speaking to children, as well as how they should treat exceptional cases, such as babies being breastfed.

The importance of protecting victims of trafficking has been stressed in the Action Plan Implementing the Stockholm Programme, as well as the Updated Schengen Catalogue, which recommends, amongst other things, that border guards should be trained to identify the victims of trafficking so that they can be protected.<sup>18</sup> The Updated Schengen Catalogue also recommends that a distinction should be made between the victims of trafficking and illegal migrants, although it does not specify how this would translate into different kinds of treatment by border guards.<sup>19</sup>

The Updated Schengen Catalogue makes a number of further recommendations that are relevant to the design and use of codes of conduct for border guards. For example, it recommends that there should be centralized command, control, supervision and instructions especially for border control, that there should be a code of conduct for border guards, and that training in implementing such a code should be organised for border guards.<sup>20</sup> It recommends that international legal instruments relevant to border management should be taken into account while carrying out border control and that, when carrying out their duties, border guards “should follow the recommendations and instructions given in the Commission’s Practical Handbook for Border Guards (Schengen Handbook)”.<sup>21</sup> This suggests that any code of conduct used by border guards should reflect the values and principles expressed in the Handbook.

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<sup>15</sup> Article 24 of the EU Charter of Fundamental Rights and Article 3 of the UNCRC.

<sup>16</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Action Plan on Unaccompanied Minors (2010 – 2014) SEC (2010) 534

<sup>17</sup> UK Border Agency Code of Practice for Keeping Children Safe from Harm; Home Office December 2008 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/keepingchildrensafe/codeofpracticechildren?view=Binary>

<sup>18</sup> Stockholm Programme: for unaccompanied minors see p.54; for illegal immigration see p.53; for trafficking see p.59. Updated Schengen Catalogue: for the treatment of minors see p.52 Section 9; for trafficking and for illegal immigration see Recommendation 1 and Recommendation 12, which states that the UN “Convention against Transnational Organized Crime and of its Protocols on trafficking of human beings and the smuggling of migrants by land, sea and air and trafficking in firearms, their parts and components and ammunition” should be implemented; that plans should be put in place “to tackle traffickers and to identify victims in cooperation with other relevant authorities; and most pertinently, that “training, targeted risk analysis, profiling and operational instructions for border guards to identify victims of trafficking of human beings” should be implemented.

<sup>19</sup> Ibid. Recommendation 148

<sup>20</sup> Ibid., Recommendation 161.

<sup>21</sup> Ibid. p.12

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Additional recommendations of the Updated Schengen Catalogue include the requirement that personal data and physical integrity be protected by ensuring that any access to such data or decisions affecting such integrity, such as decisions about when to detain somebody, are made by senior, specially-trained officers.<sup>22</sup> The Updated Catalogue also recommends that responsibility for border management should lie with a professionally trained, non-military body.<sup>23</sup> This may imply changes to border guard practices in places such as the Netherlands, where border guards are drawn from, and thus adhere to, the professional values and code of conduct of the army.

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<sup>22</sup> "As a general rule, persons performing border guard duties should be specially trained professionals. Persons with less experience can be used only for auxiliary duties assisting professionals temporarily. No exception is allowed in respect of duties that require any use of personal data, consultation of confidential registers or decisions interfering with an individual's physical integrity or freedom". (catalogue, p.10)

<sup>23</sup> Ibid. Recommendation 1.4 on Strategy and Organisational Structure, p.18.