Comments from Sweden on Draft October 2017 Principles and guidelines on human rights protection of migrants in vulnerable situations

Dear Sir/Madam,

Sweden would like to thank the High Commissioner for Human Rights, as co-Chair of the Global Migration Group’s Working Group on Migration, Human Rights and Gender, for elaborating principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements, on the basis of existing legal norms.

Sweden agrees with the statement that the *Principles and guidelines* are meant to provide advice to States and other stakeholders on how they should implement their obligations to respect, protect and fulfil the human rights of migrants in vulnerable situations, and that the development of these *Principles and guidelines* is without prejudice to the specific rights accorded to these and other groups of people by international human rights instruments, treaties or obligations. As such, Sweden recognizes the *Principles and guidelines* only as subsidiary means for the interpretation of international law.

In this context Sweden would, however, like to reiterate its position in regard to international human rights treaty bodies and special procedure mandate holders of the Human Rights Council that neither Views adopted as a result of consideration of individual communications, Views on interim measures, the General Comments adopted by treaty bodies nor opinions and recommendations by special procedure mandate holders are binding for States under international law. Their legal significance is to a large extent dependent on the content and quality and their legally persuasive character. They can however, in some instances, serve as means to ensure a dynamic nature of international human rights law and contribute to reaching normative consensus.

On general terms, Sweden would like to see that the *Principles and guidelines* are further nuanced and that the language throughout the document is more balanced. In our view many of the guidelines are too extensive and should be revised. We would also like to see clearer references in the text to when irregular or regular migrants are addressed, as the rights connected to the status of migrants differs in some areas.

We support that several of the guidelines are operational commitments. We believe that operational commitments are the best way of reducing the vulnerability of migrants. We welcome that a gender perspective is mainstreamed throughout the document as well as highlighted in specific principles. Strengthen consular capacity, as well as ensuring decent working conditions for migrants and protecting human rights of migrant women and girls are priority areas for Sweden. We are therefore pleased to see that these issues are included in the draft *Principles and guidelines*.

However, Sweden has several reservations against the *Principles and guidelines* in this version, some of which we already raised in our comments on the previous version of this text. We note with concern that our previous comments have not been taken on board in this version.

**Selections of reservations on the draft principles and guidelines**

Sweden does not submit exhaustive comments and reservations on this draft. The following is a selection of reservations, not precluding objections to other parts of the draft.

Guideline 6.3 (page 32): “ *(…) having access to up-to-date, accurate and objective information, including in relation to the place and the circumstances to which he or she will be returning.(…)”* Comment: Voluntary return, following a return decision, is legitimate based on the assessment of the application for protection, not on whether an individual is informed on the circumstances in the place or country of origin.

6.6 (page 33): *“(…)This means that children should only be returned when it has been determined that is in their best interests. Considerations such as those relating to general migration control cannot override best interest considerations such as, inter alia, family unity, survival and development. (…)”* Comment: The best interest of the child must always be assessed in relation to the interest of the state to manage migration.

Guidelines 6.8 and 6.9 (page 34-35), in whole. Comments: The obligations in the guidelines lie upon the countries of origin, not the countries of return. The principle of non-refoulement must always be respected in connection with a decision of return and its enforcement. The proposed mechanism to monitor returnees after their return is not realistic due to State sovereignty and the competence of the returning state to act towards another state and its citizens.

Example - Guideline 7.5 (page 39): *“(…) establish explicit and binding firewalls enabling migrants to report crimes, participate in criminal justice proceedings, and receive related assistance and support without fear that they will be arrested, detained or expelled because of their migration status. (…)*” Comments: As Sweden has stated before, the so- called firewalls throughout the draft document is a matter of concern. State sovereignty includes the right to decide who will be allowed to enter and stay on the state territory. Decisions on the right to enter and stay shall be made in accordance with international law. There can be no immunity from legal actions due to migrant status, or absence from status; it is not to be overlooked that a migrant, regardless of status, may be both victim and perpetrator at the same time. All legal actions must be made with proportionality. There are other tools, such as abstention from prosecution and exemption from punishment, which may provide remedies.

Principle 8, (page 40) *“(...) Never detain children because of their migration status or that of their parents”.* The wording should be “Never detain children solely based on their migration status or that of their parents”.

Guideline 8.4 (page 40), alternative wording: Detention of children should only be allowed as a last resort, under strict time-limits and on very limited grounds. A child may not be separated from both its custodians/parents by detaining the child or custodians.

Guideline 10.3 (page 51) “(…)*Where reasonable doubt arises about the age of a migrant, age determination procedures should be gender-sensitive and multidisciplinary, drawing on assessments by independent and qualified psychologists and social workers; they should be conducted in a safe, age-appropriate and dignified manner. In situations of ambiguity or doubt, decisions should presume in favour of the child. Returns should be suspended and children should not be detained while their age assessments take place. Never detain children because of their migration status or that of their parents.(…)”* Comments: First sentence, consider stop after multidisciplinary as the mentioned examples are not exhaustive or use alternative wording “(…) drawing on inter alia observations by social workers(…). Second sentence, alternative wording: “In situations of ambiguity or doubt, the principle of the benefit of the doubt should apply”. Last sentence; see comment on Principle 8 above – add solely of their migration status.

Guideline 20.5 (page 77) *“Consider to regularizing within a reasonable period of time the status of migrants in an irregular situation, in order to address their needs and secure their rights”* State sovereignty includes the right to decide who will be allowed to enter and stay on the state territory.

**Comments on the definitions in the draft principles and guidelines**

On page 3 of the present draft, migrants in vulnerable situations are described *as those migrants who may not qualify as refugees under the Convention relating to the Status of Refugees, yet who are in vulnerable situations and thus in need of the protection of the international human.*  As the 1951 Convention does not specifically address the issue of civilians fleeing conflict, unless they fall within a particular group being persecuted within the context of the conflict. However, regional instruments, such as the 1969 OAU Convention on refugees and the 1984 Cartagena Declaration in Latin America, recognize such people as refugees. Also in the EU context (the Qualification Directive) persons who have fled situations of armed conflict, death penalty or torture or inhumane or degrading treatment and who do not qualify for refugee status shall be granted subsidiary forms of protection. International protection is not limited to persons who qualify for refugee status. Reference in the guidelines should therefore not solely be made to migrants who may not qualify as refugees under the 1951 Convention, but to persons qualifying for refugee status or subsidiary forms of protection under international or regional instrument. The rational is that persons who have fled situations of violence and or threats to human rights and who are covered by a legal status and linked human rights protection by regional international protection/refugee instruments shall not fall within the category of a migrant in vulnerable situation.

Finally, the definition of an asylum-seeker on page 8*: “An asylum seeker is any person is seeking protection as a refugee, but whose claim has not been finally determined.”* Suggested wording: ‘asylum-seeker: “A third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken”.