



HUMAN RIGHTS AT INTERNATIONAL BORDERS

A TRAINER'S GUIDE



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A TRAINER'S GUIDE

Professional Training Series No. 24



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I. Introduction to the Trainer's Guide

1. Background

Contemporary migration context

Contemporary migration is a complex and contested phenomenon. An estimated 281 million people live and work in countries that are not their own; one in 29 persons in the world is currently a migrant living outside their country of origin.¹ While that may seem a large number, it is still only 3.6 per cent of the world's total population. This global migrant population is fairly gender balanced, with 47.9 per cent women (130.5 million) and 52.1 per cent men (141.5 million) comprising the world migration population in 2019.² The migrant population is diverse in any country; however, it is notably a young population with one out of every seven international migrants (15 per cent or approximately 40 million) under the age of 20.³ Migration is about people and, as such, is a human rights issue; not least because human rights are universal and all migrants have all the human rights guaranteed under international human rights law.

Migration is a positive and empowering experience for many migrants. However, policy measures that seek above all to curtail migration are resulting in migration journeys becoming longer and more fragmented, fluid and dangerous. International borders can be dangerous places, particularly for migrants in vulnerable situations. They may face a number of human rights violations by State officials, as well as abuses by private actors at borders.

The Universal Declaration of Human Rights, adopted on 10 December 1948, is accepted as a common standard of achievement for all peoples and nations, spelling out for the first time in human history the minimum civil, political, economic, social and cultural rights that all human beings should enjoy.⁴ The International Bill of Human Rights (comprising the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) distinguishes between nationals and non-nationals in respect of only two rights, and only in limited circumstances.⁵ Simply put, all human beings have all human rights.

Since 1990, efforts have been made to specify in more detail the application of the human rights framework to migration: first in the adoption by States of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (including the monitoring committee), then the inclusion of a chapter on international migration in the Programme of Action adopted by consensus at the 1994 International Conference on Population and Development, and the creation of the mandate of the Special Rapporteur on the human rights of migrants by the Commission on Human Rights in 1999. In addition, high-level dialogues on international migration and development were held in New York in 2006 and in 2013.

In 2016, the General Assembly convened a high-level plenary meeting on addressing large movements of refugees and migrants, at which it adopted the New York Declaration for Refugees and Migrants.⁶ In the New York Declaration, States committed to adopting a global compact for migration (and a separate compact on refugees). Following a year of consultations and

¹ United Nations, Department of Economic and Social Affairs, Population Division data for 2020. See www.un.org/en/desa/international-migration-2020-highlights.

² See the Migration Data Portal, last updated 23 March 2020. Available at <https://migrationdataportal.org/themes/gender-and-migration>. Note that this is the global figure; there are considerable differences in the gender proportions of migrants across regions.

³ United Nations, Department of Economic and Social Affairs, Population Division data for 2020.

⁴ See www.ohchr.org/en/udhr/pages/Language.aspx?LangID=eng.

⁵ The International Covenant on Civil and Political Rights states that citizens have the right to vote and take part in public affairs (art. 25), and the right to freedom of movement within a country (art. 12), including foreigners who are lawfully present in the country. However, the Human Rights Committee states that a foreigner may enjoy the protection of article 12 of the International Covenant on Civil and Political Rights even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. See Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 5.

⁶ New York Declaration for Refugees and Migrants, 2016, General Assembly resolution 71/1.

a period of negotiations, States adopted the Global Compact for Safe, Orderly and Regular Migration in December 2018 – 70 years after the adoption of the Universal Declaration of Human Rights. In the Global Compact for Migration, States reaffirmed the universality of human rights and their duties to “ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.”⁷ States also recognized the need and committed to “implement border management policies that respect national sovereignty, the rule of law, obligations under international law, human rights of all migrants, regardless of their migration status, and are non-discriminatory, gender-responsive and child-sensitive.”⁸

These outcomes at the international level are important developments for the integration of human rights in border governance. It may often seem that human rights considerations in the context of migration take second place to considerations of security, despite the fact that the overwhelming majority of migrants, including those crossing borders irregularly, pose no security threat.⁹ In the last decade, counter-terrorism efforts have had important implications on border security and management. In that regard, the Security Council has emphasized the importance of border control and security measures to identify so-called “foreign terrorist fighters”, who cross borders to join organizations that are deemed terrorist groups, and called on States to prevent their travel in the context of counter-terrorism responses. States have invoked counter-terrorism concerns to justify increased border security measures, such as militarization and extensive data collection.

However, the Security Council has repeatedly affirmed that all counter-terrorism measures, including at international borders, must comply with international law, in particular human rights, humanitarian and refugee law. States have repeatedly affirmed that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but rather complementary and mutually reinforcing.¹⁰ In reality, there is little evidence that terrorists take advantage of migration routes to carry out acts of terrorism. In many cases, refugees and other migrants are themselves victims of terrorist violence.¹¹

Border governance and the work of border officials are about ensuring the well-being of communities by upholding human rights and protecting the rule of law; they are often first responders in providing assistance and protection to people in vulnerable situations. Indeed, human rights standards provide invaluable guidance to border officials to ensure they are able to carry out their critical functions in a professional and effective manner.

While there may be a number of risks in the context of border governance, viewing border governance solely as a national security issue, and borders as zones of exemption from human rights obligations can lead to unfavourable human rights outcomes. States are entitled to exercise jurisdiction at their borders as part of their sovereign prerogative to determine their migration policies, but they must do so with full respect for their human rights obligations, because international human rights laws apply equally at international borders.

No State can, on its own, address migration in a comprehensive way. Reluctance on the part of some States to strengthen migration governance seems to be based on the misconception that it will limit their sovereignty. In fact, States have assumed their human rights obligations voluntarily and in exercise of their sovereignty. Furthermore, rather than diminishing national sovereignty, global migration governance gives States more control in determining who enters and stays in

⁷ Global Compact for Safe, Orderly and Regular Migration, para. 15. See General Assembly resolution 73/195, Annex.

⁸ *Ibid.*, para. 27 (Objective 11: Manage borders in an integrated, secure and coordinated manner).

⁹ Special Rapporteur on the human rights of migrants, A/68/283, para. 87.

¹⁰ See, for example, United Nations Global Counter-Terrorism Strategy, General Assembly resolution 60/288, Annex. Available at www.un.org/counterterrorism/un-global-counter-terrorism-strategy; and Security Council resolutions 2178 (2014) and 2396 (2017).

¹¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/71/384, paras. 6, 8, 10, 11.

their territory by improving coordination and cooperation between States, which leads to better governed migration that better respects the human rights dimension.¹²

Recommended principles and guidelines on human rights at international borders

In 2014, the Office of the United Nations High Commissioner for Human Rights (OHCHR) published the *Recommended Principles and Guidelines on Human Rights at International Borders* with the aim of translating the international human rights framework into practical border governance measures and providing guidance to States and other stakeholders on how to integrate a human rights-based approach in their border governance laws, policies and practices.¹³ The *Principles and Guidelines* advocate a human rights-based approach deriving from the core international human rights instruments and anchored in the interdependence and inalienability of all human rights. They seek to establish accountability between duty bearers and rights holders, emphasizing participation and empowerment, and with particular focus on migrants facing situations of vulnerability, marginalization or exclusion. They recognize that States have legitimate interests in implementing border controls, including in order to enhance security and respond to transnational organized crime. In addition, they seek to emphasize the role that States play in protecting human rights in the context of border governance, and show how a human rights-based approach can enhance the effectiveness of border governance processes.

The *Principles and Guidelines* set out 3 core principles and 10 guidelines. The principles are derived from international human rights law and apply to the implementation of the guidelines, on the basis of measures taken by individual States or private actors hired to perform their border management functions, or taken on a collective basis with other States or entities. The guidelines recommend practical measures that States could take to fulfil their human rights obligations vis-à-vis the rights holders they encounter at international borders. The implementation of each guideline must adhere to the three recommended principles.

Recommended principles on human rights at international borders

Principle A: The primacy of human rights

Principle B: Non-discrimination

Principle C: Assistance and protection from harm

Recommended guidelines on human rights at international borders

Guideline 1: Promotion and protection of human rights

Guideline 2: Legal and policy framework

Guideline 3: Building human rights capacity

Guideline 4: Ensuring human rights in rescue and interception

Guideline 5: Human rights in the context of immediate assistance

Guideline 6: Screening and interviewing

Guideline 7: Identification and referral

Guideline 8: Avoiding detention

Guideline 9: Human rights-based return or removal

Guideline 10: Cooperation and coordination

¹² Special Rapporteur on migrants, A/68/283, paras. 89, 90; also OHCHR, *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration*, 2013, pp. 9, 16, 22, 23.

¹³ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014. Available at www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

Furthermore, underpinning the *Principles and Guidelines* is the recognition that respecting the human rights of all migrants, regardless of their nationality, migration status or other circumstances, facilitates effective border governance. Policies aimed at curtailing migration at any cost only serve to exacerbate risks posed to migrants and create zones of lawlessness and impunity at borders, and are ultimately ineffective. Conversely, approaches to migration governance that adhere to internationally recognized human rights standards bolster the capacity of States to protect their borders and uphold States' obligations to protect and promote the rights of all migrants. Therefore, the *Principles and Guidelines* are addressed to States and other stakeholders, not only because they are obliged to put human rights at the forefront of border governance measures, but because they have an interest in doing so.

States have recognized the value of the *Principles and Guidelines* in implementing objective 11 on managing borders of the Global Compact for Migration.¹⁴ This training course draws on, and complements, the *Principles and Guidelines* and represents a capacity-building tool to support States and other stakeholders in adopting a human rights-based and gender-responsive approach in their work with migrants at international borders. Developed collaboratively by OHCHR and the Office of Counter-Terrorism, the training course seeks to support States in adopting a human rights-based and gender-responsive approach to border governance, including in the context of counter-terrorism.

Integrating a gender perspective

Gender analysis is an essential part of a human rights-based approach, including at international borders. Without it, any engagement with migrants by border officials risks being inaccurate and incomplete, and may actually be detrimental to migrants by perpetuating harmful gender stereotypes based on false assumptions. Gender analysis helps to recognize, understand and make visible the gendered nature of human rights violations, including their specific and differential impact on women, men and individuals who identify with other identities, including those that specifically target lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

The principle of non-discrimination is fundamental to international human rights law, including discrimination on the basis of sex, gender identity and sexual orientation. While non-discrimination applies to all persons, the pervasive discrimination against women, as documented worldwide, requires that particular attention be given to the human rights of women.

Certain human rights situations or crises can have particularly adverse impacts on individuals or populations, because of discrimination on the basis of single or multiple elements of their identity, such as age, gender, race or nationality. Differential human rights experiences of women, men, girls, boys and individuals who identify with other identities are well documented, and are further impacted by additional intersecting discriminatory attitudes. Gender analysis is critical to identifying such impacts and to better tailor responses by officials at international borders. On the other hand, a lack of gender analysis often results in rendering the experiences of women and girls or LGBTI persons invisible; and could lead to their experiences being reduced to victimization and vulnerability, thereby perpetuating a narrative that downplays the agency of women and girls and LGBTI persons. Furthermore, the lack of gender analysis can result in men and boys not being considered as victims or as vulnerable, so that their particular experiences of violence or abuse – and their need for assistance and remedy – may be disbelieved or disregarded.

A gender-responsive approach seeks to move beyond merely identifying those gaps to addressing historical gender biases in order for those who are discriminated against on the basis of gender to be able to engage and benefit from action that promotes gender equality and empowerment. Integrating a gender-responsive approach in the context of border governance is thus critical to ensure that individuals of all genders can equally enjoy their human rights without discrimination, and that specific measures can be taken to address the perpetuation of harmful gender stereotypes and discrimination.

¹⁴ Global Compact for Safe, Orderly and Regular Migration, para. 27 (Objective 11).

2. About the Trainer's Guide

This Trainer's Guide – a joint publication by OHCHR and the Office of Counter-Terrorism – will help trainers to prepare, organize and deliver a three-day training course entitled Human Rights at International Borders. It is accompanied by a set of slides for each session, and associated materials, including handouts, which are available electronically under the Professional Training Series of the OHCHR publications web pages (www.ohchr.org/en/publicationsresources/pages/trainingeducation.aspx). The training course itself is a capacity-building tool for individuals working in border security and management to build their understanding of migration from a human rights perspective, focusing on situations at international borders. It is expected that the main learners attending this training course will be front-line workers or supervisors with experience working with migrants at international borders. The Trainer's Guide provides an introduction to relevant human rights principles and issues. It is designed to support trainers in delivering the training course to persons who have basic knowledge of human rights, including those who have not previously perceived their knowledge as being rooted in human rights.¹⁵

Goal and learning objectives of the course

The goal of the training course, Human Rights at International Borders, is to build the capacity of learners to adopt a human rights-based approach in their work with migrants at international borders. In line with Guideline 1.1 of the *Principles and Guidelines*, the purpose of the course is to support the development, implementation and strengthening of human rights-based border governance measures.

The learning objectives specify that, at the end of the course, learners will be able to:

- ▶ Identify and apply relevant human rights standards to different aspects of border security and management;
- ▶ Recognize and consider the situations faced by individuals at borders, particularly those who may be in vulnerable situations, including irregular migrants;
- ▶ Apply a gender-responsive approach to their daily work in border security and management;
- ▶ Analyse institutional policies (e.g., standard operating procedures) and mechanisms (e.g., accountability mechanisms) of border authorities and other governance structures from a human rights perspective, and discuss strategies to enhance human rights compliance.

Training methodology

The Trainer's Guide is based on OHCHR human rights training methodology.¹⁶ The methods proposed in this Trainer's Guide aim not only to build knowledge and understanding of the human rights framework, but also to enhance skills and attitudes that will enable practitioners to better promote and protect the human rights of migrants.

Accordingly, the guide proposes an interactive training methodology based on a practical approach, which focuses on the relevance of human rights in the work of border officials. This methodology encourages learners to play an active role during the training course, including

¹⁵ Learners may already be familiar with some of the material presented in the course. The course provides an opportunity to affirm and build on that knowledge and demystify human rights, reaffirming that human rights are core to their work. It is also important to situate this training course within a broader strategy of engagement with national border authorities and other governance structures, as relevant, particularly through ensuring dialogue and commitment to implementing the objectives of the course at senior levels.

¹⁶ See OHCHR, *From Planning to Impact: A Manual on Human Rights Training Methodology*, No. 6/Rev. 1, 2019; OHCHR and Equitas, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators*, No. 18, 2011; and OHCHR, *Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for Law Enforcement Officials*, No. 5/Add.2/Rev. 1, 2021.

through the case studies and role-play exercises proposed. Trainers should ensure sufficient time in each session for discussions and exchange of information and experience with and between the learners. The training course should not be a unidirectional monologue in which the trainer imparts information and the learners take notes; rather trainers should encourage learners to share their professional expertise and promote peer learning throughout the training course. Trainers should also encourage learners to consider their own views and those of their colleagues about migrants and migration, to support an enhanced appreciation of the challenges faced by migrants, their rights and the positive contributions they may make to both their country of origin and country of destination.

For whom is the Trainer's Guide intended?

The Trainer's Guide is designed to support the work of OHCHR and the Office of Counter-Terrorism staff in the field and at Headquarters. It is intended for use by staff of United Nations entities, international and regional organizations, including members of the United Nations Network on Migration, government officials, national human rights institutions, non-governmental organizations, trade unions, other relevant civil society actors and humanitarian actors.

The training materials have been devised to support trainers who have good human rights knowledge and at least basic knowledge of migration, in delivering the course. Although the materials provide explanations of concepts and cite various sources, it is assumed that the trainers have an understanding of international human rights law. The information in the materials is complex and at times legalistic, therefore trainers must have the capacity and skills to adapt the materials and make complex concepts and issues more understandable for learners who do not share this background.

The size and composition of the training team may vary. Ideally, the team should consist of at least two trainers, of different genders, with some additional administrative support at the preparatory stage. The participatory methodology advocated in this training course requires trainers to have reasonable training experience and facilitation skills.

OHCHR training methodology highlights the importance of peer learning. As this training course targets border officials, the training team should include a trainer with expertise in border operations and awareness of the human rights implications of such operations. Trainers with border operations expertise should be vetted to ensure that they have a sound human rights record and, if possible, they should be from the relevant geographic region. That approach would allow the training team to better engage with the culture of the learners and tailor the human rights-based approach to the existing policies and procedures.

How to use this Trainer's Guide

The Trainer's Guide accompanies the trainer through each session of the training course. It provides background explanations, including legal sources, on the human rights principles and guidelines that pertain to the work of border officials, with particular reference to their work with migrants. That material is substantial and not intended to be delivered in full, during the training course. Trainers are encouraged to adapt the information in the Trainer's Guide to design a course that meets the needs of border officials in their particular context. Trainers are also encouraged to use other materials, such as images or videos, to illustrate points and to adapt them to the particular context, as appropriate.









There are references to the *Recommended Principles and Guidelines on Human Rights at International Borders*, on which this training course is based, throughout the Trainer's Guide. However, due to space limitations, only the principles are quoted, while the guidelines are summarized. Some of the principles and guidelines call for action that may be beyond the remit of a front-line border official, however, they are included to illustrate the rationale behind the human rights-based approach.

The training methodology advocates an iterative, participatory approach that includes trainer-led information, group work, quizzes, hypothetical scenarios and case studies of migrant

experiences and situations at international borders, discussions and role-play exercises. The activities build on information provided by the trainer and give learners the opportunity to share their knowledge and experience, identify and reflect on human rights and gender-specific concerns at international borders, and consider ways to address those concerns in their own work.

Activity	Context	Session
Discussion of human rights and gender-related concerns	Migrant experiences	1
	Interception, rescue and immediate assistance	3
	Screening and interviewing	4
	Immigration detention	5
	Return	6
Case studies of migrant experiences	At the border	1
	Detention	5
	Return	6
Role play	Screening and interviewing at the border	4

The following icons will be used throughout the Trainer’s Guide.

Icon	Meaning
	Distribute handout
	Duration of the activity
	Debriefing
	Tips for trainer
	See Glossary
	Cross-reference/Refer to
	Notes for trainer
	Discussion of human rights particularly at risk at international borders (sessions 1, 3, 4, 5 and 6)

3. Planning, designing and organizing the training course

Analysing the training context

In order to tailor the training course to the particular context, trainers should carry out desk research beforehand on the existing laws and policies that apply in border management and the current human rights situation of migrants in the country and at its borders. That should enable the identification of good practices, as well as any gaps in the institutional framework, particularly with respect to human rights. The work of national human rights institutions and civil society groups may also help to determine the situation of migrants, as well as the needs of border officials and the approaches used. Trainers should familiarize themselves with relevant **basic country and/or regional information**, such as:

- ▶ What is the legislative framework in relation to migration and human rights?
- ▶ What administrative procedures are in place?
- ▶ What are the most common human rights issues for migrants?
- ▶ What is the gender-specific context, not just for women and girls but across genders, including in relation to prevailing social norms and practices?
- ▶ What is the ratification status of the core international human rights treaties and any relevant regional human rights treaties – by country/countries?
- ▶ What observations and recommendations have international and/or regional human rights mechanisms addressed to the country/countries?
- ▶ Which organizations are working in the geographical area?

Trainers should have an understanding of **national and regional migration laws, policies, programmes and practices** and how they are/are not in line with the State's international human rights obligations, as that can assist them in tailoring the course materials to the particular context, for example by adapting the scenarios and case studies to the local situation. That would also enable trainers to prepare for likely questions from learners. Issues to consider in tailoring the course materials could include:

- ▶ Examining the human rights compliance of existing border governance measures, to assess whether or how they may adversely impact the human rights and dignity of migrants at international borders, with particular attention to policies and measures addressing irregular migration, as well as combating transnational organized crime.¹⁷
- ▶ Ensuring that relevant experiences are discussed during the training course. What actions or measures have been carried out? How effective have current actions been? What analysis has been carried out in that area? What do those issues reflect in terms of knowledge, skills and attitudes of learners, and which could be improved? What options are there for border officials to report human rights violations observed in the course of their work?

In addition to desk research, discussions with senior and other staff involved in border operations are an essential starting point as well as an integral element of the overall work to support human rights at international borders. Those discussions should seek to build political will to institute or strengthen a human rights-based approach to border management. They are also useful for obtaining information that can shape the training course, such as on existing standard operating procedures that border officials follow in their daily work.

¹⁷ Based on OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014, Guideline 1.7.

In preparing for the training course, including in communications with senior officials, it is important to be clear about the added value provided by this training course in relation to its focus on the human rights of migrants at international borders, including those who may fall through existing protection gaps. It is important to be aware of input from or initiatives by other organizations that may contradict or undermine the key messages of this training course.

Undertaking a training needs assessment

A training needs assessment is a preliminary step that would provide useful information for designing an effective training course. The training needs assessment questionnaire should be sent to learners in advance of the training course so that it can be returned in time to allow the training team to analyse the responses and adjust/modify the training course accordingly. The training needs assessment should check prior knowledge of or engagement with elements of the training course, as well as learners' expectations.

More specifically, the training needs assessment should provide information on the needs of the learners and the context in which they work; it will inform the decisions taken by the trainer when designing and organizing the training course. For example, the assessment can help the trainer to evaluate the level of knowledge of individual learners, their roles and responsibilities in the organization in which they work (e.g., managerial position or technical level, types of interaction with migrants) and their expectations of the training course. Assessment of learners' training needs may also be informed through discussion with relevant United Nations or other personnel in the country. The assessment would provide an indication of attitudes towards and knowledge of migration and human rights, and information on their roles and the broader human rights context in which they work. While the training materials have been developed to accommodate basic informational needs and various learning preferences, they should always be adapted to suit the particular needs of the people they aim to support. The training needs assessment is the beginning of a continuous evaluation cycle.¹⁸ A sample training needs assessment questionnaire, accompanying this Trainer's Guide, is available electronically under the Professional Training Series on OHCHR publications web pages (www.ohchr.org/en/publicationsresources/pages/trainingeducation.aspx).¹⁹

If it is not possible to reach all the target learners, it may be sufficient to reach some of them to assess their needs and expectations in relation to the training course. That can be done by telephone or in face-to-face meetings, if that offers better access and engagement than the questionnaire.

Designing and organizing the course

Extensive guidance on designing, adapting and organizing the course, based on the context analysis and training needs assessment can be found in OHCHR, *From Planning to Impact: A Manual on Human Rights Training Methodology*, chapter 3.

Logistical requirements of the training course would depend on the number of learners and include available training facilities and resources; space for group work and role-play exercises; technical equipment (e.g., laptop, projector, screen and audio-visual equipment, including roving microphones) and other materials (e.g., flip charts, markers and sticky notes); interpretation needs and facilities; accessibility for persons with disabilities; breaks for religious observance; overall timing to ensure learners can return safely to their homes after the training course, if the course is not in their residential area. While there are no strict requirements regarding the numbers of learners per course, the ideal number would be 20 to 24, to allow for meaningful discussion and interaction among learners. When organizing the training course, trainers should seek to ensure gender balance among learners as far as possible. There are several handouts and exercise

¹⁸ See OHCHR and Equitas, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators*, 2011. Available at www.ohchr.org/Documents/Publications/EvaluationHandbookPT18.pdf.

¹⁹ See also OHCHR, *From Planning to Impact: A Manual on Human Rights Training Methodology*, 2019, pp. 15 and 54–57. Available at www.ohchr.org/Documents/Publications/training6en.pdf; OHCHR and Equitas, *Evaluating Human Rights Training Activities*, 2011, pp. 36–53.

materials to prepare in advance of the training course (see samples/templates available under the Professional Training Series of the OHCHR publications web pages (www.ohchr.org/en/publicationsresources/pages/trainingeducation.aspx).

The evaluation cycle

The evaluation cycle involves continuous evaluation before, during and after the training course in order to ensure that the course is tailored to the needs of the learners and effectively delivered, so as to provide learners the opportunity to reflect on their own learning.²⁰ The training needs assessment is the starting point of the evaluation; from there, the training course can be fine-tuned to meet the needs of the learners through observation, debriefings and learners' written or oral feedback during the training course.

Therefore, it is recommended that short evaluations be completed at the end of each day of training so as to capture learners' assessment of the effectiveness of each session in terms of improving their knowledge and skills, and relevance to their professional needs. Those assessments can also provide feedback on the effectiveness of the trainer's communication/facilitation skills and the usefulness of the activities and materials. The evaluation on the last day of training includes questions aimed at assessing overall learning and soliciting feedback on the training course as a whole.

The exercises and discussions throughout the training course are also opportunities for informal evaluation of course effectiveness and impact on capacity development. The evaluations enable trainers to assess actual results, in comparison with desired results, identify areas for improvement in the design and delivery of the training course, and potential follow-up needs for the future.

After the course, follow-up evaluations should be carried out in the medium and long terms to assess whether learners have put into practice what they learned, and whether the training course has had an impact on their work and the institutions for which they work.

Tools/process	Data that can be collected
End of day: Evaluation/feedback questionnaire and activities	<ul style="list-style-type: none"> ▶ Learners' reactions to content and delivery of the course ▶ Learners' self-assessment of learning and perceptions of learning
During the training: Responses/feedback from learners during activities	<ul style="list-style-type: none"> ▶ Tangible evidence of learning
During the training: Informal exchanges (trainers and learners)	<ul style="list-style-type: none"> ▶ Learners' reactions to information provided ▶ Learners' self-assessment of their learning ▶ Real-time formative evaluation and suggestions on how to improve the course
End of training: Final evaluation/feedback questionnaire	<ul style="list-style-type: none"> ▶ Expanded end-of-day evaluation to gather learners' feedback on all aspects of the training course, including their learning and factors that affected their learning

Note that it is important to collect data disaggregated by sex so as to get an idea of any significant differences in the learning experience of women and men.

²⁰ Detailed guidance on training evaluation is provided in OHCHR and Equitas, *Evaluating Human Rights Training Activities*.

Examples of various evaluation tools, which can be adapted for this specific course, can be found in OHCHR and Equitas, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators*.

4. Role of training in human rights and border management

It is important to bear in mind that effective human rights training will build the capacity of border officials to adopt a human rights-based approach in their work with migrants at international borders. At the same time, such training should be part of a wider effort to address systemic gaps in the human rights protection system of the relevant institutions. Human rights training should seek to promote change within border institutions to enhance commitment to incorporate human rights elements in institutional policies, guidance and accountability frameworks. Human rights training should be ongoing to ensure that border authorities are kept abreast of emerging issues and human rights-based responses.

Training in isolation is not likely to change institutional behaviours, particularly if existing laws and internal regulations do not reflect the content of the training course nor seek to implement a human rights-based approach to border governance. Therefore, it is important to engage senior border officials and other relevant staff, such as operational department staff, at an early stage in order to secure their commitment and support for the training. That would ensure that learners can trigger attitudinal and behavioural change at both the institutional and personal levels, and put into practice what they learn in the training course. That will also increase the sustainability of the training beyond regular staff turnover and contribute to bringing about systemic change. In the context of border governance, it is important to consider from the outset, how such medium- and long-term impacts could be further supported through other forms of engagement, for example, through collaboration on developing a rights-based code of conduct, standard operating procedures, rules of engagement, or a general training curriculum that integrates human rights knowledge and obligations.

II. Glossary



Distribute a handout of the Glossary so that learners can refer to it throughout the training course.

Asylum seeker

An asylum seeker is any person who is seeking protection as a refugee but whose claim has not been finally determined.²¹

Border authorities/officials

Border guards, consular and immigration officials, border police, staff at border detention facilities, immigration and airport liaison officers, coast guard officials and other front-line officers and staff performing border governance roles.²²

Child

Under international human rights law, a child is anyone below the age of 18.²³

Diplomatic assurances

In the context of the transfer of a person from one State to another, diplomatic assurances refer to assurances by the receiving State that the person concerned will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, persecution, or other serious human rights violations, or transferred to another country where they would risk such violations. Diplomatic assurances generally take the form of non-binding memorandums of understanding.²⁴ See also *Non-refoulement*.

Due process

Rights and procedures related to ensuring that the administration of justice is independent and effective. This includes putting in place laws, processes or other measures to ensure that every individual is treated fairly, reasonably and that arbitrariness is avoided. Any limitations imposed on the human rights of an individual must be based in law, necessary and proportionate.

Enforced disappearance

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.²⁵

²¹ See OHCHR and Global Migration Group, *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations*, 2018, p. 11. Available at www.ohchr.org/en/issues/migration/pages/vulnerablesituations.aspx.

²² OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, para. 10(d).

²³ Convention on the Rights of the Child, art. 1.

²⁴ Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 19.

²⁵ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

Foreign terrorist fighter

The Security Council defines “foreign terrorist fighters” as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or receiving of terrorist training, including in connection with armed conflict.”²⁶ Note that experts caution that this definition could lead to an individual being defined as a “terrorist” without due process.

Gender

Gender refers to the socially constructed identities, attributes and roles of persons in relation to their sex and the social and cultural meanings attached to biological differences based on sex. The understanding of those socially constructed identities, attributes and roles varies across societies, communities and groups, and over time. This often forms the basis of hierarchical relationships and an unequal distribution of power and rights, affecting all members of society, favouring men and boys, and disadvantaging women and girls, as well as LGBTI and non-binary individuals. Gender may describe binary categories of men or women as well as people who have non-binary gender identities. An inclusive framing of genders as women, men, girls, boys and individuals who identify with other identities by centring self-identification allows for the inclusion of trans people who identify within binary genders, cisgender people, as well as individuals who identify outside the binary.

When individuals or groups are perceived as not “fitting” within established gender norms, they often face stigma, discriminatory practices or social exclusion.²⁷

“Sex” versus Gender”: Most people have a biological sex of either male or female attributed to them when they are born, based on physiological and anatomical features. Gender refers to the social and cultural meanings attached to biological differences based on sex; those meanings vary across societies, communities and over time. See also [Gender identity](#).

Gender identity

Gender identity refers to a person’s deeply felt and experienced sense of their own gender. Everyone has a gender identity that is part of their overall identity. A person’s gender identity is typically aligned with the sex assigned to them at birth; such persons are described as cisgender. However, a person can have a gender identity that is different from the sex that they were assigned at birth; such persons are described as transgender.²⁸ In this training course, we will use the term “trans” to refer to persons who identify with a gender that is different from the sex they were assigned at birth.²⁹ “Trans” is an umbrella term used to describe individuals with a wide range of identities, whose sense of their own gender is different from the sex that they were assigned at birth. Those individuals do not constitute a homogenous group: there are diverse identities, and trans persons have different views, experiences and needs. Some seek surgery or take hormones to bring their bodies into alignment with their gender identities. Gender identity is distinct from sexual orientation and sex characteristics.³⁰ See also [Intersex, Sexual orientation](#).

²⁶ Security Council resolution 2178 (2014), preamble, also paras. 5 and 6(a).

²⁷ See OHCHR, *Integrating A Gender Perspective into Human Rights Investigations: Guidance and Practice*, 2018 (HR/PUB/18/4), p.7. Available at www.ohchr.org/Documents/Publications/IntegratingGenderPerspective_EN.pdf.

²⁸ OHCHR, *Living Free and Equal: What States Are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*, 2016, p. 18.

²⁹ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, para. 5.

³⁰ OHCHR, *Living Free and Equal*, p. 18.

Gender stereotype/stereotyping

A gender stereotype is a generalized view or preconception about attributes or characteristics that are thought to be possessed, or the roles that are or should be performed by members of a particular social group. Gender stereotyping refers to the practice of ascribing to an individual specific attributes, characteristics or roles by reason only of their membership in the social group of a particular gender – e.g., application of a stereotypical belief to an individual by reason only of their membership in the social group of women or men. A gender stereotype is harmful when it limits the individual's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives. Gender stereotyping can result in violations of human rights.³¹

Human rights defender

A human rights defender is someone who, individually or with others, acts to promote or protect human rights.³² An individual or group does not need to self-identify as a human rights defender to be one. It includes humanitarian and human rights workers who are involved with providing assistance, including rescue, to migrants as well as advocating for their rights.

Immediate assistance

Provision of assistance to any person in distress at sea, land, or air borders, regardless of the nationality or status of the individual(s) or the circumstances in which they are found. It encompasses provision of initial medical or other care and delivery to a place of safety. Assistance must be provided unconditionally, where necessary taking priority over border control or police or other enforcement procedures.³³

Immigration detention

Immigration detention is any deprivation of liberty for the purposes of border and migration governance. Deprivation of liberty includes “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.”³⁴ It could occur in various places, such as at land and sea borders, in “international zones” at airports, on islands, on boats or in closed camps.

Interception

All measures taken by a State or States, outside or within their national territory, to prevent further movement of individuals or groups of individuals for law enforcement purposes, including examination of their documentation and their vehicles/vessels, or for counter-terrorism purposes. In the context of cross-border movement, interception may involve measures to prevent

³¹ OHCHR commissioned report, “Gender stereotyping as a human rights violation”, October 2013, p. 9. See www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx. See also www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx.

³² See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998, General Assembly resolution 53/144, art. 1.

³³ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, 2018, Principle 4, Guideline 4.

³⁴ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1) and (2).

or interrupt the movement of persons without the required documentation.³⁵ See also *Pushback, Pullback*.

International borders

The politically defined boundaries separating territories or maritime zones between political entities/States and the areas where political entities exercise border governance on their territory or extraterritorially. They include land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and neutral, buffer or disputed areas (so-called “no-man’s land”) between border posts, as well as embassies and consulates.³⁶

Intersex

An intersex person is born with physical or biological sex characteristics, including the sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns, that do not fit the typical definitions of male or female. Those characteristics may be apparent at birth or emerge later in life, often at puberty. Being intersex relates to biological sex characteristics and is distinct from a person’s sexual orientation or gender identity.³⁷ Some States have passed legislation to amend sex markers on the birth certificates and official documents, including passports, of intersex persons.

Interview (at the border)

For the purposes of this training course, the interview is the second step at an international border after an individual has been screened. The interview is usually a short verbal interaction between an individual and a border official that can serve to provide more information about the individual’s situation, immigration status, vulnerability, protection needs and/or security risk. The interview enables the border official to make appropriate referrals. See also *Screening (at the border)*.

Law enforcement officials

Law enforcement officials are all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. The definition of law enforcement officials shall be given the widest possible interpretation.³⁸ For example, it includes military authorities or State security forces in countries where they exercise police powers, whether or not they are uniformed. Law enforcement officials are required to fulfil the duty imposed upon them by law at all times, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession. Service to the community is intended to include particularly the provision of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.³⁹

³⁵ There is no internationally agreed definition of interception. The definition used in this guide builds on a working definition proposed by the Office of the United Nations High Commissioner for Refugees (UNHCR). See Executive Committee of the High Commissioner’s programme, 18th Meeting of the Standing Committee, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CPR.17, para. 10.

³⁶ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, para. 10(b).

³⁷ OHCHR, *Living Free and Equal*, p. 18.

³⁸ Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, Economic and Social Council resolution 1989/61, annex, sect. I.A, para. 2; see also UNODC, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, 2016, p. 286.

³⁹ Code of Conduct for Law Enforcement Officials, 1979, General Assembly resolution 34/169, art. 1 and Commentary.

Migrant

There is no agreed definition of “migrant” under international law for the purposes of this Trainer’s Guide, the term “migrant” refers to any person who is outside the State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner, as well as migrants in irregular situations.⁴⁰ OHCHR uses the umbrella term “international migrant” to include a number of more precisely defined groups of people, including the specific legal categories “migrant workers” and “refugees”.⁴¹ See also [Refugee](#).

Migrant worker

A “migrant worker” is defined in international human rights law, as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.⁴²

Migrants in vulnerable situations

Migrants are in vulnerable situations when they are unable to effectively to enjoy their human rights and are at increased risk of human rights violations or abuse.⁴³ There is no legal definition of “vulnerable situations”, or of the term “vulnerability”, although it is widely used across human rights, criminal justice, human security and other areas. Vulnerability can be understood as referring to the multiple and intersecting forms of discrimination, inequality and structural and societal dynamics that lead to diminished and unequal levels of power, choice and enjoyment of human rights and increase the risk of an individual being subjected to human rights violations.⁴⁴ Migrants in vulnerable situations may need specific human rights protection because of the situations they left behind, the circumstances in which they travel, the conditions they face on arrival, or because of discrimination based on personal characteristics, such as age, gender identity, disability or health status.

Mixed migration

There is no agreed definition of “mixed migration”. The term describes the reality of movements of people with varying protection profiles, reasons and needs, including refugees, asylum seekers and other migrants, including those who are in an irregular situation, trafficked persons, unaccompanied and separated children. They all move along the same routes, use the same transport or means of travel, often in large numbers.⁴⁵

Non-refoulement

Under international human rights law, the prohibition of refoulement entails the obligation not to extradite, deport, expel, return or otherwise remove a person, whatever their status, when there are substantial grounds for believing that the person would be at risk of being subjected to torture or cruel, inhuman and degrading treatment or punishment, persecution or other serious human rights violations, either in the country to which they are to be transferred or removed

⁴⁰ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014, footnote 2.

⁴¹ See also the note on refugee protection in session 2.1.

⁴² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 2(1).

⁴³ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 5. The term “migrants in vulnerable situations” does not include refugees, and is without prejudice to the protection regimes that exist under international law for specific legal categories of non-nationals, including refugees, asylum seekers, stateless persons, trafficked persons and migrant workers.

⁴⁴ *Ibid.*, p. 6.

⁴⁵ OHCHR, *Situation of migrants in transit*, A/HRC/31/35, para. 10.

(direct refoulement), or in a third country of further transfer (indirect or chain refoulement) where there would be a real risk of such violations.⁴⁶ Under international human right law the prohibition of refoulement is absolute.

Place of safety

Following rescue or interception, migrants should be disembarked or transferred to a place of safety. A place of safety is a location where rescue operations are considered to end; the rescued persons' safety of life is no longer threatened; basic human needs, such as food, shelter and medical needs, can be met; and transportation arrangements can be made for the rescued persons' next or final destination.⁴⁷ There is no agreed definition of "place of safety", but it should be understood as a place where a person's physical needs are met and where their human rights are protected, including the right to adequate food, water, health and shelter and protection from onward refoulement.

Profiling

Profiling refers to the extrapolation of information about a person, based on certain characteristics, to establish whether or not they are likely to pose a security or other risk. Profiling is generally defined as the systematic association of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions. Profiles can be descriptive, that is, designed to identify those likely to have committed a particular criminal act, and thus reflecting the evidence the investigators have gathered concerning this act; or predictive, that is, designed to identify those who may be involved in some future or as-yet-undiscovered crime.⁴⁸ Profiling should not be undertaken on the basis of disproportionate surveillance or generalizations based on prohibited grounds, such as race, ethnicity, religion or national origin. Profiling must strictly comply with the principles of necessity, proportionality and non-discrimination, and should be subject to close judicial scrutiny and periodically reviewed.⁴⁹

Pullback

Pullback operations are designed to physically prevent migrants from leaving the territory of any given State, or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State. Pullbacks could happen at the instigation and on behalf of destination States desiring to prevent migrant arrivals without having to engage their own border authorities in unlawful pushback operations (indirect arrival prevention).⁵⁰ See also [Interception](#).

Pushback

Pushback operations are proactive operations that aim to physically prevent migrants from reaching, entering or remaining within the territorial jurisdiction of the destination State (direct arrival prevention measures). They can take place at sea, where they involve the interception of vessels carrying migrants inside or outside territorial waters and may be followed by immediate return to their port of origin or may leave migrants adrift. They can also happen on land at or close to an international border. Pushbacks usually involve the threat or use of force by border

⁴⁶ See, inter alia, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; International Covenant on Civil and Political Rights, art. 7 International Convention on Enforced Disappearances, art. 16. Under international refugee law, the principle of non-refoulement is stated in the 1951 Convention relating to the Status of Refugees, art. 33(1).

⁴⁷ International Maritime Organization (IMO), UNHCR and International Chamber of Shipping (ICS), *Rescue at Sea: A Guide to Principles and Practice Applied to Refugees and Migrants*, 2015, p. 13.

⁴⁸ Special Rapporteur on countering terrorism, A/HRC/4/26, para. 33.

⁴⁹ OHCHR, *Human Rights, Terrorism and Counter-terrorism*, Fact Sheet No. 32, 2008.

⁵⁰ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, para. 54.

officials to prevent migrants from approaching or crossing the border, or to intimidate those who have successfully crossed the border, before returning them to the country of departure. Pushbacks render screening for protection needs summary or non-existent.⁵¹ See also [Interception](#).

Readmission agreements

Readmission agreements are bilateral agreements that allow States to return migrants to a “safe” country – not necessarily the migrant’s country of origin – which, in turn, is obliged to accept (readmit) the returnees. Decisions to return migrants that are taken on the basis of readmission agreements can risk violating the prohibition of collective expulsions or the principle of non-refoulement if they do not integrate an individualized assessment of each migrant’s situation.⁵²

Reasonable accommodation

Reasonable accommodation refers to adjustments made in a system to accommodate or make the same system fair for an individual based on a proven need, such as physical or mental health needs, religious freedom or disability status. The duty of reasonable accommodation in relation to the human rights of disabled individuals requires, for example, “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.⁵³

Refugee

A refugee is a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵⁴

Rescue

Operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety at all international borders.⁵⁵

Return

An umbrella term to refer to all the various forms, methods and processes by which migrants are returned or compelled to return to their country of origin or of habitual residence or a third country.⁵⁶ Returns may thus include deportations, expulsions, removals, rejections at the border, extraditions, repatriations, handovers, transfers or other types of return as defined in different national legal frameworks and practices. In practice, returns are often characterized as either “forced” or “voluntary”, though the reality is often less clear-cut. For the purposes of this training course, the use of the term “return” provides no determination as to the degree of voluntariness or compulsion in the decision to return, nor of the lawfulness or arbitrariness of the return.

⁵¹ Ibid., para. 51.

⁵² Ibid., para. 46.

⁵³ Convention on the Rights of Persons with Disabilities, art. 2.

⁵⁴ Convention relating to the Status of Refugees, art. 1.A(2).

⁵⁵ International Convention on Maritime Search and Rescue, Annex, Chapter 1, para. 1.3.2.

⁵⁶ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, pp. 16–17.

Search

A search is the act by which a law enforcement official or any person authorized by the law, inspects an individual and the area immediately within that person's control, including clothes, any objects being carried, or a vehicle, for a legitimate law enforcement purpose.⁵⁷

Sexual and gender-based violence

The term “sexual and gender-based violence” is used to emphasize the element of sexual violence while acknowledging that it is also part of the broader term “gender-based violence”. Gender-based violence is violence directed towards, or disproportionately affecting, someone because of their gender or sex. Understood as one form of gender-based violence, sexual violence encompasses acts of a sexual nature perpetrated against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. Forms of sexual violence include rape, attempted rape, sexual mutilation, forced sterilization, forced abortion, forced prostitution, trafficking for the purpose of sexual exploitation, child pornography, child prostitution, sexual slavery, forced marriage, forced pregnancy, forced nudity and forced virginity testing.⁵⁸

Screening (at the border)

Screening is the initial interaction between border officials and arriving or departing individuals for the purposes of immigration control, border governance, risk assessment and preliminary identification of persons in vulnerable situations. See also [Interview \(at the border\)](#).

Sexual orientation

Sexual orientation refers to a person's physical, romantic and/or emotional attraction towards other people. Everyone has a sexual orientation, which is integral to a person's identity. Sexual orientation is distinct from gender identity and sex characteristics.⁵⁹ See also [Gender identity, Intersex](#).

Smuggling of migrants

Smuggling of migrants occurs when an individual – the smuggler – engages in obtaining entry into a country for a person who is not a national or permanent resident of that country through irregular channels, and does so intentionally and for the purpose of obtaining a financial or other material benefit.⁶⁰ (For the difference between smuggling of migrants and trafficking in persons, see [session 2.1.3](#).)

⁵⁷ United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism* (2nd ed.), Basic Human Rights Reference Guide, 2014, para. 4; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, 2017, p. 135; International Committee of the Red Cross (ICRC), *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, (2nd ed.), 2014, p. 303.

⁵⁸ OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, pp. 7, 9.

⁵⁹ OHCHR, *Living Free and Equal*, p. 18.

⁶⁰ The agreed definition of smuggling of migrants is “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.” See Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (Smuggling of Migrants Protocol), art. 3(a).

Statelessness

A stateless person is defined in the 1954 Convention relating to the Status of Stateless Persons as “a person who is not considered as a national by any State under the operation of its law.”⁶¹

Stigma

Stigma means marking with shame, disgrace, discredit or disapproval. It involves penalizing, humiliating or ostracizing individuals, groups or communities for bringing shame to or “transgressing” the standards of their community or society. Stigma may be associated with migration in a several ways, some gender related. For example, a migrant may fear criticism and stigma if returned to their community before having fulfilled expected remittances. That may be associated with the gender stereotyped role of men as primary providers, for example, but it may also apply to women or child migrants. Stigma associated with actual or imputed sexual autonomy or sexual violence is socially and culturally constructed around gender dominance and inequality. Such stigma leads to the creation, condoning or compounding of social exclusion for those who are, or are perceived to be, sexually active or victims and survivors of sexual violence.

Terrorism

There is no internationally agreed definition of “terrorism”. The United Nations Global Counter-Terrorism Strategy⁶² states that “acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments”. The Strategy emphasizes that “terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group.” Terrorism threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms and aims at the destruction of human rights.⁶³

Torture

Torture is defined as “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.”⁶⁴

Trafficking in persons

Human trafficking has a three-part definition covering the act, means and purpose of trafficking. For adults, all three elements must be met; for children, only the act and purpose elements are necessary. The “act” of trafficking in persons refers to the action that the trafficker takes, that is, “the recruitment, transportation, transfer, harbouring or receipt of persons”. The “means”

⁶¹ The International Law Commission considers the definition in article 1(1) of the 1954 Convention as forming part of customary international law (see A/61/10, chap. IV, para. 49). See also UNHCR, *Handbook on Protection of Stateless Persons: Under the 1954 Convention relating to the Status of Stateless Persons*, 2014.

⁶² See General Assembly resolution 60/288.

⁶³ OHCHR, *Human Rights, Terrorism and Counter-terrorism*, Fact Sheet No. 32, pp. 7–8.

⁶⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1.1.

describes how the act is achieved, that is, “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”. The “purpose” in all cases of human trafficking is exploitation. Exploitation⁶⁵ is not fully defined but includes “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” In the case of a child, trafficking is “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.”⁶⁶ (For the difference between trafficking in persons and smuggling of migrants, see [session 2.1.3](#).)

Use of force

Use of force refers to the use of physical means that may harm a person or cause damage to property. Physical means include the use of hands and body by law enforcement officials; the use of any instruments, weapons or equipment, such as batons; chemical irritants, such as pepper spray; restraints, such as handcuffs; dogs; and firearms. The actual use of force has the potential to inflict harm, cause (serious) injury, and may be lethal in some instances.⁶⁷

Xenophobia

There is no agreed definition of xenophobia in international law but it can be understood as attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.⁶⁸

⁶⁵ The agreed definition of “exploitation” is “the recruitment, transportation, transfer, harbouring or receipt of 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol), art. 3(a).

⁶⁶ Trafficking in Persons Protocol, art. 3 (a) and (c).

⁶⁷ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 1.

⁶⁸ International Labour Office (ILO), International Organization for Migration (IMO) and OHCHR, in consultation with UNHCR, *International Migration, Racism, Discrimination and Xenophobia*, 2001, p. 2.

III. Course content

Introductory session	<ol style="list-style-type: none"> 1. Welcoming learners 2. Introducing the training course 3. Introducing the learners 4. Course overview (agenda and methodology) 5. Terms of engagement 6. Additional information (logistics)
Session 1: Introduction to human rights	<ol style="list-style-type: none"> 1.1. Human rights 1.2. Gender, migration and human rights 1.3. Human rights at international borders 1.4. Key human rights principles at international borders 1.5. Human rights of border officials and institutional accountability
Session 2: Migrants in vulnerable situations at international borders	<ol style="list-style-type: none"> 2.1. Migrants in vulnerable situations
Session 3: Ensuring human rights in interception, rescue and immediate assistance	<ol style="list-style-type: none"> 3.1. Human rights considerations in interception, rescue and immediate assistance 3.2. When and how may force be used at international borders?
Session 4: Ensuring human rights-based screening and interviewing at international borders	<ol style="list-style-type: none"> 4.1. Screening and interviewing 4.2. Key human rights considerations and practical measures for screening and interviewing 4.3. Exercise (role play): Screening at the border 4.4. Practical steps to ensure human rights-based and gender-sensitive interviews 4.5. Exercise (role play): Interviewing at the border 4.6. Exercise (brainstorming): Considerations when screening or interviewing migrants in potentially vulnerable situations
Session 5: Avoiding detention and inadequate conditions of detention	<ol style="list-style-type: none"> 5.1. Immigration detention 5.2. Key human rights considerations regarding immigration detention 5.3. Protecting human rights in the event of immigration detention 5.4. Situations of vulnerability and immigration detention
Session 6: Human rights-based return	<ol style="list-style-type: none"> 6.1. Return in the context of migration 6.2. Key human rights considerations relating to return 6.3. Practical steps to protect human rights in the return process
Session 7: Wrap-up of training course	<ol style="list-style-type: none"> 7.1. Key learning points/messages of the training course 7.2. Exercise (reflection): Putting learning into practice

Introductory session

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Welcome learners and facilitate the introduction of learners and the training team ▶ Outline the rationale for the training course, its objectives, the approach adopted and provide an overview of the course ▶ Agree the ground rules for the training course
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Appreciate the rationale and learning objectives of the training course ▶ Understand the methodology and approach that will be used over the next three days
Preparation	<ul style="list-style-type: none"> ▶ The trainer should prepare and print copies of the handout for the icebreaker exercise (People Bingo), adapting it as necessary for the local context and the learners
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts and pens
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ Course folder ▶ Handout for the icebreaker (People Bingo)

1. Welcoming learners

The introductory session should be structured in accordance with the usual formalities of the country or region where the training course is taking place. Appropriate representatives of the host Government and/or organizations should be invited to welcome the learners and to express their commitment to and support for the importance of human rights at international borders in the local context.

- ▶ Aim for 10 to 15 minutes maximum for all the welcoming addresses.
- ▶ Briefly introduce the training team, as well as other persons involved in the course (e.g., resource persons, observers, as relevant).

2. Introducing the training course

Goal and learning objectives

The goal of this training course is to build the capacity of the learners to adopt a human rights-based approach in their work with migrants at international borders. At the end of the training course, learners will be able to:

- ▶ Identify and apply relevant human rights standards to different aspects of border security and management;
- ▶ Recognize and consider the situations faced by individuals at borders, particularly those who are in vulnerable situations, including irregular migrants;
- ▶ Apply a gender-responsive approach to their daily work in border security and management;

- ▶ Analyse institutional policies (e.g., standard operating procedures) and mechanisms (e.g., accountability mechanisms) of border authorities and other governance structures from a human rights perspective, and discuss strategies to enhance human rights compliance.

While recognizing that the learners have different roles and responsibilities, duties and operational imperatives at international borders, the training course will focus on the human rights aspects of the learners' work. The trainer should write the learning objectives on the flip chart at the front of the room and make sure they are displayed prominently for the duration of the course.

Approach adopted

Clearly state and explain the approach adopted in this training course so as to help manage learners' expectations and start the discussion about how the various areas of work at international borders and human rights protection interrelate and complement each other. Make sure to frame border governance work and human rights as mutually reinforcing.

Focus on human rights and migrants at international borders

Respect for human rights is a part of modern and professional law enforcement, including in border operations. Respect for human rights is well established in international law and in good practices worldwide, as exemplified in agreed policy frameworks and guidelines for United Nations Peacekeeping Operations and the Strategic Guidance Framework of the United Nations Police Division.⁶⁹

Emphasize that the training course focuses on human rights, in particular those of migrants at international borders. In that respect, it addresses migrants in vulnerable situations and looks at gender considerations to be taken into account, bearing in mind that gender and vulnerability are not the same. Given the contemporary security context of border management, the training course also emphasizes the centrality of human rights to ensuring national security. With an estimate of over 1 billion people – more than one in seven of the world's population – crossing international borders annually, ensuring human rights protection in border governance is important. Not all those crossing international borders are migrants; some people do so for business and tourism.⁷⁰ However, this training course focuses on international migrants.



See Glossary for a definition of "migrant".

Migrants in vulnerable situations and gender considerations

To understand respect for human rights at international borders, one needs to understand how people's experiences vary. In this training course, we will focus specifically on migrants in vulnerable situations and on how gender influences migrants' experiences at the border. Those differences are easily overlooked unless they are deliberately considered. Paying attention to how gender and situations of vulnerability influence migrants' experiences at borders, and understanding how those factors differ and interrelate, would help border authorities deliver effective border governance.

Respecting the human rights of all migrants regardless of their nationality, migration status or other circumstances facilitates effective border governance. Policies aimed at curtailing migration at all costs instead of governing migration serve only to exacerbate the risks posed to migrants and create zones of lawlessness and impunity at borders, and are ultimately ineffective.⁷¹

⁶⁹ See United Nations Police, *Strategic Guidance Framework for International Policing*. Available at <https://police.un.org/en/strategic-guidance-framework-international-policing>.

⁷⁰ See World Tourism Organization, UNWTO Highlights Confirm Another Record Year in 2017, PR No. 18062 (August 2018). Available at www.unwto.org/global/press-release/2018-08-27/unwto-highlights-confirm-another-record-year-2017.

⁷¹ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, para. 4.

Human rights are fundamental to security measures, including counter-terrorism

Border management includes responsibilities with regard to national security, including the security challenges posed by the threat of terrorist acts. There have been unwarranted linkages between migration, refugee protection and terrorism threats, although States have agreed and affirmed many times that respect for all human rights for all and the rule of law is the fundamental basis for effective counter-terrorism measures.⁷² As part of an effective counter-terrorism policy, it is essential to have a comprehensive border security policy that respects human rights, justice, accountability, human dignity, equality and non-discrimination, and that grants victims of terrorism the protection to which they are entitled. Security and the protection of the rights of migrants are not opposing goals; they are complementary and mutually reinforcing.⁷³ In 2005, the Secretary-General wrote: “In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.”⁷⁴

The Secretary-General has asserted that, “when we protect human rights, we are tackling the root causes of terrorism.”⁷⁵ In line with this, Security Council and General Assembly resolutions have repeatedly affirmed that any counter-terrorism measures must be in compliance with international law, in particular human rights law, international refugee law and international humanitarian law.⁷⁶

Pillar IV of the Global Counter-Terrorism Strategy (2006) concerns measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but rather are complementary and mutually reinforcing.⁷⁷

The Plan of Action to Prevent Violent Extremism, adopted in 2016,⁷⁸ calls for a comprehensive approach encompassing not only security-based counter-terrorism measures but also systematic preventive steps to address the underlying conditions that drive individuals to radicalize and join violent extremist groups. It reaffirms that human rights are central to an effective counter-terrorism effort and recognizes that violent extremism becomes attractive where human rights are being violated.⁷⁹ It also reminds States that their legal definitions of “terrorism” and “violent extremism” must be consistent with their obligations under international law, in particular international human rights law.⁸⁰

In the 2016 Global Counter-Terrorism Strategy Review, States and United Nations entities are encouraged to consider the impacts of counter-terrorism strategies on the human rights of women and women’s organizations and to seek greater consultations with women and women’s organizations when developing strategies to counter terrorism and violent extremism conducive to terrorism. They are also encouraged to integrate a gender analysis on the drivers of radicalization of women to terrorism into their relevant programmes.⁸¹

⁷² United Nations Global Counter-Terrorism Strategy, General Assembly resolution 60/288, Annex, Section IV.

⁷³ Special Rapporteur on terrorism, A/71/384, para. 54.

⁷⁴ Secretary-General, In larger freedom: towards development, security and human rights for all, A/59/2005 and Corr.1, para. 94.

⁷⁵ Secretary-General, “Counter-terrorism and human rights: winning the fight while upholding our values”, Speech delivered at SOAS, University of London, 16 November 2017. Available at www.un.org/sg/en/content/sg/statement/2017-11-16/secretary-general's-speech-soas-university-london-counter-terrorism.

⁷⁶ See for example, Security Council resolutions 2178 (2014) and 2396 (2017).

⁷⁷ United Nations Global Counter-Terrorism Strategy.

⁷⁸ Secretary-General, Plan of action to prevent violent extremism, A/70/674. Also available at www.un.org/counterterrorism/plan-of-action-to-prevent-violent-extremism and General Assembly resolution 70/254.

⁷⁹ See Secretary-General, A/70/674, para. 3.

⁸⁰ Ibid., para. 5.

⁸¹ Global Counter-Terrorism Strategy Review, General Assembly resolution 70/291, para. 12.

3. Introducing the learners

Icebreaker exercise: People Bingo



Duration: 10 minutes

Aim of the exercise:

This activity will allow learners to get to know each other quickly, in a fun way, and will help to create a dynamic learning environment.



Write general characteristics of people in a 25-square (5 rows, 5 columns) bingo card (see card provided in the course materials as an example). The characteristics can be adapted to the local context. Photocopy or print enough copies for the number of learners.

If learners are not familiar with bingo, explain how the game is played.

Bingo is a game in which players mark off numbers on a card as they are drawn randomly and called out by a caller. The winner is the first person to mark off all the numbers on their card, or the first person to mark off all the numbers in a particular pattern, e.g., across or down or diagonally. In People Bingo, the characteristics of people are used instead of numbers.

How to carry out the exercise:

- ▶ Give each learner a People Bingo card and a pen.
- ▶ Learners should mingle – walk around –, introduce themselves to each other, and ask questions to find people who match the characteristics on the card. They can help each other out by sharing which characteristics they match. They should put the name or initial of the person who matches a characteristic in the corresponding square or have the person sign or initial it.
- ▶ The first person to fill 5 boxes across or down or diagonally shouts “BINGO” and the game is over.
- ▶ Congratulate the winner OR allow learners to continue playing until time is up (10 min.). See how many have managed to fill 5 boxes across or down or diagonally.

The amount of time needed for the game will vary depending on the size of the group and how easily the learners mingle. Allow about 10 minutes. If no one has called BINGO after 15 minutes, stop the game and ask if anybody has managed to fill at least 4 boxes across or down or diagonally.

This activity can be carried out with up to 30 people, though more time would be required. If the group is larger than that, consider dividing the learners into smaller teams of equal size.

Tour-de-table

With learners back at their tables, complete the introductions so that everyone has an idea of who the other learners are, if they did not meet during the bingo game.

- ▶ Ask each learner to introduce themselves, giving just their name, role in border security/management and country.

4. Course overview

- ▶ Present the agenda of the training course and explain the methodology for course delivery (e.g., participatory approach, discussions, morning recap of key learning points from the previous day; role play, group work, daily evaluation and feedback).

Agenda: Human Rights at International Borders

Day 1	<p>Session 1: Introduction to human rights</p> <ul style="list-style-type: none">▶ Give a broad overview of key human rights principles; discuss the need for a gender-responsive approach; focus on human rights at international borders, including the rights of border officials. <p>Session 2: Migrants in vulnerable situations at international borders</p> <ul style="list-style-type: none">▶ Discuss what constitutes a vulnerable situation at international borders; foster an understanding of why it is important to focus on migrants in vulnerable situations at international borders. <p>Session 3: Ensuring human rights in interception, rescue and immediate assistance</p> <ul style="list-style-type: none">▶ Consider the human rights principles that guide the work of border officials in relation to intercepting migrants, rescuing and providing assistance to those in distress; review when and how force can be used within a human rights-based approach. <p><i>Learners' evaluation and feedback</i></p>
Day 2	<p><i>Recap of learning points from day 1</i></p> <p>Session 4: Ensuring human rights-based screening and interviewing at international borders</p> <ul style="list-style-type: none">▶ Use presentations, discussions and role play to explore a human rights-based approach to screening and interviewing at international borders. <p><i>Learners' evaluation and feedback</i></p>
Day 3	<p><i>Recap of learning points from day 2</i></p> <p>Session 5: Avoiding detention and inadequate conditions of detention</p> <ul style="list-style-type: none">▶ Examine key human rights considerations to avoid immigration detention to the extent possible; discuss how to adopt a human rights-based approach when immigration detention cannot be avoided, particularly for migrants in vulnerable situations. <p>Session 6: Human rights-based return</p> <ul style="list-style-type: none">▶ Consider the work of border officials when migrants are removed from the country; discuss the international human rights law that defines the limits of return; and discuss how to adopt a human rights-based approach towards sustainable return. <p>Session 7: Wrap-up of training course</p> <ul style="list-style-type: none">▶ Summarize the key learning points/messages of the training course. <p><i>Learners' final evaluation of the course</i></p> <p><i>Distribution of certificates</i></p>

5. Terms of engagement

- ▶ Establish the ground rules at the outset so as to create an atmosphere of trust and mutual agreement on how everyone can work together and benefit from the training course.
- ▶ Invite learners to identify and agree the ground rules to be followed during the training course. This is important to ensure buy-in and ownership of the rules. Trainers should ensure that all essential issues are covered, if anything is missing from the learners' suggestions.
- ▶ Examples of ground rules:
 - Be on time;
 - Avoid using mobile phones and laptops;
 - Ask questions;
 - Respect each other's opinion;
 - Respect confidentiality, but agree to share good practices;
 - Other.

6. Additional information (logistics)

▶ **Course folder**

In addition to the agenda and the list of learners already distributed, handouts will be provided during the training course. Some of the handouts will be used throughout the course, therefore it would be a good idea for learners to keep them in a folder and bring them to the training each day.

▶ **Daily course evaluations**

Brief evaluations will be conducted at the end of each day to gather learners' feedback on the training course. This will serve as evaluations of the course and indicate what is working well, what needs improving and will help to identify areas for follow-up.

▶ **"Parking lot" (for pending matters)**

It would be useful to dedicate a "parking lot" in the form of a flip chart or space on a wall for sticky notes, where trainers and learners can note questions or any other issues that may emerge during the discussion, but which may be better addressed in a later session.

▶ **Gaps and challenges board (for matters outside the control of learners)**

It would also be useful to have a Gaps and Challenges board, also in the form of a flip chart, to identify and note structural or institutional issues that may make it difficult for learners to apply what they have learned in their daily work. It is important that trainers check and review the flip charts regularly and respond in a timely manner.

▶ **Administration/housekeeping**

Provide any additional information that learners may need to have during the training course (e.g., on fire safety, location of toilets, coupons for lunch and dinner, if applicable, reimbursement procedure, and so on.)

Session 1: Introduction to human rights

Content	This session will: <ul style="list-style-type: none"> ▶ Introduce key human rights concepts and the core international human rights instruments ▶ Identify human rights norms and gender considerations relevant to the situation of migrants ▶ Introduce three key human rights principles applicable to the governance of international borders ▶ Consider what a human rights-based approach means for the border officials themselves
Learning objectives	After this session, learners will be able to: <ul style="list-style-type: none"> ▶ Describe the nature of States' obligations under human rights law ▶ Describe the concept of gender and how it is relevant to border governance ▶ Identify some human rights potentially at risk at international borders ▶ Describe three key human rights principles in the area of border governance ▶ Identify the human rights of border officials and their obligations in respecting and protecting human rights
Key learning points/ messages	<ul style="list-style-type: none"> ▶ Human rights are inherent and inalienable: all persons at international borders, including migrants, regardless of their status, are entitled to the same human rights. ▶ States (as duty bearers) have specific obligations towards individuals (the rights holders) under their jurisdiction. ▶ The right to due process applies in all border governance contexts to ensure that every individual is treated fairly and with respect for their human rights. The tests of lawfulness, necessity and proportionality are crucial in any consideration of limitation to the human rights of individuals at international borders. ▶ Human rights should be at the centre of all border governance measures: migrants must be protected against any form of discrimination and priority must be given to providing assistance and protection from harm. That means that human rights obligations take precedence over law enforcement and migration management objectives. ▶ A gender-responsive, rights-based approach to border governance is necessary to account for different experiences, views and needs of both migrants and border authorities, taking into account gender, age and other factors. ▶ International human rights law and the rule of law are complementary and both must be respected as they are essential to successful efforts to effectively prevent and combat terrorism.
Preparation	<ul style="list-style-type: none"> ▶ Prepare and print handouts
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts; pens; true/false cards
Handouts or additional resources (see course material)	<ul style="list-style-type: none"> ▶ True/false cards ▶ List of rights in the Universal Declaration of Human Rights ▶ International and regional human rights instruments and ratifications ▶ Cases: At the border ▶ OHCHR <i>Recommended Principles and Guidelines on Human Rights at International Borders</i>, 2014 (print or electronic copies) ▶ Session 1 summary

Session overview/rationale

To start, let us reflect on our own lives, needs and hopes before moving on to recognize that the human rights framework includes all the elements that we need to flourish as human beings.

This session assumes very little prior knowledge of human rights law and standards. We will look at why it is useful to include a gender analysis in our work – in human rights, migration/ border management and counter-terrorism. Then we will focus on human rights at international borders, including the rights of those working at international borders – the learners' themselves.

Session content

- 1.1. Human rights
- 1.2. Gender, migration and human rights
- 1.3. Human rights at international borders
- 1.4. Key human rights principles at international borders
- 1.5. Human rights of border authorities and institutional accountability

1.1. Human rights

First, check how many learners have previously attended a human rights training, in order to understand the baseline of knowledge in the room. This is useful, particularly if it was not possible to organize a comprehensive training needs assessment beforehand.



This exercise helps to demonstrate how human rights give legal expression to the values and concepts that we regard as essential to flourish as human beings and to live a life in dignity, free from fear and want.

1.1.1. Exercise: What do we need to flourish as human beings?



Duration: 20 minutes
(group work: 5-10 min.; debriefing 10 min.)

Aim of the exercise:

To encourage learners to identify needs or factors that are fundamental to leading a dignified life – which could be linked to the concept of human rights inherent to every human being.

How to carry out the exercise:

- ▶ Divide learners into groups.
- ▶ Ask learners to brainstorm on the following question:
What do we need to flourish as human beings?
- ▶ Give the groups 5 minutes to discuss and write their ideas, using keywords, on a flip chart. If necessary, allow another 5 minutes, as this is the first time the learners are working together.
- ▶ Invite learners to think about themselves and their families, and what they need to lead dignified and fulfilled lives (e.g., good education, a home, enough food, family, security, liberty, justice, health, equality).
- ▶ Once learners have finished brainstorming, distribute the list of rights in the Universal Declaration of Human Rights.



Distribute the list of rights in the Universal Declaration of Human Rights.

- ▶ Invite learners to compare the needs they noted on the flip charts with the rights in the list.
 1. Are there similarities between the needs on the flip chart and the rights in the list?
 2. Are any rights missing (i.e., needs on the flip chart that are not in the list of rights)?
 3. Is anything missing from the needs on flip charts (i.e., rights that are not among their needs)?



Debriefing

- ▶ Invite one group to present a few of their findings, and ask the other groups to add to the presentation.
 - Are there any rights included or missing that surprised them?



This may be an opportunity to mention the human rights framework, which will be introduced later in the session.

- ▶ Ask learners if they think that their needs would be different in different circumstances (e.g., if they were a migrant or after a disaster)?
- ▶ Ask learners if they perceive human rights as being experienced differently by women and men?
 - Varied circumstances demonstrate how difficult it is to prioritize certain rights at any given moment.
 - We all have the same basic needs to flourish in this life; human rights recognize this and are universal. Human rights set out a common set of values for everyone.
 - The capacity to empathize with others who have had different life experiences and who may lead very different lives is an essential element of our work and of a human rights-based approach to migration.



The handout summarizes the human rights articulated in the Universal Declaration of Human Rights. See the Declaration for more details. See also the International Bill of Human Rights and the other human rights treaties.

Challenges to the universality of human rights

The Universal Declaration of Human Rights was drafted by State representatives with different legal and cultural backgrounds from all regions of the world. Together with the Charter of the United Nations, the Declaration forms the basis of all international human rights law, and Member States are expected to uphold and promote the human rights and fundamental freedoms set out therein, as well as in the International Covenants on Human Rights and the other human rights treaties that they have ratified. Since the adoption of the Declaration, States have repeatedly emphasized – including through the exercise of their sovereign prerogative to negotiate, adopt and ratify legally binding human rights treaties – the universality and indivisibility of all human rights. However, the universality of human rights is sometimes challenged.

One example is when States and other actors try to justify violations of women's rights in the name of culture. Those relativist discourses brand human rights as foreign ideas incompatible with local culture. Those arguments present culture as monolithic, static and immutable. While cultural acceptability in order to protect human rights is a key tenet of human rights law, appeals to culture for the purpose of denying the human rights of certain population

groups are not acceptable. In those contexts, it is critical to interrogate who is speaking for any given culture, and if they have the right to purport to represent the views of those most impacted.

The Working Group on discrimination against women and girls stressed that “culture is not a static or unchanging concept, although some States tend to present it as such in order to justify inequality between men and women.” Culture is a “living, dynamic and evolving process [that] permeates all human activities and institutions, including legal systems, in all societies across the world.” The Working Group emphasized that “viewing culture and beliefs as immutable hinders the realization and development of all human rights, including those of women.”⁸² The Special Rapporteur in the field of cultural rights also noted women’s lack of influence in decision-making processes that define the culture of any given community.⁸³ While the Special Rapporteur on violence against women has emphasized that “the challenge that confronts us today is to respect and prize our diverse cultures while developing common strategies to resist oppressive practices in the name of culture, and to promote and uphold universal human rights while rejecting encroachments grounded in ethnocentric thinking.”⁸⁴

1.1.2. What are human rights?

Building on the discussion in exercise 1.1.1 above, we can say that human rights are:

- ▶ Expressions of human dignity;
- ▶ A set of agreed values/norms reflecting the principles of dignity, equality and freedom:
 - They are found in cultures, religions and societies the world over and throughout history;
 - They are universal;
 - They are inherent to all human beings, regardless of differences of any kind – we are all equally entitled to our human rights;
- ▶ Legal standards and agreements – international and regional:
 - After the Second World War, the international community agreed that there was need for a more formal and universal statement of these values. That resulted in the Universal Declaration of Human Rights, which was adopted in 1948;
 - Human rights are expressed in a range of international legal instruments: some are declarations, and some are binding legal treaties;
- ▶ Inherent to all individuals, and primarily define the relationship between the individual and the State:
 - Human rights are inherent to all human beings by virtue of our humanity;
 - Belonging to individuals, human rights impose responsibilities or duties on others to respect them;
 - The primary duty rests on the State that exercises power and sovereignty jurisdiction, but we each also have responsibility to respect the rights of others.

⁸² Working Group on the issue of discrimination against women in law and in practice, A/HRC/29/40, para. 10.

⁸³ Special Rapporteur in the field of cultural rights, A/67/287, para. 22.

⁸⁴ Special Rapporteur on violence against women, A/HRC/4/34, para. 71.

1.1.3. Universal Declaration of Human Rights

Several countries in the global South – some newly independent from colonial rule – were influential in the creation of the Universal Declaration of Human Rights.

Three women who had a particularly strong influence on the Declaration were Minerva Bernardino (Dominican Republic), Hansa Jivraj Mehta (India), and Begum Shaista Suhrawardy Ikramullah (Pakistan).

Since its adoption, the Universal Declaration of Human Rights has inspired hundreds of other human rights instruments and influenced the bills of rights of nearly every national Constitution adopted in the years since it was created. The Declaration affirms:

- ▶ The inherent dignity and the equal and inalienable rights of all members of the human family (Preamble);
- ▶ All human beings are born free and equal in dignity and rights (Article 1):
 - Human rights are *universal* and *equal*: they are the same everywhere and for everyone;
- ▶ Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind (Article 2);
 - The principle of *non-discrimination* applies to all human rights and prohibits any direct or indirect distinction, exclusion, restriction or preference or other differential treatment.

Human rights are also:

- ▶ *Interdependent*: the improvement of one right facilitates advancement of other rights;
- ▶ *Indivisible*: the implementation of all rights simultaneously is necessary for the full functioning of the human rights system;
- ▶ *Inalienable*: you cannot give up your rights, nor can they be taken away from you.



These key human rights concepts are described in the handout on international and regional human rights instruments and ratifications (see session 1.1.6).

1.1.4. Rights holders and duty bearers

Human rights law functions as a framework of accountability by identifying “rights holders” and corresponding “duty bearers”:

- ▶ *Rights holders* are individuals. In certain circumstances, some rights can be enjoyed in community with others.
- ▶ *Duty bearers* are those actors who have a particular obligation or responsibility to respect, protect and fulfil human rights and to abstain from human rights violations.

The term is most commonly used to refer to State actors who bear the primary responsibility, but it can also apply to non-State (private) actors, such as non-State armed forces with effective control over territory, individuals (e.g., parents), humanitarian organizations or other local organizations, and private companies. However, States may be responsible if they fail to act with due diligence to prevent violations of human rights by non-State actors or to investigate and punish/remedy those violations.

The duty bearers (State actors) are expected to fulfil their responsibility towards the rights holders (individuals), and the rights holders claim their rights from the duty bearers and hold them accountable.

Are you a rights holder or a duty bearer?

- ▶ Ask learners if they are rights holders or duty bearers, and why they think so?

Correct answer: Both.

- As individuals, they are rights holders, but in their professional roles, they are State actors and therefore duty bearers with an obligation to rights holders, such as migrants at international borders.

1.1.5. Nature of States' human rights obligations

Human rights law and States' obligations towards every person

Under human rights law, States have obligations not only to their citizens, but also to those individuals who do not have citizenship, such as irregular migrants, smuggled migrants, refugees, asylum seekers, trafficked persons, suspected terrorists and stateless persons.

Human rights law obligates all Government actors to protect human rights

The human rights obligations of a State are binding on all State organs and agents. All branches of Government (i.e., executive, legislative and judicial) and other public or government authorities at national, regional or local levels are obligated to fulfil the human rights requirements.⁸⁵

State actors are responsible for upholding the State's obligations. Those include border authorities (e.g., border police, border guards, customs officers, immigration officers, coast guards, and other officials involved in border management), other law enforcement officials, as well as the judiciary. Those obligations have implications for officials at strategic, operational and tactical levels.



Responsibility for human rights obligations also applies to private-sector actors (e.g., corporations) contracted by the State to fulfil any border management function. This will be discussed subsequently.

Due diligence

International human rights treaties and customary law impose three obligations on States: to respect, to protect and to fulfil.⁸⁶

- ▶ The obligation to *respect* means that States must refrain from interfering with or curtailing the enjoyment of human rights by individuals and groups. It prohibits State actions that may undermine the enjoyment of human rights. In the context of border governance, the obligation to respect may require a State not to put in place mandatory detention policies for migrants who arrive without a visa, as such policies are inherently arbitrary.
- ▶ The obligation to *protect* requires States to protect individuals and groups against human rights abuses by non-State actors, foreign State agents or State agents acting outside of their official capacity. A State is obliged to enact legislation protecting human rights; to take action to protect individuals when it is aware (or could have been aware) of threats to their human rights; and to ensure access to impartial legal remedies for human rights violations. In the context of border governance, the obligation to protect may require a State to ensure adequate oversight of and accountability by private companies that are contracted to carry out border management functions, such as screening.
- ▶ The obligation to *fulfil* means that States must take positive action to ensure the realization of human rights for all. The extent of the obligation to fulfil varies according to the right concerned

⁸⁵ Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 4.

⁸⁶ See Inter-Parliamentary Union and OHCHR, *Human Rights: Handbook for Parliamentarians* No. 26, 2016, pp. 32–34. Available at www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf.

and the State's available resources but, in general, States should create the legal, institutional and procedural conditions necessary to ensure that rights holders are able to realize and enjoy their rights in full. In the context of border governance, the obligation to fulfil may require a State to ensure that sufficient resources are devoted to training and that border officials are equipped to carry out their functions in a rights-based manner.

Human rights law obligates States to protect all persons under their territorial jurisdiction and effective control

Principle A.3: States shall respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially. The privatization of border governance functions does not defer, avoid or diminish the human rights obligations of the State.

Under international human rights law, States' obligations extend to every individual in their territory and subject to their jurisdiction.⁸⁷ That includes persons residing outside the territory, but where the State exercises authority or control extraterritorially. A State may not avoid its international human rights obligations by taking action outside of its territory that it would be prohibited from taking within its territory. In the context of migration and, specifically, human rights at international borders, such actions include anti-migration operations such as pushbacks/pullbacks, externalization of border control measures or extraterritorial detention.⁸⁸

States' obligations apply to all persons. They are not limited to citizens, but apply to all individuals, regardless of nationality or statelessness, who find themselves in the territory or subject to the jurisdiction of the State.⁸⁹

For the purposes of this training course, a *migrant* is any person who is outside the State of which they are a citizen or national or, in the case of a stateless person, outside their State of birth or habitual residence.



See Glossary for a definition of "migrant".

Human rights law holds States responsible for human rights abuses committed by private actors

Guideline 2.12: Ensure that any delegation of border management functions to private actors does not undermine human rights.

Under international human rights law, the State can be held responsible for abuses committed by private actors involved in all stages of border management and returns. The State is accountable for human rights abuses committed by private (non-State) actors in a number of specific ways: if it has a specific kind of connection with the non-State actors, such as contracting the entity to take on work that is normally the role of the State to deliver, or if it fails to take reasonable steps to prevent or respond to an abuse perpetrated by the entity, such as persistent failure to

⁸⁷ Human Rights Committee, general comment No. 31 (2004), para. 3.

⁸⁸ Special Rapporteur on torture, Interim report, A/70/303, paras. 12, 42.

⁸⁹ Human Rights Committee, general comment No. 31 (2004), para. 10.

conduct criminal prosecutions for racial discrimination by airline personnel against passengers from migrant and minority communities.

The State is also accountable for human rights abuses committed by corporations and their workers. Private-sector actors involved in border management may include travel/transportation companies (e.g., airlines, railways or ferry companies), including their involvement in returns/removals; private security companies; private detention companies; companies providing telecommunication services and Internet service providers, including data storage and biometric identification technology; companies providing surveillance equipment such as motion sensors, cameras and drones; infrastructure providers (e.g., construction companies); or health service providers.

Where companies are fulfilling government contracts, as in the context of border management, they are helping the State to deliver their human rights obligations. States should exercise adequate oversight to meet their international human rights obligations when they contract or legislate for business enterprises to provide services that may have an impact on the enjoyment of human rights.⁹⁰

1.1.6. Legal human rights sources



Distribute the handout on international and regional human rights instruments and ratifications, which contains a brief description of the nine (9) core international human rights treaties (and their respective optional protocols), and maps the action that States (in the region where the training session is being conducted) have taken in relation to each treaty (i.e. ratification, signature, or no action).



The handout must be adapted to the local context (i.e., State(s), region) beforehand.

Charter of the United Nations (1945)

The Charter proclaims that one of the aims of the United Nations is to promote and encourage respect for human rights and fundamental freedoms for all. Thus, since the founding of the United Nations in 1945, human rights have been the business of every Member State, every constituent body, every programme and agency, and every staff member of the United Nations.⁹¹

Universal Declaration of Human Rights (1948)

The Declaration, adopted in 1948, sets out the fundamental human rights to be universally protected (see above).

Core international human rights treaties

- ▶ International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- ▶ International Covenant on Civil and Political Rights (1966)
- ▶ International Covenant on Economic, Social and Cultural Rights (1966)

⁹⁰ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, Annex, Guiding Principle 5. Also available as OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011 (HR/PUB/11/04), at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁹¹ Charter of the United Nations, Arts. 1(3), 13(1)(b), 55(c), 62(2), 68, 76(c).

- ▶ Convention on the Elimination of All Forms of Discrimination against Women (1979)
- ▶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- ▶ Convention on the Rights of the Child (1989)
- ▶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
- ▶ International Convention for the Protection of All Persons from Enforced Disappearance (2006)
- ▶ Convention on the Rights of Persons with Disabilities (2006)

Each of these instruments has established a committee of independent experts to monitor the implementation of the treaty provisions by States parties.⁹²

Status

Ratification: When a State ratifies one of the international human rights treaties, it assumes a legal obligation to implement the rights recognized in that treaty. Through ratification, States undertake to put in place domestic measures and legislation compatible with their treaty obligations.

Signatory: A State that has signed a treaty has not expressed its consent to be bound by it. Signature is a means of authentication and expresses the willingness of the signatory State to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty (see Vienna Convention on the Law of Treaties, 1969).

No action indicates that the State has not yet indicated a willingness to undertake the process to join the treaty.

Reservations

A *reservation* is a declaration made by a State by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application in that State. However, reservations should not be incompatible with the object and the purpose of the treaty (see Vienna Convention on the Law of Treaties). The Office of the High Commissioner for Human Rights (OHCHR) is working to promote the withdrawal of reservations.

Other areas of law relevant to international borders

International refugee law – applies to refugees	Convention relating to the Status of Refugees (1951) and its Protocol (1967)
Conventions on statelessness– apply to individuals who are stateless	Convention relating to the Status of Stateless Persons (1954); Convention on the Reduction of Statelessness (1961)
International humanitarian law – applies to situations of armed conflict	Four Geneva Conventions (1949) and their three Additional Protocols (two adopted in 1977, the third in 2005)
Law of the sea – applies to situations of rescue and assistance at sea	United Nations Convention on the Law of the Sea (1982); International Convention for the Safety of Life at Sea (1974)

⁹² See www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

International labour law – applies to migrant workers	International Labour Organization (ILO), Migration for Employment Convention (Revised), 1949 (No. 97); Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
International criminal law – addresses smuggling of migrants, trafficking in persons, corruption; defines deportation as a crime against humanity	<p>Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); United Nations Convention against Corruption (2003)</p> <p>The Rome Statute of the International Criminal Court defines deportation as a crime against humanity, when “committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack” (Rome Statute, Article 7, paras. 1(d) and 2(d))</p>

Other sources of international human rights law

- ▶ Regional human rights treaties
- ▶ Customary international law⁹³

Sources of authoritative human rights guidance

- ▶ International *human rights treaty bodies* are international committees of independent experts mandated to monitor the progress that States parties make in meeting their human rights obligations in relation to each of the nine core international human rights treaties.⁹⁴ The committees’ main functions include:
 - reviewing the periodic reports submitted by States on measures taken to implement the provisions of the relevant treaty, and any difficulties encountered;
 - issuing general comments that provide an interpretation of specific substantive provisions, or guidance on the general obligations of State parties to the relevant treaty, or that address wider cross-cutting issues and how they relate to the provisions of the treaty;
 - considering complaints from individuals submitted through the complaints procedure, if it has entered into force.

Some treaty bodies have other mandated functions: they may undertake country visits to State parties; conduct inquiries on receipt of reliable information indicating grave or systematic violations by a State party of rights set forth in the treaty; receive requests for urgent action; receive and consider inter-State complaints; bring a matter to the urgent attention of the General Assembly.

⁹³ Customary law is based on States’ conduct; it comprises international obligations arising from established international practices, rather than obligations arising from formal written conventions and treaties.

⁹⁴ There are 10 human rights treaty bodies: Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee against Torture; Committee on the Rights of the Child; Committee on Migrant Workers; Committee on the Rights of Persons with Disabilities; Committee on Enforced Disappearances; Subcommittee on Prevention of Torture. See OHCHR, *Reporting to the United Nations Human Rights Treaty Bodies Training Guide*, Part I – Manual, 2017, Table 3, pp. 14–16.

- ▶ *Special procedures* of the Human Rights Council are independent human rights experts mandated to report and advise on human rights from a thematic or country-specific perspective. Special procedures mandate holders undertake country visits; bring alleged violations or abuses (individual cases and concerns of a broader, structural nature) to the attention of States and others; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy; raise public awareness; provide advice for technical cooperation; and report annually to the Human Rights Council and the General Assembly.
- ▶ *International commissions of inquiry, human rights commissions, fact-finding missions* established by the Security Council, the General Assembly, the Human Rights Council, the Secretary-General or the High Commissioner for Human Rights are mandated to carry out various investigations. They are convened to respond to situations of serious violations of international humanitarian law and international human rights law, whether protracted or resulting from sudden events, and to promote accountability for such violations and counter impunity.

Principle A.1: States shall implement their international legal obligations in good faith and respect, protect and fulfil human rights in the governance of their borders.

1.1.7. Can States restrict human rights?

International human rights law allows States to restrict certain rights through limitations or exceptionally, through derogations, but only in conformity with the law. Such restrictions on rights, whether in the form of limitations or derogations, can never be arbitrary or discriminatory.

Limitations are permissible if the following conditions are met:

- ▶ Is it *lawful*?
The principle of legality means that a measure restricting rights must have a clear legal basis. Information on the law must be sufficiently accessible for a person to understand what the law says or be able to find out what it says. A measure that is established in domestic law, but which is incompatible with international human rights law will not meet the requirement of legality as it will be fundamentally unlawful.⁹⁵
- ▶ Is it *justified to achieve a legitimate aim*?
Any limitation on rights must be justified on grounds that are set out in the relevant provisions in international human rights law. For example, limitations may be justified to protect the rights of others, for national security, public order, public health or morals.⁹⁶
- ▶ Is it *necessary*?
Whether or not a measure is “necessary” should be based on an objective assessment that the limitation meets a pressing social need and is necessary to achieve the legitimate aim.⁹⁷ The burden is on the State to show that a particular measure that limits the rights of individuals does not impair the democratic functioning of the society, in full respect of the Charter of the United Nations and the Universal Declaration of Human Rights.
- ▶ Is it *proportionate* to the aim?

⁹⁵ Human Rights Committee, general comment No. 16 (1988) on the right to privacy, para. 3.

⁹⁶ International Covenant on Civil and Political Rights, arts. 17, 19.

⁹⁷ Greer, S. “The exceptions to Articles 8 to 11 of the European Convention on Human Rights”, Human rights files No. 15 (Strasbourg, Council of Europe Publishing, 1977). Available at [www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf).

The principle of proportionality serves to assess the balance between the harm caused by the limitation of the individual's human right and the benefits achieved. For a measure to be considered as proportionate to its aim, it should:

- Be the least restrictive measure available,
- Be carefully tailored to achieve the stated objective, and
- Not be arbitrary, unfair or based on irrational considerations.

► Is it *non-discriminatory*?

Non-discrimination and equality before the law constitute fundamental principles of international human rights law and are essential elements of human dignity.

A measure that distinguishes between different groups of people or affects groups differently will be discriminatory if it has no reasonable or objective justification or if it is disproportionate.⁹⁸ If a measure is discriminatory, it is not compliant with international human rights law.

- Discrimination is any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination –including race, colour, national, ethnic or social origin, language, sex, religion, political or other opinion, descent, birth, caste, age, disability, health status, migration status, sexual orientation, gender identity or other grounds – and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights.

An individual may experience multiple forms of discrimination, such as on the basis of their migration status and gender. The structural and dynamic consequences of multiple forms of discrimination is known as intersectionality.⁹⁹ That refers to two or more grounds of discrimination interacting concurrently and changing the nature of the different forms of discrimination an individual has to contend with. Without deliberate attention, the consequences of intersectional discrimination may remain unaddressed even by human rights approaches because the specific problems or conditions created by intersectional discrimination are often subsumed within one category of discrimination, such as race or gender discrimination.¹⁰⁰

- Discrimination may be direct or indirect:¹⁰¹
 - *Direct discrimination* occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground and is not justified by objective, reasonable grounds (e.g., laws that prohibit women from driving); Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable situation (e.g., discriminatory laws that prohibit certain reproductive health services, including access to safe abortion).
 - *Indirect discrimination* refers to laws, policies or practices that appear to be equally applicable to all, but which, in fact, have a disproportionate impact on the exercise or enjoyment of human rights as distinguished by prohibited grounds of discrimination or results in unequal treatment (e.g., requiring a birth certificate for school enrolment may result in discrimination against migrants, ethnic minorities, indigenous peoples or stateless individuals who may not possess or who have been denied such a certificate).

⁹⁸ Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 7.

⁹⁹ Contribution by the Special Rapporteur on violence against women, on the subject of race, gender and violence against women, to World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, on race, gender and violence against women, 2001, A/CONF.189/PC.3/5, para. 23.

¹⁰⁰ *Ibid.*, para. 20.

¹⁰¹ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 10; OHCHR, *Manual on Human Rights Monitoring*, 2011, chap. 28, Table 1, pp. 13–14.

Discussion: Example of restrictions on human rights

Country Y introduces an “exit ban” prohibiting women migrant workers under a certain age (e.g., 30 years old) from going to work in Country X. Country Y claims that women must be protected from exploitation, when the policy decision is beyond the role of front-line officials.

Is it lawful? Yes, if the Government has adopted a law on the measure.

Does it have a legitimate aim? It might, for example, if it was introduced in good will to protect migrant workers in the light of documented harms against such workers in the destination country.

Is it justified to achieve a legitimate aim? Such measures usually have the effect, whether intentionally or not, of restricting the rights of the targeted individuals and can be seen as paternalistic and denying the agency of (young) women, for example, their right to work, their right to leave their country, among others.

Is it necessary? Although the measure seeks to prevent further harms to women migrant workers, it does not, in itself, address the cause of the harm or change the circumstances of/risk to the women migrant workers already working in Country X. It does not help women migrants in Country X or provide an alternative to women who need to migrate for work.

Is it proportionate to the aim? The scale of the risk in Country X would have to be assessed. Is it just one well-documented case that has caused a media scandal or is there a systemic risk in the country? Is the ban effective in protecting the rights of women migrant workers? What is the impact on women who migrate despite the ban? For example, if their rights are abused in Country X, do they find themselves without recourse to justice or remedies because their Government argues that they violated the ban and migrated irregularly? What about implications for those who are prevented from migrating as a result of the ban? Note that even with a ban in place, States (the duty bearers) are not absolved from responsibility for abuses that occur in migration.

Is it non-discriminatory? No. It is targeted only at young women and is therefore discriminatory on the (intersectional) grounds of age and gender.

Derogations

Derogations from human rights law must be lawful and fulfil the principle of proportionality as they are only permitted “to the extent strictly required by the exigencies of the situation”. States must ensure that derogations are temporary in nature and non-discriminatory, and they must notify the Secretary-General of about the derogation measures.¹⁰²

Non-derogable or absolute rights: Some rights can never be restricted, including the principle of non-discrimination. According to the provisions of the international treaties and the guidance of the treaty bodies, the following rights are non-derogable and therefore cannot be limited or suspended even in times of war or other public emergency threatening the life of the nation:¹⁰³

- ▶ The prohibition of arbitrary deprivation of life;¹⁰⁴
- ▶ The right to be free from torture and other cruel, inhuman or degrading treatment or punishment;¹⁰⁵
- ▶ The right to freedom from slavery, slave-trade and servitude;¹⁰⁶

¹⁰² Human Rights Committee, general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency.

¹⁰³ International Covenant on Civil and Political Rights, art. 4(2).

¹⁰⁴ *Ibid.*, art. 6; see also, Human Rights Committee, general comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, paras. 2, 67 and 68.

¹⁰⁵ International Covenant on Civil and Political Rights, art. 7.

¹⁰⁶ *Ibid.*, art. 8(1) and (2).

- ▶ The right not to be imprisoned because of inability to fulfil a contractual obligation;¹⁰⁷
- ▶ The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed;¹⁰⁸
- ▶ The right to recognition everywhere as a person before the law;¹⁰⁹
- ▶ The right to freedom of thought, conscience and religion;¹¹⁰
- ▶ The right to liberty and security of person¹¹¹ encompasses an absolute prohibition on arbitrary detention; however, lawful grounds for limiting the right to liberty, may exist, for example, because a person is found guilty in a fair trial on criminal charges;
- ▶ The obligation of non-discrimination in the enjoyment of economic, social and cultural rights is non-derogable, as is the obligation to guarantee the minimum core content of each right provided for in the International Covenant on Economic, Social and Cultural Rights.¹¹²

1.1.8. Right to due process



The right to due process is referenced throughout the training course. It is worth spending some time here to ensure that learners are familiar with the right and its requirements.

- ▶ *Due process* refers to the legal requirement that the State must respect all of the legal rights that are owed to a person. It is critical to the application of laws and to guaranteeing the enjoyment of human rights.

Due process rights comprise a number of specific rights set out in international human rights laws and standards in legal processes, which ensure that they are predictable and fair. Furthermore, there should be recourse for individuals to claim and obtain an effective remedy for human rights that have been violated.

The right to due process requires that States put in place appropriate laws, legal processes and other measures to ensure that:

- ▶ Every individual is treated fairly;
- ▶ Every individual is treated reasonably;
- ▶ Arbitrariness (i.e., action that is not lawful, necessary or proportionate and is contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or in the relevant international instruments ratified by States)¹¹³ is avoided; and
- ▶ Any limitation imposed on the rights of the individual meet the tests of necessity and proportionality, so that the administration of justice is independent and effective.¹¹⁴

The due process requirement also applies across all border contexts, including screening, interviewing, detention and expulsion of a person.

¹⁰⁷ Ibid., art. 11.

¹⁰⁸ Ibid., art. 15.

¹⁰⁹ Ibid., art. 16.

¹¹⁰ Ibid., art. 18.

¹¹¹ Ibid., art. 9.

¹¹² Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations.

¹¹³ OHCHR, *The Working Group on Arbitrary Detention*, Fact Sheet No. 26, p. 4; OHCHR, *Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police*, Professional Training Series No. 5/Add.2, 2002, p. 31.

¹¹⁴ United Nations, CTITF and OHCHR, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism: Basic Human Rights Reference Guide*, 2015, p. 4.

Due process requires an unbiased approach to each individual to ensure that border officials and other actors who may be involved with migrants at international borders, including the judiciary who rule on immigration cases, health professionals or interpreters, do not discriminate.

There are a range of discriminatory barriers, including gender-specific barriers, to realizing the different due process rights for individuals in this context. For example, migrant women and girls may encounter misunderstanding of their experiences and their testimony may be given less value than that of men or boys in interviews or legal proceedings. Migrant men and boys may encounter stereotyping attitudes about who are victims of sexual and gender-based violence, which could be a barrier to justice. LGBTI migrants may face prejudice in accessing justice and their right to due process on the basis of their actual or imputed sexual orientation or gender identity and expression.

Gender discrimination in due process may arise through gender stereotyping, discriminatory laws, bias in procedural and evidentiary requirements and practices, and gender-insensitive judgments or decisions owing to a lack of training, all compounded by intersecting discriminations, including with migration status.

States need to take measures to ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all, without discrimination. An individualized approach is an important element in rejecting stereotyping, such as on the basis of gender, race or nationality, working on the basis of the facts of the case rather than any conscious or subconscious preconceived beliefs.

Highlighting and eradicating all practices, procedures and jurisprudence that promote or limit full access to justice by women, girls and LGBTI persons requires qualitative studies and critical gender analyses of all justice systems, in collaboration with civil society organizations and academic institutions, and application of those findings to developing priorities, policies, legislation and procedures to ensure that all components of the justice system are gender-sensitive, user-friendly and accountable. Tracking progress in that effort requires gender-sensitive monitoring and independent review mechanisms.

Principle A.7: The right to due process of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction or effective control. This includes the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal.

The right to due process in the context of border governance encompasses the following rights:

- ▶ To be informed of any decision concerning the individual (e.g., detention, denial of admission, expulsion) in a language they understand;
- ▶ To submit reasons against the expulsion;
- ▶ To have the case reviewed by a competent authority;
- ▶ To have access to qualified and independent lawyers so as to obtain legal advice and be represented in such a review.

Furthermore, any charges must be determined by a competent, independent and impartial tribunal established by law and in compliance with human rights standards in all respects. The following rights must be ensured:¹¹⁵

- ▶ To a public hearing. Any restrictions on the public nature of a hearing or trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis, and allow adequate mechanisms for observation or review to guarantee the fairness of the hearing;
- ▶ To be presumed innocent, where charged with a criminal offence, until proved guilty according to the law. No one can be forced to testify against themselves or to confess guilt;

¹¹⁵ Ibid., pp. 1–2.

- ▶ To a fair hearing, in both criminal and non-criminal proceedings, which involves the right to a trial “without delay” or “within a reasonable time”, including the right to a timely judgment;
- ▶ To be present at the trial. That applies to everyone charged with a criminal offence, including a terrorist offence;
- ▶ To representation by a competent and independent legal counsel of their choosing or to self-representation;
- ▶ To adequate time and facilities to prepare their case, including full disclosure of any relevant material by the prosecution in criminal proceedings;
- ▶ To call and examine witnesses, including expert witnesses;
- ▶ To a genuine review of the conviction and/or sentence by a higher tribunal established by law;
- ▶ To effective remedies for any violation of fair trial rights.

1.2. Gender, migration and human rights

1.2.1. What is meant by gender?



See Glossary for definitions of various terms relating to gender and sexuality.

Although they are often used interchangeably, *gender* is not another word for women – everyone has a gender –, nor is *gender* synonymous with *sex*.

- ▶ The term *sex* describes the biological differences, which are typically assigned as either male or female when an individual is born, on the basis of physiological and anatomical features. Persons born with sex characteristics that do not fit the typical binary notions of male or female bodies are known as intersex persons;
- ▶ Whereas, the term *gender* refers to the socially constructed identities, attributes and roles of persons in relation to their sex and the social and cultural meanings attached to biological differences based on sex.

The social norms around gender roles shape the behaviours, activities, expectations, responsibilities and opportunities of every person, including in relation to access to and control over resources and in the context of decision-making, that are considered appropriate in a particular sociocultural context.¹¹⁶ Such gender norms lead to inequality if they reinforce the prejudices and customary or other practices that are based on the idea of the inferiority or the superiority of a particular gender or on stereotyped roles for men and women, including LGBTI people.

Gender stereotypes are a generalized view or preconception about the attributes or characteristics that women and men ought to possess, or the roles that are or should be performed by men and women, including with regard to sexual orientation.¹¹⁷ The international human rights law framework prohibits harmful gender stereotypes and stereotyping, which undermine the enjoyment of human rights.¹¹⁸ A harmful gender stereotype is one that limits an individual’s ability to develop their personal abilities, pursue their professional careers and make choices about their lives. Gender stereotyping is wrongful when the practice of stereotyping results in

¹¹⁶ OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 7.

¹¹⁷ *Ibid.*, p. 8.

¹¹⁸ Convention on the Elimination of All Forms of Discrimination Against Women, art. 5. For further information, see www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx.

violations of human rights and fundamental freedoms, for example a State enforcing a gender stereotype into law. Gender stereotypes can be hostile or negative (e.g., stating that women are irrational), even when they are seemingly benign (e.g., stating that women are nurturing). Such stereotypes may have rights-limiting consequences, for example, the labour options for women migrants are largely limited to domestic and care work.¹¹⁹

The meaning of such socially constructed identities, attributes and roles also impacts relationships and the distribution of power in those relationships. In most societies, power is manifested in a hierarchical manner, often to the disadvantage of women. That is why so much discussion about gender, including in this training course, focuses on women and girls. It is necessary to pay special attention to the human rights situation of women and girls because of the inequality, including unequal power relations, and discrimination that women and girls have traditionally faced – and continue to face – in all societies, and which remains a barrier to the full realization of their human rights. Similarly, LGBTI people also face inequalities, power imbalances and discrimination owing to preconceived gender norms.

Our understanding and expectations of gender change over time and in different contexts. For example, in many societies, women were not allowed to pursue advanced education in subjects such as medicine or law, and expectations of men are also changing over time, for example, in some countries, employers are offering men parental leave to help care for their babies.

Gender encompasses multiple categories – women, men, trans¹²⁰ people, non-binary people. It is much more than a male/female binary system from which some minority identities depart.¹²¹

All persons have a gender identity; it reflects a deeply felt and experienced sense of one's own gender, and is not always aligned with the sex assigned to them at birth.¹²² Depending on how their gender identity is perceived in a particular context, gender-diverse persons – those whose gender identity, including their gender expression, is at odds with what is perceived as being the gender norm in a particular context at a particular point in time – can potentially be subject to violence and discrimination on that basis. It is important to respect people's choice of terms, names and pronouns to refer to themselves. Gender identity is distinct from an individual's sexual orientation.

There is considerable diversity within any gender category. No gender category is homogenous. Gender is informed by, and intersects with, various other means by which individuals' roles, functions and responsibilities are perceived and practiced, such as race, ethnicity, culture, religion and class, which changes the individual's experience, including of their gender.

Countering rollback against women's rights: conservative narratives around gender ideology

Border officials may encounter opposition to carrying out a gender analysis to consider the interrelationship of gender and human rights in their work.

The concept of *gender* has been challenged, misunderstood and misused to further undermine the struggle towards the elimination of discrimination against women and towards gender equality. In this regard, the hostilities against so-called gender ideology exemplify the growing challenges in the quest for equality.

Conservative lobbies advocating against gender ideology, presented as a threat to "traditional values", wrongly see efforts to advance gender equality as the imposition of ideas and beliefs that seek to destroy such institutions as the family, marriage and religious freedom.

¹¹⁹ OHCHR commissioned report, "Gender stereotyping as a human rights violation", p. 9; See also www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx.

¹²⁰ On the use of the term "trans", see Independent Expert on sexual orientation and gender identity, A/73/152, para. 5.

¹²¹ *Ibid.*, para. 6.

¹²² United Nations Free and Equal, LGBTI Equality: Frequently asked questions. Available at www.unfe.org/wp-content/uploads/2018/10/FAQs-English.pdf.

This movement has been particularly vocal in opposing policies or even debates on issues of scientifically based comprehensive sexuality education in schools, women's sexual and reproductive rights, marriage equality and gender-based violence.

Attacks against gender ideology are used by conservative actors to oppose the universal applicability of human rights standards on the basis of non-discrimination and to undermine achievements made in the recognition of women's human rights and in the implementation of gender equality.¹²³

1.2.2. Gender in a human rights-based approach

As stated earlier, gender roles and norms have played a part in driving human rights abuses by entrenching unequal power relations, which has led to gender-based discrimination preventing the full advancement of women and girls, LGBTI people and non-binary individuals.

Gender analysis is an integral part of a human rights-based approach as it makes visible the many ways that gender affects human rights. Gender analysis is a key tool to help recognize, understand and make visible the gendered nature of human rights violations, including the power imbalances that drive them, and their specific and differential impact on individuals of different genders and gender identities and – because they can be closely associated – different sexual orientations. It is not about genders being the same, but rather about ensuring that an individual's access to and enjoyment of rights is not different because of their gender. As such, gender analysis considers the power relations within the larger sociocultural, economic, political and environmental context and contributes to building an understanding of the root causes of discrimination and inequality.¹²⁴

While the same human rights violations and abuses, including terrorism, may affect individuals of all genders, their impact (i.e., how individuals of different genders experience them, including their access to justice and effective remedy for the harm done to them) may be different, and those differences are often tied to societal gender roles. Some people also experience human rights violations directly because of their gender. Note that gender is not synonymous with gender-based violence – another common misconception. Attention to gender-differentiated concerns needs to run through the full human rights response and not be limited to certain forms of violence.

Attention to the differential experiences, views and needs of women, men, girls, boys and those who identify with other gender identities is key to identify human rights protection gaps and to understand how to ensure equal access to and enjoyment of their human rights, including by taking specific measures. The process of assessing the implications for women, men and other gender identities of any planned action, including legislation, policies or programmes, in all areas and at all levels is referred to as *gender integration* or gender mainstreaming.¹²⁵

Gender is just one element of understanding each other. For example, gender-based discrimination, compounded by and intersecting with discriminations based on other elements of a person's identity, will have a disproportionate negative impact and contribute to creating layers of inequality that structures the relative positions of people on the grounds of gender, race, class and other factors. Those factors intersect to inform a diversity of views, experiences and needs. When carrying out a human rights analysis, it is important to keep in mind that diversity, and not make the simplistic assumption that groups of people (e.g., all persons with disabilities, all people of the same ethnicity or nationality, all LGBTI people, all women) share the same opinions, experiences and needs.

For a policy response or measure to be human rights based, it needs to be responsive to the genders of the individual rights holders. Ignoring gender issues means failing to protect those who are disadvantaged by structural factors in our societies and systems.

¹²³ Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46, para. 14.

¹²⁴ OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 7.

¹²⁵ *Ibid.*, p. 8.

1.2.3. Discussion: Gender in the context of migration – check your assumptions

- ▶ Referring to the posters on the slide,¹²⁶ ask the learners:
 1. Who do you see?
A friendly, professional woman? Someone who is being trafficked?
Is she a citizen or a migrant?
 2. Who do you see?
An adult or a child? A model or a student? Is he a gang member?

We all make assumptions. The brain processes the visual and other information it receives by resorting to known categories such as woman/man, adult/child and so on. But our assumptions may not always be correct, and we need to be aware of our own biases and stereotypes, including in relation to gender and how it intersects with other factors such as age, race, migration status and so on, in order to address them and prevent them from affecting the important work carried out by border officials.



As a background for this discussion and to illustrate the concept of assumption beyond gender, show an optical illusion to demonstrate how our brain sees things that are not there and try to make sense of things that do not fit our expectations.

Gender-related assumptions and stereotypical discourses to be aware of and challenge

- ▶ *Women are a group*: Women constitute half the world's population and about half the world's migrants. They are not a single or a homogenous group. Nor are women a "vulnerable group". Women can constitute the majority of migrants facing vulnerable situations. Eliminating the persistent gender-based discrimination and backlash against women's rights should be addressed as both a stand-alone goal and a mainstreaming issue.¹²⁷
- ▶ *Women are inherently vulnerable and in need of protection*: Women are active rights holders with agency and play multiple roles in any given context. Women are not passive beneficiaries of aid or protection. Being vulnerable to human rights abuses is not inherent to being a woman (or girl). It is external factors that may put an individual at particular risk. Men and boys are also vulnerable to human rights violations, including specific gendered human rights violations.
- ▶ *Women are often categorized together with children*: That risks infantilizing women (i.e., treating women as children and not allowing them full autonomy as adults in charge of their lives), or reinforcing the historical tendency to make concern for the human rights of women derivative of the gender norm that prescribes their roles as mothers, rather than recognizing their status as independent rights holders. Furthermore, that conflation of women with children masks the different substantive human rights guarantees that apply, such as the principle of the best interests of the child.

Such gender stereotypes have a number of challenging impacts, including:

- ▶ Paternalism, when it comes to protection, can override women's autonomy and limit or otherwise violate women's rights;
- ▶ Overlooking that men and boys may also be at risk of specific gendered human rights violations can result in lack of protection of their rights;

¹²⁶ See also www.un.org/en/letsfightracism/.

¹²⁷ Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46, para. 12.

- ▶ Migration, especially through irregular channels or in mixed flows, can put migrants in vulnerable situations at many points and on many grounds, including gender (see also session 2).¹²⁸

1.2.4. Migration is not gender neutral

The situations, views and experiences of women migrants are often different from those of men. The differences tend to be manifested in terms of access to regular migration channels; the labour sectors into which they migrate; the forms of abuse they suffer and the consequences of that abuse; and how they are perceived by the authorities.

Gender-specific norms governing society are decisive factors in migration, as are gendered expectations and differentiated power relations. For example, an important factor driving the migration of women and girls is gendered expectations; families may send abroad their daughters, rather than their sons, if they believe that their daughters are more likely to send home remittances.¹²⁹ Consider the following:

Gender (and other) inequalities and discriminations during/driving migration

Gender discrimination can mean that women are easily targeted, often with impunity, by individuals or groups, for human rights abuses, or that they are at disproportionate risk of human rights abuses arising from structural factors, such as poverty and climate change. Discriminatory gender norms inform laws and policies that contribute to situations of vulnerability and that may drive migration and influence experiences of migration.¹³⁰

For example, pervasive gender discrimination means that women migrants typically migrate with fewer resources, have had less access to education than men, and often migrate in debt. Consequently, women migrants may face more precarious journeys than those who can pay for easier routes and means of travel, and so have less control over their migration experience. Single men who migrate irregularly are often perceived as “less vulnerable” by authorities, and may be disproportionately vulnerable to inadequate conditions in detention.

The situations, views and experiences of trans migrants are likely to be different from those of cisgender migrants, and there will be additional differences among trans migrants. Trans people face discrimination and violence throughout society. This can mean that trans migrants have little access to resources and may not have enjoyed full access to education – factors that can be detrimental to their migration. In addition, travelling with documents that list gender markers that are different from the self-identification of the individual and how they present themselves places trans migrants at an increased risk of human rights violations. Few States have policies to allow individuals to change the gender on their passports to be in line with their self-determined gender identity. That is also an issue for some intersex migrants.

Harmful gender stereotypes and traditional gender roles/social norms

The gendered ethic of care is often reproduced in migration, with women migrants mainly offered work in the care economy and hospitality industry. Migrant domestic/care workers face particular issues and concerns, owing to the isolation and dependence associated with their employment.

Gendered social norms may put trans travellers/migrants at risk if their identity documents are not in line with their gender presentation, or if their passport recognizes their non-binary gender

¹²⁸ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*.

¹²⁹ Special Rapporteur on the human rights of migrants, *The impact of migration on migrant women and girls: a gender perspective*, A/HRC/41/38, paras. 31-32.

¹³⁰ Special Rapporteur on migrants, A/HRC/41/38, para. 78.

identity, and they are travelling to a State that does not readily accept or recognize such identity markers.

It is important to be aware of the possibility that State agents, including border officials, have perceptions (e.g., implicit bias of women or minorities) that may negatively influence their interactions. For example, the perception that minorities are more likely to be engaged in criminal activity than non-minorities may result in their receiving harsher sentences in the criminal justice system.¹³¹ Given that most border officials are men who may unconsciously transfer their biases, perception and culture of male privilege/entitlement to their interactions with migrants (e.g., in their assessment of harms to, or decision-making by, migrants during screening and interviewing). Those biases may lead to their overlooking important gender-sensitive or other information, for instance, by not asking the relevant questions, which can affect information-gathering and documentation. One example is when the border official assumes erroneously that victims of sexual violence do not have information to share about other types of violations that they may have experienced.¹³² It is vital that border officials be aware of and question such perceptions, have access to guidance and training with respect to implicit bias and indirect discrimination, and make efforts to ensure that those biases and perceptions do not influence their work.

Gendered labour markets

Migrant labour markets are often highly gendered. Women are more likely to migrate through irregular channels and into informal work where, given the type of work available, they will be paid low wages and be outside the protective mechanisms afforded to other workers, including social security, labour rights or terms of bilateral agreements, as domestic labour laws often do not cover the informal economy in which women migrants work. Women migrants are also less likely to have access to opportunities to remain in a country with legal permanent or temporary status. Therefore, during transit and at destination, women migrants are at greater risk of human rights abuses. It should be noted that migration for domestic work forms a significant proportion of women's migratory experiences. Domestic work is less likely to offer internationally recruited work contracts and fully documented migration through regular migration channels.¹³³

Universal prevalence of gender-based violence

Gender-based violence is often perpetrated to assert gendered power relations and norms. Although usually discussed solely with respect to violence against women, it is also perpetrated against LGBTI people as well as heterosexual cisgender men, when their attacker perceives them to be betraying what they consider to be norms of acceptable male conduct. The prevalence of sexual and gender-based discrimination and violence and unequal access to rights and resources are crucial reasons why women, girls and LGBTI people migrate.¹³⁴

It is important to pay attention not only to sexual violence but also to other forms of gender-based violence and other violations to which women – and anyone targeted on the basis of their gender – are exposed. States have recognized that the “historically unequal power relations between men and women, ... have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.¹³⁵

¹³¹ Special Rapporteur on racism, A/HRC/29/46, para. 23; Recommendations of the Forum on Minority Issues at its eighth session: Minorities and the criminal justice system (24 and 25 November 2015), A/HRC/31/72, para. 22.

¹³² OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 37.

¹³³ Special Rapporteur on migrants, A/HRC/41/38, paras. 36–37, 39, 59.

¹³⁴ *Ibid.*, paras. 33, 70.

¹³⁵ Declaration on the Elimination of Violence against Women, 1993, preamble.

Particularly migrants with irregular status, have little or no access to services, justice or remedies to address gender-based violence. Migrant women, especially migrant domestic workers, face significant barriers to accessing justice and services.¹³⁶

For all of those reasons, migration policies and programmes need to be gender-responsive so as to be effective for all migrants. The Global Compact for Safe, Orderly and Regular Migration establishes gender responsiveness as one of its guiding principles. States are called upon to ensure that the human rights of migrants of all genders are respected at all stages of migration; their specific needs are properly understood and addressed; and they are empowered as agents of change. The Global Compact for Migration mainstreams a gender perspective and promotes gender equality and the empowerment of all women and girls, recognizing “their independence, agency and leadership in order to move away from addressing migrant women primarily through a lens of victimhood”.¹³⁷

1.2.5. Gender and counter-terrorism at international borders

Assumptions about gender and security have tended to have a sustained focus on men in identifying the causes of radicalization and the capacity for violent mobilization. That focus may affect border officials’ approach to migrants at international borders.¹³⁸ For example, it may lead to men – in particular young men – being subjected to stricter security checks, and women may be assumed to be subordinate to men and never participate in any terrorist act voluntarily.

Such assumptions have implications for the individual’s enjoyment of human rights, as well as for the counter-terrorism aspect of border work. It is necessary to take an individualized approach and to act on objective, specific intelligence and behavioural indicators, and not on gendered assumptions or those based on factors such as ethnicity, religion or race.¹³⁹

In a broader context, away from the border, we should also consider that, in our efforts to counter terrorism and violent extremism, contributory problems – including discrimination, political exclusion and socioeconomic marginalization – cannot be solved without a gender perspective. Yet, some Governments have fuelled those problems by using “vague and broad definitions of ‘terrorism’ to punish those who do not conform to traditional gender roles and to suppress social movements that seek gender equality in the protection of human rights”.¹⁴⁰

1.3. Human rights at international borders

1.3.1. What are international borders?

OHCHR *Recommended Principles and Guidelines on Human Rights at International Borders* define *international borders* as:

The politically defined boundaries separating territory or maritime zones between political entities and to the areas where political entities exercise border governance measures on their territory or extraterritorially (such areas include land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called “no-man’s land” between border posts, as well as embassies and consulates).¹⁴¹

No-man’s land includes neutral, buffer and disputed areas.

¹³⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008) on women migrant workers, paras. 20, 21, 26(d), (i) and (l).

¹³⁷ Global Compact for Safe, Orderly and Regular Migration, para. 15(g) on gender-responsiveness as a guiding principle.

¹³⁸ Special Rapporteur on terrorism, A/72/495, paras. 31, 32.

¹³⁹ Special Rapporteur on terrorism, A/71/384, para. 45.

¹⁴⁰ Special Rapporteur on terrorism, A/64/211, para. 27.

¹⁴¹ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, p. 4, para. 10(b).

Although they are sometimes governed by special laws and regulations, international borders are not zones of exclusion or exemption for human rights obligations. International human rights law applies equally in border spaces.

1.3.2. Exercise (case studies): What human rights could be at risk at international borders?



Duration: 50 minutes
(group work: 20 min.; debriefing: 30 min. (15 min. per case study))

Aim of the exercise:

To introduce learners to different experiences of migrants at international borders and to encourage learners to reflect on their own experiences and the role of border officials in ensuring human rights-based and gender-responsive border management measures.

How to carry out the exercise:

- ▶ Divide learners into groups of four to six people, and distribute the cases.



Distribute the cases so that approximately the same number of learners are working on each one.

- ▶ Ask learners to read through and discuss their case.
- ▶ Invite the groups to nominate a rapporteur who should write their responses to the following questions on the flip charts and represent them in plenary:
 1. What human rights issues can you identify in the case? List at least four.
 2. What gender-specific concerns can you identify in the case?
 3. Do you think these individuals would/should be treated differently depending on their gender?
 4. What can border officials do to protect the rights identified?



Learners should keep the handouts of the cases as they will be continued in session 5 (detention) and session 6 (return).

Learners may raise questions in this session that can be addressed in those sessions, therefore the trainer should be familiar with the entire story, so as to refer the questions.



Debriefing

- ▶ Briefly summarize each case.
- ▶ First, discuss case A: ask one of the groups that worked on case A to give an example of one human rights issue and one gender-specific concern that they identified and/or what measures they would take to protect/address those rights/concerns. Then, ask each of the other groups that worked on case A to do the same thing, until all the groups have contributed (see table below as a guide).



Ask if there are any more rights/concerns not yet mentioned. Make a note and discuss now or in a subsequent session.

- ▶ Next, repeat the debriefing for case B.

CASE A (At the border)

Kai, 17 years old, and Sammy, 22 years old

Analysis of case A

Story summary

My cousin Sammy and I left our country together.

At home we are very poor and there is a lot of violence.

I loved school but the gang members in the neighbourhood said that "real men" should work.

We decided we should make a better life for ourselves away from that place.

My father moved to Syldavia two years ago to work and a year after, my mother was killed as a bystander in a shoot-out.

For a few months, we have been travelling on buses and by foot, crossing a number of countries to try and join my father in Syldavia.

One night, border security officials raided the farm we were sleeping in.

I was able to escape but they arrested and detained Sammy.

Sammy was forced to work while in detention and only after paying a bribe to a guard, managed to escape.

Issues/concerns

- ▶ *Rights of the child* → Kai is 17 years old, therefore legally a child under international human rights law: all child migrants should be treated as children first and foremost and have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them.¹⁴²



Kai and Sammy are unisex names and their genders are not given. Do our assumptions about Kai and Sammy's experiences in this case study change if we think of them as different genders?

- ▶ *Driver of migration* → Kai and Sammy lived in poverty: many human rights would be out of reach as a cause and a consequence of poverty. Poverty is a recognized driver of migration.¹⁴³
- ▶ *Rights to security of person, life* → Kai and Sammy understand theirs is a violent society; Kai's mother was killed in violation of her right to life; and they had been threatened by local criminals: they may have feared they would be subject to violence or other risk by gang members.
- ▶ *Right to education* → Kai was threatened for going to school.
- ▶ *Gender stereotypes* → The gang members said that "real men" should work; that fuels gender inequalities.¹⁴⁴
- ▶ *Irregular migration; violation of rights* → They have been travelling for a few months (long journey): first indication that they are likely migrating irregularly, as they are not travelling to Syldavia by a more direct route (e.g., by air, which would require passports, visas and so on); on such a long journey, they are more likely to experience human rights abuses, including of their economic, social and cultural rights, such as the right to food, water and sanitation, and health care.

¹⁴² Committee on the Rights of the Child, general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 1.

¹⁴³ For more information on extreme poverty and human rights, see www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx; Global Compact for Safe, Orderly and Regular Migration, para. 18 (Objective 2).

¹⁴⁴ See Convention on the Elimination of All Forms of Discrimination against Women, art. 5.

We are at the border now, and I am working to earn enough money to pay the expensive fees smugglers demand so they will take us to Syldavia.

It would be too dangerous to go on our own, people have been kidnapped and have died in the desert.

I have been working long hours in a local restaurant and have been burnt by the fires of the oven several times.

I haven't been able to get treatment for my wounds because I am afraid that they will report me to the immigration officers who will then deport me.

- ▶ *Right to family unity* → They are hoping to join Kai's father (Sammy's uncle): as Kai is still legally a child, the State has a positive obligation under the Convention on the Rights of the Child to take all necessary measures to reunify Kai and his father as soon as possible, if it is in Kai's best interests.¹⁴⁵
- ▶ *Interception* → Border officials raided the place where they were sleeping at night: human rights concerns and duties during interception will be discussed in session 3.
- ▶ *Right to liberty* → Sammy was arrested and detained: human rights concerns and duties during detention will be discussed in session 5. However, note that according to international human rights standards, migrating through irregular channels is not a criminal offence; therefore migrants should not be treated as criminals.
- ▶ *Right to due process, access to justice* → There is no mention of Sammy being brought before a court or judicial authority, which is a breach of Sammy's rights.
- ▶ *Forced labour* → Sammy was forced to work: while there are prohibitions against forced labour in international human rights and labour law, there are exceptions for prison labour for individuals who are imprisoned as a consequence of a conviction in a court of law; however, Sammy was not convicted of an offence in a fair trial.¹⁴⁶
- ▶ *Corruption of State actor* → Sammy bribed a guard.

Guidelines 2.11 and 3.17: Investigate and prosecute all instances of corruption.

- ▶ *Ongoing risk to right to liberty* → Sammy escaped and was not released.
- ▶ *Smuggled migrants* → Kai and Sammy are planning to pay to be smuggled to Syldavia. Note that it is not a crime in international law to be a smuggled migrant.¹⁴⁷
- ▶ *Use of smugglers* → They plan to use smugglers because it is too dangerous to travel the route alone. Lack of access to regular migration channels, combined with the dangers on the irregular route, compel migrants like Kai and Sammy to use the services of smugglers. While smuggling does not in itself constitute a human rights violation, smuggled migrants are at increased risk of abuse and exploitation when power relationships are unequal.¹⁴⁸

¹⁴⁵ Convention on the Rights of the Child, art. 10.1; Also see discussion in session 1.3.3(g).

¹⁴⁶ International Covenant on Civil and Political Rights, art. 8.3(a); and ILO Forced Labour Convention, 1930 (No. 29), art. 2(1). Note exceptions for prison labour in International Covenant on Civil and Political Rights, art. 8.3(b) and ILO Convention No. 29, art. 2(2)(c).

¹⁴⁷ Smuggling of Migrants Protocol, art. 5.

¹⁴⁸ OHCHR, Situation of migrants in transit, A/HRC/31/35, p. 20.

<p>Sammy hasn't been able to work and is <u>still very shaken</u> from the time in detention and sometimes depressed.</p> <p>I am afraid to ask what happened there.</p>	<ul style="list-style-type: none"> ▶ <i>Poor and unsafe working conditions</i> → Kai has repeatedly been injured at work: everyone has the right to work in safe and healthy working conditions, regardless of their migration status.¹⁴⁹ ▶ <i>Right to health</i> → Kai is reluctant to seek treatment for injuries sustained, fearing deportation. Kai has the right to seek treatment for the injuries sustained at work, but fears being reported to immigration enforcement (we do not know if such fears are valid). In a human rights-based approach, the State should establish clear and binding "firewalls" between public-health service providers and immigration enforcement authorities to ensure that everyone can exercise their right to health.¹⁵⁰ ▶ <i>Right to health, possible ill-treatment in detention</i> → Sammy seems to be carrying some trauma related to the period in detention.
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CASE B (At the border)

Amodita, 20 years old, and Ichanga, 23 years old

Analysis of case B

Story summary

My village in Cordinia has been affected by drought since before I was born.

The harvests from the land our family owned steadily decreased, without enough to sustain and feed everyone.

In addition, my father has fallen ill and his medical treatment is very expensive.

When I married Ichanga, we started saving so we could move elsewhere and support my family.

Issues/concerns

- ▶ *Driver of migration: environmental degradation, effects of climate change* → Amodita's home village is affected by drought: the impacts of climate change are already being experienced in many areas in connection with decreased food security, land degradation and more limited availability of water and other natural resources; there is evidence that the effects of food, land and water insecurity are not gender neutral, and that women are more likely to suffer from undernourishment and malnutrition in times of food scarcity.¹⁵¹
- ▶ *Lack of sustainable livelihood* → Her family's land can no longer sustain them: the right to work and to sustain oneself and one's family.¹⁵²

¹⁴⁹ International Covenant on Economic, Social and Cultural Rights, art. 7(b); see also articles 6 to 8 on the right to work more broadly. The Committee on Economic, Social and Cultural Rights affirms that the right applies without discrimination, including on the basis of migration status. See the Committee's general comment No. 23 (2016) on the right to just and favourable conditions of work, paras. 5, 47(e)).

¹⁵⁰ With specific reference to health services, the Committee on Migrant Workers affirms: "States parties shall not require public health institutions to report or otherwise share data on the migration status of a patient to immigration authorities, and health care providers should also not be required to do so". See the Committee's general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 74.

¹⁵¹ Committee on the Elimination of Discrimination against Women, general recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, para. 69.

¹⁵² International Covenant on Economic, Social and Cultural Rights, arts. 6(1) and 7(a)(ii); see also ILO Decent Work Agenda; and OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, 2014 (HR/PUB/14/1), p. 120.

A friend of the family knew an agent who arranged documents for us to get to Elbonia, and we set off by bus.

The agent told us the journey would take three days, travelling through the neighbouring country of Liberto to Elbonia.

I was five months pregnant when we left.

About two hours after crossing the border into Liberto, immigration officers stopped our bus.

Ichanga was standing in the back while someone had offered me their seat in the front.

The officials boarded the bus and ordered Ichanga and another man to get off.

I tried to join him, but the officials made me stay on the bus.

After about 20 minutes, Ichanga was still not back and the bus left.

I started shouting and protesting, but they would not stop to let me get off.

I was very distressed because I did not know what to do and could not speak the language; and I started to get severe cramps.

When we finally got to the border of Elbonia, another woman helped me walk to the border office.

There were no women officers; the male officers examined my documents, but said I could not enter because I did not have the right papers.

- ▶ *Right to health* → Her father's necessary medical treatment is costly: he should be able to access affordable health services.¹⁵³
- ▶ *Travel documents* → Amodita and Ichanga obtained their documents via an agent, which are not valid/correct. Although it is not a crime in international law to cross a border by irregular means, including using a facilitator (smuggler), and we don't know what precisely is wrong with the documents, it is a crime under international (criminal) law to produce or possess fraudulent travel or identity documents.¹⁵⁴
- ▶ *Possible discriminatory profiling, gender* → Ichanga and another man were ordered off the bus; we do not know why those two were targeted (human rights concerns relating to profiling will be discussed in session 4).
- ▶ *Enforced disappearance*¹⁵⁵ → Ichanga's removal by State actors may also constitute enforced disappearance.
- ▶ *Family separation* → Amodita is not allowed to join Ichanga: although it would not have been good for Amodita if she was also taken away by border officials, the family is now separated and Amodita has no way of knowing where Ichanga is or how to contact him or the authorities holding him, and vice versa.
- ▶ *Right to health, sexual and reproductive health* → Amodita gets severe cramps: the right to sexual and reproductive health is an integral part of the right to health,¹⁵⁶ which includes maternal health. The officer refused Amodita access to a health professional.
- ▶ *Gender, women's rights* → There are no women officers on duty at the border (we do not know if it is the particular shift or wider practice): → the right of women migrants/travellers to see (searched/interviewed by) women border officials is well established in human rights practice and a rights-based approach. Even if same sex border officials are not available, the officer on duty did not react in a gender-responsive way, especially given her condition.

¹⁵³ Accessibility, including economic accessibility, is one of the four interrelated and essential elements of the right to health (together with availability, acceptability and quality). See Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 12(b).

¹⁵⁴ Smuggling of Migrants Protocol, arts. 5, 6(1)(b)(i) and (ii).

¹⁵⁵ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2: "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

¹⁵⁶ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016) on the right to sexual and reproductive health, para. 1.

At this point, all I wanted was to see a doctor, as the pain was unbearable, but the officers said this was not possible because I had tried to enter Elbonia irregularly.

- ▶ *Right to an individual assessment, health*
→ Amodita is refused entry to Elbonia and access to a doctor because her documents are not correct: States have a sovereign prerogative to establish immigration policies; however, they must do this within their human rights obligations. Regardless of Amodita's papers, border officers cannot return her without having assessed the risk she may face and need to facilitate her access to health-care services.

1.3.3. Discussion: Human rights particularly at risk at international borders

Discussion prompts in sessions 1, 3, 4, 5 and 6 to review a non-exhaustive list of human rights that could be at risk in the specific context at international borders are intended to encourage learners to reflect on their own experiences and human rights knowledge and examine how the human rights of migrants may be at risk in the relevant context. The discussions will demonstrate how a broad range of civil, political, economic, social and cultural rights may be affected by migration and specifically by border procedures. The information provided on these human rights is intended to help the trainer answer questions about the human rights standards or guidance in the specific context. The trainer should encourage learners to share examples from their work contexts and to discuss the gender dimensions of the human rights at risk.

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Some of the human rights mentioned in one session may be discussed in detail in subsequent sessions. The description of human rights particularly at risk at international borders is more comprehensive here (session 1.3.3) and trainers should refer back to it as needed.

Principles and guidelines on human rights relevant to the specific context are also provided in each session.



For this first discussion of human rights particularly at risk at international borders, the gender dimension of human rights at risk is first addressed, followed by a description of each relevant human right as it applies to the migrants' experience. See also:

- ▶ Session 3.1.2: on the right to shelter, derived from the right to adequate housing, in the context of reception and immediate assistance;
- ▶ Session 4.1.3: on the right to freedom of religion or belief, in the context of screening and interviewing at international borders;
- ▶ Session 5.1.2: on the right to education, in the context of immigration detention;
- ▶ Session 6.3.5: on the rights of the child (in particular the best interests principle), in the context of returns

Principles:

A.2: The primacy of human rights – States shall ensure that human rights are at the centre of the governance of migration at international borders.

C.10: States shall protect and assist migrants at international borders without discrimination. Human rights obligations, including in respect of civil, political, economic, social and cultural rights, must take precedence over law enforcement and migration management objectives.

Gender dimension of human rights

Gender-based inequalities and discriminations exist throughout an individual's migration. It is worth noting that access to and experiences of these rights by women migrants can be different from those of men; and access and experiences of LGBTI migrants may differ from those of heterosexual and cisgender migrants, including in terms of:

- ▶ *Access to resources* – often limited due to pervasive gender-based discrimination and discriminatory social norms and practices (e.g., in relation to education and employment, as well as inheritance and land rights). That means that women have fewer resources to fund their migration, and are more likely than men to migrate in debt; this in turn, leads to reduced control and more precarious journeys. Trans migrants may also have few resources for their migration and limited access to regular migration channels as a result of factors such as barriers to education and participation in school life (e.g., in relation to school uniforms, appropriate name on school records, discrimination and bullying, among others), or disrupted work histories (e.g., finding employment, job retention) due to discrimination or the need to take time out of the workforce for health reasons related to their transition;
- ▶ *Access to (identity) documentation* – linked to access to resources: the cost of obtaining the necessary documentation can be prohibitive. In some cases, migrating families prioritize securing documentation for men, as it is expected that they will find better-paying work, especially if they are in regular status. In addition, discriminatory laws or practices may result in women and their children in some States being unable to gain access to documentation that proves their identity and nationality;
- ▶ *Access to regular migration channels* – linked to access to resources and documentation, as well as to gender discrimination. For example, high-skilled permits often disproportionately favour male-dominated professions, so that a disproportionate number of women must migrate through irregular channels and into informal work where they will be paid low wages and be outside the protective mechanisms afforded to other workers;
- ▶ *Labour sectors into which they migrate* – often women are limited to work in the informal sector, particularly domestic/care and hospitality sectors, which offers fewer opportunities for regular migration, and results in less security and greater dependency on employers;
- ▶ *How they are perceived by authorities*, including identification of situations of vulnerability – the perception of who is in a situation of vulnerability is often subject to gender bias, resulting in the underidentification of men and sometimes boys, and the overidentification of women and girls, as being in vulnerable situations. Single men are less likely to be perceived as being at risk of human rights abuses, which could lead to inadequate conditions in reception or detention centres, with their needs overlooked by border officials. The assumption that the migration of women and girls is more likely to result in a situation of vulnerability can trigger responses that impose limitations on their human rights, such as bans on some forms of migration and protective detention¹⁵⁷ (discussed further in [session 5.2.4](#));

¹⁵⁷ Special Rapporteur on migrants, A/HRC/41/38, para. 35.

- ▶ *Forms of violations and abuse they suffer, and the consequences* – including in the context of involuntary returns – and *access to justice and remedies*. For example, trans migrants face particular challenges in the migration journey (e.g., discrimination and violence on the basis of their gender identity and expression, including when their identity documents are not in line with their gender presentation or when their papers have non-binary gender markers that are not recognized or accepted in the transit or destination States).

Many human rights could be at risk at international borders including the following:

(a) Right to life

All humans have the inherent right to life. That right is particularly important in the work of law enforcement officials at international borders, as they are State actors (duty bearers) in that context. A number of human rights treaties provide for the right to life.¹⁵⁸ The right not to be arbitrarily deprived of life is absolute and non-derogable.¹⁵⁹ However, in exceptional circumstances, deprivation of life may be considered lawful (e.g., as a proportionate act of self-defence or to protect the lives of others).¹⁶⁰

The right to life also provides protection against arbitrary deprivation of life by State law enforcement and security forces.¹⁶¹ State actors have an obligation to take reasonable measures to avoid resorting to the use of force in order to comply in full with their positive obligation to ensure the right to life.¹⁶² Principle 9 of the Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, adopted by the General Assembly in 1990, provides that the use of lethal force may be applied only in a situation in which it is strictly necessary to save lives. Similarly, the tests/requirements of necessity and proportionality require that force should only be used by law enforcement officials when strictly necessary and that the application of force should be proportionate – that is, it should be applied only to the extent required for the legitimate ends of law enforcement and maintaining public order. The officer must exercise restraint and seek to minimize damage and injury, and there should be accountability (i.e., reporting and review) for any use of force.¹⁶³

There are documented cases of pregnant women being stopped at international borders and prevented from reaching hospitals to receive appropriate medical attention, which have resulted in miscarriages and the death of some women. That amounts to violations of the right to life.

(b) Right to freedom from torture and other forms of cruel, inhuman or degrading treatment

The right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment is set out in a number of human rights treaties.¹⁶⁴ The right is absolute, meaning that it cannot be restricted under any circumstances, either through limitation or derogation. States must take all necessary and reasonable steps to protect those under their jurisdiction against acts of torture and ill treatment, regardless of their migration status or any other distinction. That protection applies whether such acts are inflicted by people acting in their official capacity,

¹⁵⁸ Including International Covenant on Civil and Political Rights, art. 6; Convention on the Rights of the Child, art. 6; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 9 and 28; Convention on the Rights of Persons with Disabilities, art. 10.

¹⁵⁹ International Covenant on Civil and Political Rights, art. 4(2).

¹⁶⁰ *Ibid.*, art. 6(1); see also Human Rights Committee, general comment No. 36 (2018), para. 14.

¹⁶¹ *Ibid.*, para. 13.

¹⁶² *Ibid.*, paras. 18-31.

¹⁶³ OHCHR, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Professional Training Series No. 5, 1997, chap. 14.

¹⁶⁴ This right is the subject of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but it is also addressed in the International Covenant on Civil and Political Rights, art. 7; Convention on the Rights of the Child, art. 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 10; among others.

outside their official capacity or in a private capacity.¹⁶⁵ There can never be any justification for border officials using methods that amount to torture or cruel, inhuman or degrading treatment or punishment in the course of their work, whether the subject is under direct control (i.e., arrested or detained) or in cases of incident control (e.g., during a riot) and regardless of whether such control is an order from a higher-ranking officer or a public authority.¹⁶⁶

There are numerous gender-specific considerations in the realization of this right. For example, humiliating and invasive identification procedures may constitute torture or ill treatment, particularly for trans individuals.¹⁶⁷ Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including rape, domestic violence or harmful practices.¹⁶⁸ Violations of sexual and reproductive health and rights, such as denial or delay of safe abortion and post-abortion care, or abuse and mistreatment of women and girls seeking sexual and reproductive health information or goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.¹⁶⁹

(c) Right to liberty and security of person

Everyone has the right to liberty and security of person.¹⁷⁰

Right to personal liberty

Liberty in this context concerns freedom from confinement of the body, not a general freedom of action or movement. Deprivation of liberty refers to 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, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.¹⁷¹ That covers detention in all its forms. Further restrictions on a person who is already detained (e.g., solitary confinement or the use of physical restraining devices) are also considered as deprivation of liberty. Furthermore, holding migrants in any facilities where individuals remain under constant surveillance, such as in the transit or international zones of stations, ports, airports, among others, may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty. The right to liberty of person is not absolute: international human rights law recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws¹⁷² (see discussion on immigration detention in [session 5](#)).

Deprivation of liberty also concerns other human rights, including the principle of non-discrimination and the rights to freedom of movement, personal integrity, privacy, health, work, education, freedom of assembly, association, expression and religion or belief. How migrants experience deprivation of liberty differs on the basis of characteristics such as gender, age, whether or not they have a disability, race or ethnicity, sexual orientation, gender identity or socioeconomic status, which combine to produce distinct forms of discrimination and risks to their human rights.¹⁷³

The causes and consequences of deprivation of liberty for migrant women are gendered. For example, a result of the limited pathways for regular migration open to women is that

¹⁶⁵ Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 2.

¹⁶⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(3).

¹⁶⁷ Special Rapporteur on torture, A/HRC/31/57, para. 36.

¹⁶⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, para. 16.

¹⁶⁹ *Ibid.*, para. 18.

¹⁷⁰ See Universal Declaration of Human Rights, art. 3; International Covenant on Civil and Political Rights, art. 9; and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 2.

¹⁷¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1) and (2).

¹⁷² International Covenant on Civil and Political Rights, art. 9.

¹⁷³ Working Group on the issue of discrimination against women in law and in practice, Women deprived of liberty, A/HRC/41/33, paras. 11, 13.

irregular status becomes a contributing factor to deprivation of liberty of migrant women.¹⁷⁴ In the context of deprivation of liberty, women's rights have, at best, been subsumed under the recognized rights of a supposedly neutral individual who is, in practice, male, or they have simply been ignored or disregarded.¹⁷⁵ Once they are detained, women, girls and LGBTI people experience their confinement in specific ways and are often at risk of heightened gender-based discrimination, stigma and violence, as well as the consequences of lack of access to health services, including sexual and reproductive health services.¹⁷⁶

Right to security of person

Under international human rights law, everyone is guaranteed security of person, which concerns freedom from injury to the body and the mind, or bodily and mental integrity.¹⁷⁷ States are required to prevent and redress any injury that may arise from discrimination against particular migrants, such as violence against women, including domestic violence, or violence against persons with disabilities.¹⁷⁸ For trans migrants and other travellers, it means that their right to bodily and mental integrity, autonomy and self-determination must be respected, including when they are deprived of their liberty.¹⁷⁹ States are obligated to prevent and redress unjustifiable use of force by State law enforcement or private security forces. The right to due process acts as a safeguard also for the right to security of person, with the requirement that the individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power as a means to inquire into the treatment that they received in custody.

(d) Right to freedom of movement

Principle A.4: States shall ensure that all border governance measures protect the right of all persons to leave any country, including their own, and the right to enter their own country.

The right to freedom of movement encompasses the right of individuals to leave any country, including their own country, and the right of individuals to enter their own country. In international human rights law, there is no right to migrate per se.

Right to leave any country, including one's own

The right to freedom of movement encompasses the right to leave any country, including one's own, for any specific purpose or period of time that the individual chooses to stay outside the country.¹⁸⁰ This right is not absolute and can be lawfully restricted, but only to protect national security, public order, public health or morals or the rights and freedoms of others.

Many legal and practical restrictions on the right to leave any country, including one's own, do not meet the requirements for such restrictions in international law, including unreasonable delays in the issuance of travel documents, restrictions on family members travelling together or the requirement of a disproportionate repatriation deposit. Some such restrictions on individuals

¹⁷⁴ Ibid., para. 59.

¹⁷⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Prevention of torture and ill-treatment of women deprived of their liberty, CAT/OP/27/1, para. 9.

¹⁷⁶ Working Group on discrimination against women, A/HRC/41/33, paras. 13, 74; and Special Rapporteur on migrants, A/HRC/41/38, para. 71.

¹⁷⁷ Human Rights Committee, general comment No. 35 (2014), para. 3.

¹⁷⁸ Ibid., para. 9.

¹⁷⁹ See OHCHR, *Living Free and Equal*, pp. 40–43; Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2007, Principle 9, A and B; and the Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles, 2017.

¹⁸⁰ International Covenant on Civil and Political Rights, art. 12(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 39; Convention on the Rights of Persons with Disabilities, art. 18; Human Rights Committee, general comment No. 27 (1999) on freedom of movement, para. 8.

leaving their own country are gendered, such as those requiring women to obtain written approval from a male family member or those banning women from migrating.

Right of an individual to enter their own country

The right to freedom of movement further encompasses the right of an individual to enter their own country.¹⁸¹ The notion of what constitutes an individual's "own country" is quite broad, including for example, an individual born outside the country but holding its nationality, who is coming to the country for the first time, or long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of residence. A State shall not arbitrarily deprive a person of the right to enter their own country, including stripping a person of their nationality or expelling an individual to a third country. The State must not arbitrarily prevent individuals from returning to their own country.

Constraints on the sovereign prerogative to bar entry

While States have a sovereign prerogative to determine entry into their territory, certain rights constrain that prerogative. Although international human rights law does not recognize the right to migrate, human rights mechanisms have affirmed that a foreigner may enjoy the right to freedom of movement, including in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.¹⁸² In terms of freedom of movement, differences in treatment of migrants and nationals or different categories of non-nationals must be provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and they must be consistent with other human rights.¹⁸³

The principle of non-refoulement provides that all individuals, regardless of migration status, have the right not to be returned or extradited to their country of origin or to another State where there are substantial grounds for believing that the person will be at risk of being subject to serious violations of their human rights, either in the country to which they would be removed or in any country to which the person may subsequently be removed. The principle of non-refoulement is a non-derogable norm of customary international law.¹⁸⁴

Similarly, the State should avoid expulsions of migrants, especially long-term residents, that would result in disproportionate interference with the right to family life.¹⁸⁵ States should further take into account that irregular entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child.¹⁸⁶ Enacting sovereign prerogative to bar entry to a child in such a situation would not be in the best interests of the child, which should always be the primary consideration when dealing with children in the context of migration.

Collective expulsion and the principle of non-refoulement are discussed further in [session 6](#) (return).

(e) Right to privacy

The right to privacy is enshrined in a number of international human rights treaties and applies to everyone, regardless of migration status.¹⁸⁷ The Special Rapporteur on the promotion and

¹⁸¹ International Covenant on Civil and Political Rights, art. 12(4),

¹⁸² Human Rights Committee, general comment No. 27 (1999), para. 5.

¹⁸³ Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 8.

¹⁸⁴ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, Revised Deliberation No. 5 on deprivation of liberty of migrants, para. 43.

¹⁸⁵ Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens, para. 28.

¹⁸⁶ Committee on the Rights of the Child, general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 62.

¹⁸⁷ Universal Declaration of Human Rights, art. 12; International Covenant on Civil and Political Rights, art. 17; Convention on the Rights of the Child, art. 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 14.

protection of the right to freedom of opinion and expression has defined “privacy” as the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how that information is used.¹⁸⁸

As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should require provision of information relating to an individual’s private life only when such information is essential in the interests of society.¹⁸⁹

States have affirmed that the same rights that people hold offline must also be protected online, including the right to privacy.¹⁹⁰ That is relevant in the context of border security and management, owing to the heightened significance of automatic screening which uses digital data, such as advance passenger information (API), passenger name records (PNR) and biometric data,¹⁹¹ and the associated concerns relating to the right to privacy and data security.¹⁹²

While concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law, including in relation to counter-terrorism measures.¹⁹³ As technology increasingly facilitates collecting more and more data about migrants and other travellers, States often work under the assumption that it is necessary to collect such data to protect national security.¹⁹⁴ Any interference with private communications, including online, must be prescribed by law and must be a necessary and proportionate means of achieving a legitimate public policy objective. The prevention of terrorism is plainly a legitimate aim, but the activities of intelligence and law enforcement agencies to achieve the aim must still comply with international human rights law. Merely to assert, without particularization, that mass surveillance technology can contribute to the suppression and prosecution of acts of terrorism does not provide an adequate justification under human rights law for its use. The greater the interference with protected human rights, the more compelling the justification must be.¹⁹⁵ The holding of personal data by State actors (or private actors contracted by the State to act on their behalf) obligates the State to ensure that every individual can exercise the right to have their records rectified or deleted if such files contain incorrect personal data.¹⁹⁶ That has implications for the use of watch lists in the border context.



For further discussion on screening at borders, including profiling, see session 4 (screening and interviewing).

¹⁸⁸ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/23/40, para. 22.

¹⁸⁹ Human Rights Committee, general comment No. 16 (2013), para. 7.

¹⁹⁰ The right to privacy in the digital age, General Assembly resolution 68/167, para. 3.

¹⁹¹ Threats to international peace and security caused by returning foreign terrorist fighters, Security Council resolution 2396 (2017).

¹⁹² Special Rapporteur on terrorism, A/69/397.

¹⁹³ *Ibid.*, para. 14; OHCHR, The right to privacy in the digital age, A/HRC/27/37; also see www.ohchr.org/en/issues/digitalage/pages/digitalageindex.aspx; The United Nations Global Counter-Terrorism Strategy Review, General Assembly resolution 70/291, paras. 19, 20; General Assembly resolutions 68/167, 69/166, 71/199, preambular paragraphs; and Human Rights Council resolutions 28/16 and 32/13.

¹⁹⁴ OHCHR-Global Alliance Against Traffic in Women, Expert consultation on human rights at international borders: exploring gaps in policy and practice, Background Paper, 2012, p. 13. Available at www.ohchr.org/EN/Issues/Migration/Pages/OHCHRExpertconsultationExploringGapsinPolicyandPractice.aspx.

¹⁹⁵ All data monitoring, interception, storage, etc. is subject to the provisions of article 17 of the International Covenant on Civil and Political Rights; see also Special Rapporteur on terrorism, A/69/397, in particular paras. 10–12.

¹⁹⁶ Human Rights Committee, general comment No. 16 (1988), para. 10; and general comment No. 34 (2011) on the freedoms of opinion and expression, para. 18.

(f) Right to freedom of expression

The right to freedom of expression is covered by a number of international human rights treaties.¹⁹⁷ It includes political discourse, commentary on public affairs, discussion of human rights, journalism, cultural and artistic expression and religious discourse.¹⁹⁸ It also covers some of the activities of civil society, including those supporting the rights of migrants, which sometimes face the same anti-migrant discourse that is directed at migrants themselves in exercising their freedom of expression.

Right to freedom to share information

The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of the person's choice.¹⁹⁹ Such information includes political discourse, commentary on public affairs, discussion of human rights, journalism, and religious discourse, even those which may cause offence.²⁰⁰ To give effect to the right of access to information, States should proactively put in the public domain and ensure easy, prompt, effective and practical access to Government information of public interest.²⁰¹ That would include information about documentation requirements for migrants and processes relating to their arrival and stay that should be available in a language that they can understand and in accessible formats, including for persons who are illiterate, and child-friendly information in age-appropriate language and formats.²⁰² States have affirmed the importance of providing accurate and timely information at all stages of migration.²⁰³

Right to freedom of expression at borders

One aspect of the right to freedom of expression, along with the right to privacy, that is relevant in border security and management is the right of every individual to ascertain in an intelligible form, whether and what personal data is stored by public authorities and for what purposes, and to access those records and correct any errors.²⁰⁴ That may be relevant to individuals who find themselves on watch lists that are used for screening or other purposes. States are required to ensure the right to due process and an effective remedy in the construction and management of those lists.

Some States are also demanding travellers' social media account information as a condition for entry. At least one State has introduced a ban on any traveller who has worked in support of a boycott action against it.²⁰⁵ As border security screening is increasingly expanding to include searches of individuals' mobile phones and other computer equipment, States often distinguish between the obligations owed to nationals and to non-nationals, although international human rights law is explicit with regard to the principle of non-discrimination.²⁰⁶ Any measures to ensure that interference with the rights of individuals, including the right to freedom of expression,

¹⁹⁷ Including International Covenant on Civil and Political Rights, art. 19(2); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(viii); Convention on the Rights of the Child, art. 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 13(2); Convention on the Rights of Persons with Disabilities, art. 21.

¹⁹⁸ Human Rights Committee, general comment No. 34 (2011), para. 11.

¹⁹⁹ International Covenant on Civil and Political Rights, art. 19(2).

²⁰⁰ Human Rights Committee, general comment No. 34 (2011), para. 11. The right to freedom of expression, including the right to information, may be restricted when provided by law and necessary for respect of the rights or reputations of others, or for the protection of national security, of public order (ordre public), or of public health or morals. See International Covenant on Civil and Political Rights, art. 19(3).

²⁰¹ Human Rights Committee, general comment No. 34 (2011), para. 19.

²⁰² New York Declaration for Refugees and Migrants, para. 42; and Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/69/335, paras. 12, 13, 18, 19, 65, 89.

²⁰³ Global Compact for Safe, Orderly and Regular Migration, para. 19 (Objective 3).

²⁰⁴ Human Rights Committee, general comments No. 16 (1988), para. 10, and No. 34 (2011), para. 18.

²⁰⁵ Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/34/70, para. 60.

²⁰⁶ International Covenant on Civil and Political Rights, art. 26.

which encompasses the right to hold opinions without interference,²⁰⁷ and the right to privacy, must comply with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance.²⁰⁸

(g) Right to family life (including family reunification)

International human rights law recognizes the centrality of family in society and that various forms of family exist, including broad interpretations of “parents”.²⁰⁹ Protection of the family and its members and family unity is also guaranteed, directly or indirectly, by other rights such as the right to privacy, which prohibits arbitrary or unlawful interference with the family.²¹⁰ Protection of the right to a family environment frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including the reunion of separated family members.²¹¹

The right to found a family implies, in principle, the possibility for people to live together, which for migrants implies the adoption of appropriate measures to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.²¹² The Convention on the Rights of the Child explicitly prohibits the arbitrary separation of children from their parents.²¹³ That is sufficiently important that it can serve to override States’ sovereign prerogative to bar entry to non-nationals. Human rights guidance has affirmed that a foreigner may enjoy the right to freedom of movement, including in relation to entry or residence, when considerations relating to family life arise.²¹⁴ However, family reunification measures may be directly or indirectly discriminatory, for example, against migrant women when they do not extend to workers in certain sectors, such as domestic workers, or migrants who are unable to prove a certain income threshold.

The Convention on the Rights of the Child imposes positive obligations for States to take all necessary measures to identify children who are unaccompanied or separated at the earliest possible stage, including at the border. States must also carry out tracing activities and, where possible and if in the child’s best interests, reunify separated and unaccompanied children with their families as soon as possible in a positive, humane and expeditious manner with no adverse consequences for the applicants and the members of their family. The preservation of the family

²⁰⁷ The right to freedom of opinion is a right to which no exception or restriction is permitted. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of international human rights law. See Human Rights Committee, general comment No. 34 (2011), para. 9.

²⁰⁸ OHCHR, The right to privacy in the digital age, A/HRC/27/37, para. 36; Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, para. 22.

²⁰⁹ See for example, Universal Declaration of Human Rights, art. 16; International Covenant on Civil and Political Rights, art. 23(1); Convention on the Rights of the Child, art. 10; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 44(1); Convention on the Rights of Persons with Disabilities, art. 23; Human Rights Committee, general comment No. 16 (1988), para. 5, and general comment No. 19 (1990) on the family, para. 2; Committee for the Elimination of Discrimination against Women, general recommendation No. 21 (1994) on equality in marriage and family relations, para. 13; Committee on the Rights of the Child, general comment No. 14 (2013) on the best interests of the child, para. 59; Programme of Action adopted at the International Conference on Population and Development, Cairo, 5–13 September 1994, A/CONF.171/13, Principle 9 and para. 5.1; Beijing Platform for Action adopted at the Fourth World Conference on Women, 4–15 September 1995, A/CONF.177/20, para. 29; also A/CONF.177/20/Add.1; A world fit for children, General Assembly resolution S-27/2, para. 15; Celebration of the tenth anniversary of the International Year of the Family and beyond, General Assembly resolution 59/147, 2nd and 3rd preambular paragraphs.

²¹⁰ Universal Declaration of Human Rights, art. 12; International Covenant on Civil and Political Rights, art. 17; Human Rights Committee, general comment No. 19 (1990), para. 1.

²¹¹ Joint general comment No. 4 (2017) of the Committee on Migrant Workers / No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 7.

²¹² Human Rights Committee, general comment No. 19 (1990), para. 5.

²¹³ Convention on the Rights of the Child, art. 9. Any separation of a child from parents must be determined by competent authorities and subject to judicial review to be in the best interests of the child.

²¹⁴ Human Rights Committee, general comment No. 27 (1999), para. 5; Joint general comment No. 4 (2017) of the Committee on Migrant Workers / No. 23 (2017) of the Committee on the Rights of the Child, paras. 28–29.

unit is an important component of the child protection system and a factor in assessing the best interests of child migrants or children of migrants in decisions on family reunification.²¹⁵

Maintaining family unity should never form the justification for the detention of children whose parents/guardians are detained; alternatives to detention should instead be applied to the entire family.²¹⁶ Similarly, family reunification should never be used to justify expedited return processes. Efforts to ensure family reunification may require legal assistance, and legal and administrative protection at the bi-national level, to enable parents who have been deported from a State to reunite with their children (i.e., exercise their right to family unity and secure custody of their children).²¹⁷

(h) Best interests of the child

The principle of the best interests of the child is the primary consideration for all actions concerning children at international borders and should always take precedence over migration management objectives or other administrative considerations.

Principle A.6: The best interests of the child shall be a primary consideration applicable to all children who come under the State's jurisdiction at international borders, regardless of their migration status or that of their parents. States shall ensure that children, in the context of migration, are treated first and foremost as children and ensure that the principle of the child's best interests takes precedence over migration management objectives or other administrative considerations.

A determination of best interests must be documented in preparation of any decision fundamentally impacting the child's life. Border authorities and officials should develop and put into practice a best-interests determination procedure aimed at identifying and applying comprehensive, secure and sustainable solutions for unaccompanied or separated children, and children with families.²¹⁸ The following are elements to consider for such a procedure:

- ▶ Be a formal and multidisciplinary procedure carried out by actors independent of the migration authorities, including a meaningful participation of authorities responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, as well as the child;
- ▶ Contain appropriate safeguards, including the rights of the child to be heard and to have competent and independent legal representation;
- ▶ Assess fairly and equally all the solutions that are available to the child;
- ▶ Take into account the family environment and whether proper care and custody can be provided for the child.

²¹⁵ Convention on the Rights of the Child, art. 10.1; Committee on the Rights of the Child, general comment No. 6 (2005) paras. 13, 81; Committee on the Rights of the Child, general comment No. 14 (2013), paras. 60, 66; Inter-American Court of Human Rights, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion of 19 August 2014, para. 105. Available at www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf.

²¹⁶ Inter-American Court of Human Rights, Rights and guarantees of children in the context of migration and/or in need of international protection, paras. 158, 160; Special Rapporteur on torture, A/HRC/28/68, para. 80; Special Rapporteur on migrants, A/HRC/20/24, para. 72(h).

²¹⁷ Committee on Migrant Workers, Concluding observations on the initial report of Honduras, CMW/C/HND/CO/1, paras. 55(d) and (e).

²¹⁸ UNHCR has developed guidance on how to operationalize the principle of the best interests of the child for refugee children, but it could be adapted for children who are not refugees. See UNHCR, Guidelines on Determining the Best Interests of the Child (2008). See also, Joint general comment No. 3 (2017) of the Committee on Migrant Workers / No. 22 (2017) of the Committee on the Rights of the Child, para 32(i); and Committee on the Rights of the Child, general comment No. 6 (2005), paras. 19–22.

Children must be treated first and foremost as children, and where there is any doubt as to the age of a migrant, the child shall have the right to the rule of the benefit of doubt.²¹⁹

(i) Right to due process and fair trial guarantees

The administration of justice must be independent and effective, and able to ensure that the human rights of migrants are not limited by the migration policies of the State. Due process safeguards ensure that any restrictions to rights are strictly limited and do not impair the essence of the rights.²²⁰ Though often formulated in reference to criminal proceedings, those standards also apply to administrative measures, including immigration hearings such as appeals against detention or deportation orders. States' due process obligation also applies to counter-terrorism measures, where failure to respect international human rights obligations and the rule of law contributes to radicalization, which may lead to violent acts and a sense of impunity.²²¹

Access to justice for migrants at international borders may be challenged by the concentration of courts and quasi-judicial bodies in main cities and scarcity in rural and remote regions.²²²

At international borders, procedural safeguards provided to ensure the right to due process protect the right to liberty and ensure that migrants are not subject to arbitrary or unlawful arrest or detention or arbitrary or collective expulsions. They also provide effective remedies if the right to liberty is compromised.²²³

Those procedural safeguards include prompt access to legal aid, adequate time and facilities to prepare for the hearing and to communicate with a counsel of their choice, taking into account the individual's age if they are a child and so on. The right of access to courts and tribunals and equality before them is not limited to citizens,²²⁴ but must be available to all individuals, regardless of nationality or migration status, who find themselves in the territory or subject to the jurisdiction of the State.²²⁵ The right to a fair trial includes the principle of equality before the law, the right to be presumed innocent, and the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal established by law.²²⁶ It includes the right of access to a freely chosen legal counsel, and States are encouraged to provide free legal aid.²²⁷ Crucially for many migrants, it also includes the right to have the free assistance of an interpreter in criminal proceedings if they cannot understand or speak the language used in court.²²⁸



See sessions 5 and 6 for due process safeguards in the context of immigration detention and returns, respectively.

²¹⁹ Convention on the Rights of the Child, art. 3; Committee on the Rights of the Child, general comment No. 6 (2006), paras. 19–22, 31(i); general comment No. 10 (2007) on children's rights in juvenile justice, para. 39; general comment No. 14 (2013); and joint general comment No. 3 (2017) of the Committee on Migrant Workers / No. 22 (2017) of the Committee on the Rights of the Child, para. 32(i).

²²⁰ Human Rights Committee, general comment No. 27 (1999), para. 13; general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 18.

²²¹ Special Rapporteur on terrorism, A/71/384, para. 44, with reference to Security Council resolution 2178 (2014).

²²² Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, para. 13.

²²³ See Human Rights Committee, general comment No. 35 (2014) for a discussion of arbitrary detention, in particular para. 18 on detention in the course of proceedings for the control of immigration.

²²⁴ International human rights and labour treaties contain guarantees relating to the right of access to courts and tribunals, and equality before them. See, for example, Universal Declaration of Human Rights, arts. 7 and 8; International Covenant on Civil and Political Rights, arts. 14 and 26; Convention on the Elimination of All Forms of Discrimination against Women, art. 15; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 18; Convention on the Rights of Persons with Disabilities, arts. 5, 13.

²²⁵ Human Rights Committee, general comment No. 32 (2007), para. 9.

²²⁶ International Covenant on Civil and Political Rights, art. 14. Anyone deprived of their liberty also has the right to bring proceedings before a court, which shall decide without delay on the lawfulness of the detention, and to obtain appropriate remedies. See Working Group on Arbitrary Detention, A/HRC/39/45, Annex, paras. 28–30.

²²⁷ International Covenant on Civil and Political Rights, art. 14(3)(b); Human Rights Committee, general comment No. 32 (2007), para. 10; Committee on Migrant Workers, general comment No. 2 (2013), para. 33.

²²⁸ Human Rights Committee, general comment No. 32 (2007) para. 40.

Women migrants are often unable to access justice, owing to factors such as lack of access to quality, gender-competent legal advice, including legal aid, as well as gender-insensitive judgments/decisions due to lack of training, unequal gender representation in law enforcement and judiciary, gender stereotypes or prejudice influencing evidentiary rules, investigations and other legal and quasi-judicial procedures, among others.²²⁹ Discrimination and stereotyping may lead to the denial of claims made by women for asylum or other humanitarian stay, and thus increase their risk of migration-related detention or incarceration for immigration-related offences. For example, some legal systems require that asylum claims be submitted through a male head of household, and do not accept that women can claim asylum as individuals; also immigration judges may apply stricter standards to women, owing to gender bias.

(j) Right to health

States are required to respect, protect and fulfil the right to health of everyone within its jurisdiction, including migrants, and to improve the underlying determinants of health, such as education, nutritious food, potable water, adequate sanitation, and safe and healthy work and living conditions.²³⁰ The conditions in which migrants may be compelled to travel, especially in the context of large movements, often deny them those essential underlying determinants of their right to health.²³¹ States should ensure that their national health policy does not discriminate against non-nationals and addresses the needs of irregular and regular migrants at all stages of the migration process, including predeparture and return.²³²

At international borders, migrants' right to health may be at risk due to their underlying health conditions, the policies and practices of the States they are leaving and seeking to enter or their experiences, including human rights abuses, in transit. Border officials are required to employ medical professionals and health-care workers to provide individual health and medical screenings as a matter of priority, make referrals for further treatment, including mental health referrals, as necessary, and carry emergency health equipment when conducting interceptions or rescues. Accessing necessary and appropriate treatment is often complicated by factors such as legal barriers (especially for migrants with irregular status), cost, stigma, and cultural and linguistic issues.

States may impose immigration policies, such as compulsory medical testing (e.g., for pregnancy or HIV), detention and deportation, unilaterally or in bilateral arrangements between States. Such immigration policies should be in conformity with States' obligations under international human rights law, including the right to health and its obligations to ensure informed consent and respect the rights to autonomy, privacy, dignity and confidentiality of health information.

Health status is one of the prohibited grounds of discrimination under international human rights law. Compulsory testing, especially for HIV, is a violation of the right to health and stigmatizes

²²⁹ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 13, 15(f), 18(e), 26–29; OHCHR, *Manual on Human Rights Monitoring*, chap. 28, p. 40.

²³⁰ International Covenant on Economic, Social and Cultural Rights, art. 12; Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health.

²³¹ OHCHR, Promotion and protection of the human rights of migrants in the context of large movements, A/HRC/33/67, para. 52.

²³² Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 34; general comment No. 20 (2009), paras. 30, 38; Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004), para. 36; Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016) on women and girls with disabilities, para. 39; see also, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/23/41, para. 11.

those who are deported based on positive test results. Such testing is also counterproductive to the public health approach.²³³

The right to sexual and reproductive health is an integral part of the right to health.²³⁴ States are obligated to protect and fulfil the sexual and reproductive health and rights of all adults and youth to have control over and decide freely and responsibly on all aspects of their sexuality, including their sexual and reproductive health, free from coercion, discrimination and violence. That means providing, through the primary health-care system and with effective referral to specialized care, services for sexual and reproductive health, including information and comprehensive sexuality education, emergency obstetrics and skilled attendance at delivery, safe and effective contraception, safe and legal abortion and post-abortion care, treatment for complications of unsafe abortion, prevention and treatment of sexually transmitted infections, HIV/AIDS and reproductive cancers.

Women migrants may find themselves in irregular situations and therefore at risk of deportation, for example, if they are dismissed from employment for being pregnant. In such situations, some may decide to terminate their pregnancy, thereby risking their health and liberty in States where they do not have access to safe and legal abortion, to avoid deportation.²³⁵ Denying access to safe abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the rights to life and security of person, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.²³⁶

Guideline 5.2: Provide individual health and medical screenings as a matter of priority.

While compulsory testing of migrants at the border may represent a violation of rights, border authorities should consider providing individual health and medical screenings as a matter of priority for all migrants intercepted or rescued (for further discussion, see [session 4.2.4](#)). Any testing must respect the rights to privacy, informed consent, confidentiality, dignity and non-discrimination.²³⁷ The changes to an individual's cultural and environmental situation and disruptions to family and social networks owing to migration can be stressful and may impact the mental health of migrants. Such conditions are often underreported in part because of the stigma associated with mental illness. Experiences of difficult and drawn out migratory journeys, being the target of or witness to human rights violations, prolonged periods in immigration detention – or in the case of children, even a short time in detention, especially if separated from family – can be detrimental to a migrant's mental health.²³⁸ Although migrants display considerable resilience, the effect of precarious movement on the mental health of migrants is

²³³ Special Rapporteur on health, A/HRC/23/41, paras. 28–33 on immigration policies; OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, p. 47: Compulsory (pre-departure/on arrival) testing for HIV does not take into account the window needed for an accurate test and may lead to false results or the avoidance of being tested (such as by using forged test documents) that could be harmful for the individual tested or for wider public health concerns (see A/HRC/23/41, para. 30). States have committed to enact legislation eliminating any remaining HIV-related restrictions on entry, stay and residence. See Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, General Assembly resolution 65/277, para. 79; Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030, General Assembly resolution 70/266, para. 63(g); IOM, WHO and OHCHR, *International Migration, Health and Human Rights*, pp. 33–35.

²³⁴ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016); Special Rapporteur on migrants, A/HRC/41/38, paras. 61–62.

²³⁵ Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008), para. 18; Special Rapporteur on health, A/HRC/23/41, paras. 33, 73–74.

²³⁶ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 10.

²³⁷ Special Rapporteur on health, A/HRC/23/41, para. 73.

²³⁸ Special Rapporteur on migrants, A/HRC/14/30, para. 24; OHCHR, A/HRC/33/67, paras. 36, 37, 40, 51–54; Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 39; OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, p. 45.

often dramatic, with up to half of all migrants in large movements suffering from post-traumatic stress disorder.²³⁹

Migrants often have health issues associated with long, traumatic and exhausting journeys in which they may have experienced injury, hypothermia, burns, dehydration, untreated infections and violent trauma, owing to violence suffered during their journey. Stricter restrictions on movement and entry, and the consequent use of irregular and clandestine routes, can increase health risks as well as reduce migrants' ability to exercise informed choices concerning their health. There have been reports of women migrants being given predeparture contraceptive injections, which may be forced, to control women's sexual and reproductive health as part of a work contract. In some circumstances, migrant women and girls may take that decision based on their knowledge of the serious risks along some of the more dangerous migration routes.²⁴⁰

(k) Right to food

The human right to adequate food is recognized in several instruments under international law.²⁴¹ It is indivisibly linked to the inherent dignity of the human person, crucial to enable the enjoyment of other rights and applies to everyone without discrimination.²⁴²

At international borders, the State should ensure that anyone delayed or detained, including following interception and rescue, has access to nutritional and culturally appropriate food in sufficient quantity and quality and free from adverse substances, to satisfy an individual's dietary needs. Such needs may differ according to the life cycle and gender of the individual, for example, women who are breastfeeding.²⁴³ States are also obligated to ensure that any private companies involved in any aspect of border management are acting in conformity with the right to food.²⁴⁴

(l) Right to water and sanitation

Water is essential for life. The human right to water²⁴⁵ entitles everyone, without discrimination, to sufficient, safe, acceptable quality, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease, and provide for consumption, cooking, personal and domestic hygienic requirements. Some individuals and groups may also require additional water, owing to health, climate and work conditions.²⁴⁶

At international borders, the right to water obligates States to provide or ensure access to sufficient potable water for the individual and their family's personal use or, if they are in reception facilities,

²³⁹ OHCHR, A/HRC/33/67, para. 53; Special Rapporteur on torture, A/HRC/37/50, para. 8; IOM, WHO and OHCHR, *International Migration, Health and Human Rights*, pp. 36–38.

²⁴⁰ Special Rapporteur on migrants, A/HRC/14/30, para. 29; Special Rapporteur on health, A/HRC/23/41, para. 73; United Nations Support Mission in Libya (UNSMIL) and OHCHR, "Detained and dehumanized": Report on human rights abuses against migrants in Libya", 2016; Thematic session 6 on the Global Compact for Safe, Orderly and Regular Migration: Irregular migration and regular pathways, including decent work, labour mobility, recognition of skills and qualifications and other relevant measures, UN Women Intervention, Panel 1 (Geneva, 12–13 October 2017); UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico*, 2015.

²⁴¹ Most notably in the International Covenant on Economic, Social and Cultural Rights, art. 11; see also Convention on the Rights of the Child, arts. 24(2)(c), 27(3); Convention on the Rights of Persons with Disabilities, arts. 25(f), 28(1).

²⁴² Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food, paras. 1, 4, 18.

²⁴³ *Ibid.*, paras. 8, 9, 15. The Committee clarifies that "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters" (para. 15).

²⁴⁴ *Ibid.*, paras. 20, 27; see also Sustainable Development Goal 6: Ensure availability and sustainable management of water and sanitation for all.

²⁴⁵ International Covenant on Economic, Social and Cultural Rights, art. 11(1); Convention on the Elimination of all Forms of Discrimination against Women, art. 14(2); Convention on the Rights of the Child, art. 24(2); Convention on the Rights of Persons with Disabilities, art. 28(2)(a).

²⁴⁶ Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, paras. 2, 12(a).

for domestic uses. Access to water should be non-discriminatory and safe. No one should be disadvantaged or have their personal security put at risk in order to physically access water.²⁴⁷ Many migrants arriving at international borders, especially those arriving in the context of large movements, will be dehydrated following long journeys, such as through the desert or at sea.²⁴⁸

Access to adequate sanitation is fundamental for human dignity and privacy. It is also one of the principal mechanisms for protecting the quality of drinking water supplies and resources.²⁴⁹ States are also obligated to ensure that everyone, without discrimination, has physical and affordable access to sanitation. That requires sanitation facilities that are safe, hygienic, secure, socially and culturally acceptable, and that provide privacy and ensure dignity.²⁵⁰ The availability of facilities, goods and services for the guarantee of safe and potable drinking water and adequate sanitation facilities are some of the underlying determinants of the realization of the right to sexual and reproductive health.²⁵¹

Sanitation is an issue for reception facilities at international borders, especially in the context of large movements or detention, where migrants are often compelled to live without proper housing and sanitation, resulting in them developing skin diseases related to poor hygiene.²⁵² Even when receiving States have limited resources, they cannot justify “restricting the enjoyment of the essential content” of economic, social and cultural rights owing to lack of resources. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, resource scarcity does not relieve States of their minimum obligations, which are non-derogable, to realize economic, social and cultural rights. States, particularly economically developed States, have no justification for providing substandard water and sanitation services or for providing poor living conditions as a means of discouraging migrants from entering the territory or of expelling them.²⁵³

Gender-based inequalities in relation to access to sanitation should also be addressed, as facilities may be sites of increased risk of gender-based violence. States should ensure toilet and washing facilities that are safe for women, trans, intersex and non-binary individuals, as well as products, facilities and privacy for menstrual hygiene management. The human rights to water and sanitation include the right of everyone to affordable, safe and hygienic menstruation materials, which should be subsidized or provided free of charge, when necessary. To reduce the risk of women and girls experiencing violence, gender considerations in communal water and sanitation facilities should include measures such as gender-segregated cubicles, proximity to living quarters, and lighted pathways to and at facilities. It should be noted, however, that such measures may not eliminate the risk of gender-based violence as they do not address the root causes of violence. In addition, although gender-segregated sanitation facilities may be a solution for some, they may create a danger for others: individuals who are transgender or who do not conform to a fixed idea of gender (e.g., non-binary individuals) may experience violence and abuse when using gender-segregated sanitation facilities.²⁵⁴

(m) Right to an effective remedy

For human rights to have meaning, States must provide effective remedies to redress any violations, including gender-responsive and victim-centred reparations. Remedies should be adequate, effective, promptly attributed, holistic and proportionate to the gravity of the harm

²⁴⁷ Ibid., paras. 12(c)(iii), 13–16, 37(b) and (d); Committee on the Elimination of Discrimination against Women, general recommendation No. 37 (2018), para. 5.

²⁴⁸ OHCHR, A/HRC/33/67, para. 21.

²⁴⁹ Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), para. 29.

²⁵⁰ Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/39/55, para. 9.

²⁵¹ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 12.

²⁵² Committee on Economic, Social and Cultural Rights, No. 15 (2002), para. 15, 37(i); Special Rapporteur on water and sanitation, A/HRC/39/55, para. 17; OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, pp. 68–70.

²⁵³ Special Rapporteur on water and sanitation, A/HRC/39/55, para. 19.

²⁵⁴ Special Rapporteur on water and sanitation, A/HRC/33/49, paras. 2, 15, 30, 34, 35, 39, 44, 58; Sustainable Development Goal 6.2: By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.

suffered. Adequate reparation may take the form of restitution, compensation – in the form of money, goods or services –, satisfaction, rehabilitation (including medical and psychological care and other social services) or guarantees of non-repetition. The importance of redress for human rights abuses is central to international human rights law, and the right to remedy is provided for throughout human rights standards and guidance.²⁵⁵ Ensuring that redress and reparations are just and adequate requires a full understanding of the gendered-nature and consequences of the harm suffered by all genders, and of the stigma that is often associated with such harms, which can mean that the individual no longer has access to the same opportunities that they would have had, if such violence had not taken place.²⁵⁶

Principles:

A.7: The right to due process of all migrants, regardless of their status, shall be protected and respected in all areas where the State exercises jurisdiction or effective control. This includes the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal.

C.13: States shall ensure that all migrants who have suffered human rights violations or abuses as a result of border governance measures have equal and effective access to justice, access to effective remedies, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanism. States shall investigate and, where warranted, prosecute human rights violations and abuses, impose sentences commensurate with the seriousness of the offence and take measures to ensure non-repetition.

Guidelines:

1.10: Establish official mechanisms and/or procedures to provide effective remedies for violations of human rights at international borders.

2.12: Provide concrete mechanisms to ensure accountability of private actors and remedies in the case of human rights abuses.

4.6: Ensure the accountability of private actors involved in implementing entry restriction measures and provide effective remedies for unlawful transgressions.

²⁵⁵ More broadly, international human rights law and guidance on remedies for human rights violations against migrants at international borders includes: International Covenant on Civil and Political Rights, arts. 2(3), 9(5), 14(6); International Convention on the Elimination of All Forms of Racial Discrimination, art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 16(9), 18(6), 22(5); Declaration on the Elimination of Violence against Women, art. 4(d); Human Rights Committee, general comment No. 15 (1986), para. 10; Committee against Torture, general comment No. 3 (2012) on the implementation of article 14; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 64; Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, A/47/38, in particular, paras. 24(i) and 24(t)(i); Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008), paras. 26(c) and (l); Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015), paras. 14, 19; Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004), paras. 18, 25; Committee on Migrant Workers, general comment No. 2 (2013), paras. 35, 53, 54; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, paras. 24–25; and general comment No. 14 (2013), para. 15(c); joint general comment No. 4 (2017) of the Committee on Migrant Workers / No. 23 (2017) of the Committee on the Rights of the Child, paras. 12, 14, 15, 44(d); Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, Annex; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, Annex; Basic principles on the right to an effective remedy for victims of trafficking in persons, A/69/269, Annex.

²⁵⁶ See, for example, Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence, June 2014: “Some of the principles outlined in this note are also applicable to UN engagement with regard to reparations for victims of sexual and gender based violence outside a conflict or post-conflict situation, as well as to victims of other violations of international human rights law and international humanitarian law” (p. 2). Available at www.unwomen.org/-/media/headquarters/attachments/sections/docs/2014/unsg-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf?la=en&vs=1356.

7.9: Ensure individuals are immediately informed of their rights and obligations, and of remedies available to them.

8.14: Provide migrants in detention with free and independent legal aid to access an effective remedy for human rights violations and abuses.

9.5, 9.8, 9.22: Ensure detained individuals are informed of and understand possible remedies to challenge pre-removal detention or removal orders, and how to access an effective remedy in or from the returning country.

1.3.4. Discussion: Human rights apply to everyone, everywhere ...

Human rights apply equally in all contexts, including:

If the person is in a neutral, buffer or disputed area (so-called “no-man’s land”)

- ▶ Airport transit areas are examples of what are often considered as neutral areas in the border context. Although different or fewer rules may apply, for example, purchasing duty-free goods, in reality they are part of a State’s territory and within the jurisdiction of that State.
- ▶ Buffer zones between two countries have several functions, including providing safety zones and humanitarian space outside of conflict areas for civilians and non-nationals; there are several mentions of such areas in the Geneva Conventions.²⁵⁷ They may also serve as fortified spaces to reduce opportunities for the smuggling of migrants.
- ▶ In international waters, States have duties to cooperate in search and rescue responses; and coastal States have an obligation under international maritime law to develop adequate search and rescue services and provide initial assistance. Rescued persons may come under the jurisdiction of the coordinating State, either because the boats are registered in (i.e., under the flag) that State or because the State has taken control of coordinating the interception.
- ▶ There are no zones of exemption from international human rights law, including along international borders. Human rights law obligates States to provide protection to all persons under their territorial jurisdiction and effective control.

If the person is suspected of terrorism or is on a watch list

- ▶ There is no agreed international definition of “terrorism”. Definitions in national law vary from one State to another and border authorities should not rely on the country of origin’s definition of terrorism. Many States have adopted overly broad definitions of terrorism that cover peaceful dissent or acts that are lawful under international humanitarian law.²⁵⁸
- ▶ Border authorities must always take a human rights-based approach to all individuals, following practices that allow systematic checks of individuals who are considered to pose a risk following a risk assessment that is based on objective specific intelligence and behavioural indicators, and not on broad profiles based on factors such as race, ethnicity, religion, gender or age.

²⁵⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 60 – Demilitarized zones; Geneva Convention relative to the Protection of Civilian Persons in Time of War of (Fourth Convention), art. 14, referring to hospital and safety zones; and art. 15 referring to neutralized zones intended as shelters.

²⁵⁸ Special Rapporteur on terrorism, A/71/384, paras. 25, 46.



Refer to session 4 (screening and interviewing) for more on assessing risk.

- ▶ Terrorist watch lists, such as no-fly lists, may be constituted without due process and effective independent oversight.²⁵⁹ It is very difficult for individuals to challenge or correct the list once they have been placed on one.²⁶⁰ For example, it is an issue particularly for people who come from cultures with a limited number of names in circulation. A number of errors and privacy concerns have emerged in situations where such lists are known to be used. Identification processes must be performed with great care, and the lists must be continuously checked for errors to ensure data integrity. Unjustified inclusion of a person on a watch list can constitute a violation of their right to privacy and their right to freedom of movement, among others.²⁶¹ The principle of transparency must be upheld so that individuals can be informed as to why and how they have been included on watch lists or how their profile was developed, and of the mechanisms for appeal without undue burden.

If the person was smuggled across the border or does not have any papers

- ▶ In the case of smuggling of migrants, international (criminal) law calls upon States not to criminalize the migrant who has been smuggled.²⁶² Similarly, the fact that migrants were smuggled does not deprive them of any rights with regard to access to protection and assistance measures. For migrants who do not have the correct (or any) identity documents for regular migration, human rights guidance provides that irregular entry and stay in a country by migrants should not be treated as a criminal offence.²⁶³ International law recognizes that individuals seeking asylum often need to enter the country in which they will make their asylum claim without proper documentation, and has affirmed that refugees should not be penalized for irregular entry.²⁶⁴

Principle A.5: States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders shall not adversely affect the enjoyment of the human rights and dignity of migrants.

Guideline 2.4 on non-criminalization of migration.

In situations of large movements of migrants or mixed migrations

- ▶ In recent years, there have been large movements of mixed migrations from and through most regions of the world. Regardless of why or how migrants reach a border, human rights protections apply, and border officials must take them into account. Individuals who do not specifically request asylum cannot be simply rejected at the border or

²⁵⁹ United Nations, Office of Counter-Terrorism, *Human Rights and Screening in Border Security and Management*, pocketbook, 2018, pp. 14–15.

²⁶⁰ Special Rapporteur on terrorism, A/71/384, para. 26.

²⁶¹ Special Rapporteur on terrorism, A/HRC/13/37, para. 27; Human Rights Committee, *Sayadi and Vinck v. Belgium*, communication No. 1472/2006, in particular paras. 10.8, 10.13, 11.

²⁶² Smuggling of Migrants Protocol, art. 5.

²⁶³ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para.10: "...the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows".

²⁶⁴ Convention relating to the Status of Refugees, art. 31(1) "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

returned. States have reaffirmed that human rights are central to border management, particularly in the context of large movements of migrants: “Recognizing that States have rights and responsibilities to manage and control their borders, we will implement border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law.”²⁶⁵

As can be seen from these examples, States have the same obligations to protect the rights of migrants and other travellers, as they do for their own citizens.

To start the discussion

- ▶ Ask learners if they have any other examples/questions about where, when and to whom human rights apply. Trainers may add other examples/questions that are applicable to the training context.



This may be a good time to emphasize that human rights law continues to apply in situations of armed conflict.

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Since human rights obligations derive from recognition of the inherent rights of all human beings and that those rights could be affected both in times of peace and in times of war, international human rights law continues to apply in situations of armed conflict.

There is nothing in the international human rights treaties to indicate that they would not be applicable in times of armed conflict (see OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, 2011 (HR/PUB/11/01), pp. 5-6. Available at www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf).

1.4. Key human rights principles at international borders

1.4.1. Recommended principles and guidelines on human rights at international borders



Distribute copies of OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014) and/or provide link to the online version.

OHCHR issued the *Recommended Principles and Guidelines on Human Rights at International Borders* in 2014, following wide-ranging expert consultation aimed at supporting States in fulfilling their obligations to govern their borders in accordance with international human rights law and other relevant standards.²⁶⁶

Underpinning the *Principles and Guidelines* is the belief that respecting the human rights of all migrants, regardless of their nationality, migration status or other circumstances, facilitates effective border governance.

This is also true in the context of counter-terrorism. Security and the protection of the rights of migrants are not opposing goals; they are complementary and mutually reinforcing. Failure to respect human rights and the rule of law contributes to radicalization – which may lead to violent acts – and a sense of impunity.²⁶⁷

²⁶⁵ New York Declaration for Refugees and Migrants, para. 24.

²⁶⁶ See www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx.

²⁶⁷ Special Rapporteur on terrorism, A/71/384, paras. 44, 46, 54; Security Council resolution 2178 (2014), preamble.

1.4.2. Key principles to uphold at international borders

The *Principles and Guidelines* set out three overarching principles. Like the guidelines that follow them, the principles are all derived from international human rights law. They describe the obligations of States to protect, respect and fulfil the human rights of all migrants at international borders.

Principle A: The primacy of human rights

The *primacy of human rights* calls for human rights to be at the centre of all border governance measures.

The seven points included under this principle recommend that States:

- ▶ Implement their international legal obligations with regard to their borders in good faith;
- ▶ Put human rights at the centre of governance of their borders;
- ▶ Respect, protect and fulfil human rights wherever they exercise authority and control, including extraterritorially and over private-sector actors;
- ▶ Ensure the protection of the right of all persons to leave any country and to enter their own country;
- ▶ Ensure that measures aimed at addressing irregular migration and transnational organized crime do not adversely affect the human rights and dignity of migrants;
- ▶ Hold the best interests of the child as the primary consideration applicable to all children at international borders;
- ▶ Ensure due process, including the rights to an individual examination, to a judicial and effective remedy, and to appeal.

Principle A: The primacy of human rights

A.1. States shall implement their international legal obligations in good faith and respect, protect and fulfil human rights in the governance of their borders.

A.2. States shall ensure that human rights are at the centre of the governance of migration at international borders.

A.3. States shall respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially. The privatization of border governance functions does not defer, avoid or diminish the human rights obligations of the State.

A.4. States shall ensure that all border governance measures protect the right of all persons to leave any country, including their own, and the right to enter their own country.

A.5. States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders shall not adversely affect the enjoyment of the human rights and dignity of migrants.

A.6. The best interests of the child shall be a primary consideration, applicable to all children who come under the State's jurisdiction at international borders, regardless of their migration status or that of their parents. States shall ensure that children in the context of migration are treated first and foremost as children and ensure that the principle of the child's best interests takes precedence over migration management objectives or other administrative considerations.

A.7. The right to due process of all migrants, regardless of their status, shall be protected and respected in all areas where the State exercises jurisdiction or effective control. This includes the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal.

All States are entitled to manage their borders, but they must do so in accordance with international law.²⁶⁸ Domestic law governs whether a foreigner is authorized to enter and/or stay in the territory of the State. However, such laws must be aligned with international human rights law, i.e., the State's human rights obligations.²⁶⁹



See session 1.3.3(d) on constraints to barring entry under the right to freedom of movement.

The primacy of human rights derives from States' fundamental obligation to effectively promote and protect the human rights of all migrants, regardless of their migration status, in conformity with international human rights law.²⁷⁰ That includes border management work. In the Global Compact for Safe, Orderly and Regular Migration, adopted in 2018, States made a commitment to implement border management policies that respect national sovereignty, the rule of law, obligations under international law and the human rights of all migrants, regardless of their migration status, and that are non-discriminatory, gender-responsive and child-sensitive.²⁷¹

That means that legislative and other measures aimed at addressing cross-border crimes, including trafficking in persons, smuggling of migrants, trafficking of drugs or other contraband, and any measures aimed at preventing irregular border crossings should not negatively affect the human rights of migrants.²⁷²

Similarly, the Security Council has repeatedly called upon Member States to ensure that border security measures identify and intercept those who cross borders to engage in terrorist acts. However, the Council has always stressed that such measures must be in line with States' existing obligations under international human rights law.²⁷³ The Global Counter-Terrorism Strategy also emphasizes the importance of compliance with international human rights, as well as international refugee and humanitarian law, when taking any counter-terrorism measures. One of the four pillars²⁷⁴ of the Strategy focuses on measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

Principle B: Non-discrimination

The principle of *non-discrimination* requires that migrants are protected against any form of discrimination at borders.

Human rights law provides that every person must enjoy their rights without any form of discrimination. Non-discrimination is a fundamental principle of international human rights

²⁶⁸ New York Declaration for Refugees and Migrants, para. 42; Global Compact for Safe, Orderly and Regular Migration, paras. 7, 15, 27; Human rights of migrants, General Assembly resolution 20/3, para. 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 – for limitations to that sovereign prerogative; and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22 – concerning due process and prohibition of collective expulsion. Refer also to the discussion in [session 1.3.3\(d\)](#) of this training course.

²⁶⁹ Human Rights Committee, general comment No. 27 (1999), para. 4; Protection of migrants, General Assembly resolution 67/172, para. 3(b).

²⁷⁰ New York Declaration for Refugees and Migrants, paras. 5, 32, 41, 57, Annex II – paras. 5, 6, 8(i); Global Compact for Safe, Orderly and Regular Migration, paras. 11, 15, 23(b), 29(h), 31.

²⁷¹ Global Compact for Safe, Orderly and Regular Migration, para. 27 (Objective 11).

²⁷² *Ibid.*, para. 25(c); OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 (See E/2002/68/Add.1); Our joint commitment to effectively addressing and countering the world drug problem, General Assembly resolution S-30/1, para. 4.

²⁷³ With regard to threats to international peace and security caused by terrorist acts that affirm existing obligations under international human rights law, see, for example, Security Council resolutions 2170 (2014), 8th, 9th, 13th and 17th preambular paragraphs; 2178 (2014), 7th, 15th, 19th and 20th preambular paragraphs, and paras. 5, 11, 17; 2368 (2017), 11th, 12th, 19th and 36th preambular paragraphs and paras. 23, 36.

²⁷⁴ The four pillars of the Global Counter-Terrorism Strategy cover measures to: address the conditions conducive to the spread of terrorism; prevent and combat terrorism; build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard; ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

law.²⁷⁵ Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation, gender identity, health status, and economic and social situation.

Principle B: Non-discrimination

B.8. The principle of non-discrimination shall be at the centre of all border governance measures. Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation. Any differential treatment of migrants at international borders shall be in lawful pursuit of a legitimate and proportionate aim. Specifically, measures taken to address irregular migration or to counter terrorism, human trafficking or migrant smuggling shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked.

B.9. States shall ensure that border governance measures address and combat all forms of discrimination by State and private actors at international borders.

Legitimate differential treatment or discrimination

Not all differential treatment amounts to discrimination, but any differential treatment of people at international borders must be justified as being in lawful pursuit of a legitimate and proportionate aim.²⁷⁶ States are obliged to ensure that any differences of treatment between nationals and non-nationals or between different groups of non-nationals serve a legitimate objective. Any course of action taken to achieve such objective must itself be proportionate and reasonable. In the context of border governance, this obligation requires that all practical measures taken to address irregular migration, counter-terrorism, human trafficking or migrant smuggling not have a discriminatory *purpose* or *effect*. The permissible limitations that may be imposed upon particular rights in order to apply such differential treatment must be precisely defined so as not to confer discretion on those implementing the law. Also, they should be the least intrusive measures possible and must not impair the essence of the right. States must be able to justify any differential treatment between migrants and their nationals.

For example, the complete denial of access, including through referral, to emergency obstetric care at the border would constitute discrimination based on sex.²⁷⁷ As another example, restrictions by some States to access to family reunification visas, such as requiring the applicant take a language test, have been found to be discriminatory when applied only to citizens of certain countries. That would be discriminatory on the prohibited ground of nationality; and may also disadvantage women and girls, who often have less equal access to education or are

²⁷⁵ The principle of non-discrimination is central to all international human rights instruments. See, Universal Declaration of Human Rights, arts. 2, 7; International Covenant on Civil and Political Rights, arts. 2, 26; International Covenant on Economic, Social and Cultural Rights, art. 2.2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1; Convention on the Rights of the Child, art. 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1.1; Convention on the Rights of Persons with Disabilities, arts. 3(b), 5; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

²⁷⁶ Human Rights Committee, general comment No. 18 (1989), para. 13.

²⁷⁷ Emergency obstetric care is a core obligation under international law; a human rights-based approach places responsibility on the State for ensuring available, accessible, acceptable and quality facilities, goods and services to address life-threatening delays. See Report of OHCHR on technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality, A/HRC/21/22 and Corr.1, paras. 37, 56, 72. Denial of such care may lead to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment. See Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 10.

more likely to be illiterate, or persons living in poverty, who generally have fewer resources to take language lessons.²⁷⁸

In order to combat discrimination at borders, States must ensure that border officials perform their work without discrimination and ensure accountability for any failure to do so. For example, all border officials should receive appropriate training and ensure accountability for discrimination on any prohibited ground.

The principle of non-discrimination also means that profiling based on prohibited grounds is not permitted. For example, differential treatment of migrants based solely on their race or ethnicity or on whether they arrive by land, air or sea is prohibited.



See also, the discussion on profiling in session 4.2.4.

Principle C: Assistance and protection from harm

The principle of *assistance and protection from harm* means that human rights obligations must take precedence over law enforcement and migration management objectives.

The four points under this principle call upon States to:

- ▶ Ensure the primacy of human rights obligations over law enforcement and migration management objectives;
- ▶ Ensure that border governance measures are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions;
- ▶ Take into account the individual circumstances of all migrants at international borders, particularly those who are in vulnerable situations;
- ▶ Ensure equal and effective access to justice.



See sessions 6.2.2 and 6.2.3, respectively for details on the principle of non-refoulement and the prohibition of arbitrary and collective expulsion.

Principle C: Assistance and protection from harm

C.10. States shall protect and assist migrants at international borders without discrimination. Human rights obligations, including in respect of civil political economic social and cultural rights, must take precedence over law enforcement and migration management objectives.

C.11. States shall ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration and combating transnational organized crime, are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions.

C.12. States shall consider the individual circumstances of all migrants at international borders, with appropriate attention being given to migrants who may be at particular risk at international borders who shall be entitled to specific protection and individualized assistance which takes into account their rights and needs.

C.13. States shall ensure that all migrants who have suffered human rights violations or abuses as a result of border governance measures have equal and effective access to justice access to effective remedies, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanism. States shall investigate and, where warranted, prosecute human rights violations and abuses, impose sentences commensurate with the seriousness of the offence, and take measures to ensure non-repetition.

²⁷⁸ Women make up nearly two-thirds of the world's illiterate people aged 15 and over (estimated to be 781 million in total in 2012), see United Nations, Department of Economic and Social Affairs, *The World's Women 2015: Trends and Statistics*, 2015, p. 79.

Protection and assistance obligations are the basis of all contacts between border officials and individuals at borders, from initial detection, rescue or interception, to screening and interviewing, identification and referral, reception and assistance, as well as any necessary – and exceptional – detention or return. Protection and assistance should be prioritized over law enforcement objectives and migration management objectives.

Migration policies that weaken human rights protection and the provision of assistance to persons in need thereof are contrary to international human rights law. Protecting the rights of individuals and assisting persons in need at borders does not detract from border governance objectives, rather, they are complimentary to those objectives.

In order to operationalize these human rights commitments, border officials need to have systems in place to identify migrants in vulnerable situations and to refer them to appropriate protection and services.

From a practical viewpoint, the primacy of human rights protection and assistance obligations stresses that States must have systems in place to be able to determine the protection and assistance needs of the diverse individuals at the border. Border officials need to treat everyone with dignity, use the systems in place to identify persons in vulnerable situations and refer them to the appropriate services without resorting to arbitrary expulsion. However, border officials should not be expected to carry out specific screenings for certain vulnerabilities, such as determination of the best interests of the child or of refugee status, which should be referred to competent experts.

1.4.3. Exercise (true/false): Perceptions and misperceptions of migrants



Learners will need true/false cards for this exercise. They should keep the true/false cards in their course folders, as they will be used throughout the training course.



Duration: 10 minutes

Aim of the exercise:

To raise awareness of the various perceptions of migrants and migration, and to discuss why it is important to be aware of, and challenge, possible misperceptions and biases.

How to carry out the exercise:

- ▶ Ask learners to answer YES/TRUE or NO/FALSE to the following questions, using the true/false cards in their course folders (or handed out).
 1. Are migrants who cross borders or stay in countries without proper permission committing a crime in international law?
 2. Do irregular migrants pay taxes?
 3. Are expats and migrants different?



The questions have been framed ambiguously on purpose, in order to open the discussion on perceptions.



Debriefing

- Answer to question 1: [NO/FALSE]
- ▶ Border crossing is generally an administrative issue. Although national laws may sometimes criminalize irregular migration or the use of smugglers to cross borders, migrating with irregular status is not a crime under international law. Human rights

guidance provides that the irregular entry and stay in a country by migrants should not be treated as a criminal offence; and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration.²⁷⁹ International criminal law affirms that migrants who have been smuggled into the State should not be criminalized.²⁸⁰

Answer to question 2: [YES/TRUE]

- ▶ Whether or not someone pays taxes is not directly related to their migration status. Migrants with irregular status often pay direct and indirect taxes. While populist discourses often position undocumented migrants as a cost to the State, seeking to claim benefits, research has shown that, in general, migrants, including those with irregular status, pay more in taxes than they receive in benefits from the country of destination.²⁸¹ However, when migrants are restricted to working in the informal economy, tax revenues may be lower, although many will still pay direct and indirect taxes. Regularization of migrants with irregular status would increase tax revenues.

Answer to question 3: [NO/FALSE]

- ▶ Expat and migrant mean the same thing. While there is no internationally agreed definition of “migrant”, migrants and expats (short for expatriates) mean the same thing. The use of one term over the other usually demonstrates some degree of discrimination on the basis of race or class, whereby “expats” are often perceived as privileged migrants from the global north or western countries or used to refer to individuals in high-status employment outside of their home countries, while “migrants” are often considered to be workers from countries in the global south or to refer to individuals in low-status employment outside of their home countries.

1.4.4. Impacts of harmful language

Guideline 1.4: Ensure that terminology used in legislation, policy and practice to refer to migration is consistent with international human rights law and standards.

Language matters because it informs our views and how we treat people; language also shapes our perception and thinking. As we saw in question 3 of the previous exercise (1.4.3), our use of language can betray our biases. Therefore, border officials should:

Avoid using gendered language

- ▶ For example, if the generic pronoun used to refer to border officials is always “he”, it reinforces the stereotype that such work can only be done by men, to the exclusion of women and LGBTI people.



Refer to the discussion in session 1.2 on gender, migration and human rights. Most migrants are not intrinsically “vulnerable”; on the contrary, they are often resilient and courageous, and make life-altering decisions on a regular basis.²⁸² Yet migrant women are often treated differently from men, and described as being “vulnerable”, usually without any clarification as to what they are vulnerable to or who or what poses a risk to their rights.

²⁷⁹ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 10; A/HRC/13/30, para. 58 and A/HRC/7/4, para. 53; Committee on Migrant Workers, general comment No. 2 (2013), paras. 2, 24; also Special Rapporteur on terrorism, A/71/384, para. 20.

²⁸⁰ Smuggling of Migrants Protocol, art. 5.

²⁸¹ OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, p. 99.

²⁸² Special Rapporteur on migrants, A/71/285, paras. 59–60.

Avoid using the term “illegal” to refer to migrants or migration

- ▶ The human rights-sensitive language to be used is: migrants in an irregular situation, migrants with irregular status, irregular migration, undocumented migrants/migration.
- ▶ Human beings cannot be illegal. The use of the term “illegal” to describe migrants in an irregular situation is inappropriate and should be avoided, as it tends to stigmatize them by associating them with criminality.²⁸³
- ▶ Referring to migrants or migration as “illegal” is incorrect because migration is not a crime under international law. Using such language encourages a view that migrants do not deserve rights. However, as human beings we are all rights holders. Fuelling such discriminatory perceptions can contribute to xenophobia, discrimination and violence.
- ▶ There has been a rise in the widespread use of demeaning and commodifying language to describe migrants, such as “illegal”, “economic migrant” and “bogus asylum seeker”, and of threatening or disaster-related imagery to describe migration, such as floods, swarms, invasions and hordes. In addition, the false attribution of criminality or negative social characteristics to migrants and the use of even more violent language to refer to migrants and migration could directly incite hatred against migrants.

Crossing international borders is generally an administrative matter. Therefore, unauthorized entry, the attempt to enter a country in an irregular manner or irregular stay, in general, should not be considered a criminal offence.²⁸⁴

Did you know that, in 1975, Member States called upon the United Nations to stop using the term “illegal migrant” in its documents?²⁸⁵

1.5. Human rights of border officials and institutional accountability

1.5.1. Discussion: Human rights of border officials



See Glossary for a definition of “border officials”.

Border officials are rights holders and duty bearers.

- ▶ Ask the following question to launch the discussion:

What human rights do border officials have?

- Border officials have all human rights, including the rights to life, an adequate standard of living, just and favourable conditions of work, and freedom from discrimination.

Principle A.1: States shall implement their international legal obligations in good faith, and respect, protect and fulfil human rights in the governance of their borders.

Guideline 3.5 on fair pay.

²⁸³ Committee on Migrant Workers, general comment No. 2 (2013), para. 4; Special Rapporteur on migrants, A/65/222, paras. 28–30; and A/71/285, paras. 31–34.

²⁸⁴ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 10; Committee on Migrant Workers, general comment No. 2 (2013), paras. 2, 24.

²⁸⁵ Measures to ensure the human rights and dignity of all migrant workers, General Assembly resolution 3449(XXX).

The *Principles and Guidelines* give consideration to the rights and needs of border officials, as well as individuals seeking to cross borders. It is important to recognize that the work performed by border officials can impact their human rights and well-being. The State is obliged to protect and fulfil the rights of border officials, by ensuring safe working conditions and facilitating an environment, including adequate facilities, resources and training in which border officials are able to carry out their duties and responsibilities in a human rights-based manner. That is an important element of ensuring rights-based governance of international borders.

Guideline 3 on building human rights capacity.

1.5.2. Exercise: Reality check – challenges faced by border officials



Duration: 45-50 minutes
(group work: 15–20 min.; debriefing: 30 min.)

Aim of the exercise:

To enable learners to share the experiences and challenges faced in their day-to-day work, and to identify how human rights can support them in carrying out their work.



Challenges may include lack of resources; personnel/capacity issues; security of personnel; increased complexities at borders; risks that border officials deal with; problematic policies, including standard operating procedures (SOPs) and laws; the many actors involved; and so on. Emphasis on recognition and discussion and learning of the challenges that border officials face is important. Understanding and recognizing the learners' operational contexts may help set the foundations for discussions of substantive areas of work during the training course about the positive role they can play.



This is an opportunity to note key issues on the *Gaps and Challenges* board. Trainers should ensure that the points raised in this exercise are taken into account in the relevant sessions on days 2 and 3 of the training course. In some cases, it may be best to delay discussion of some points (with learners' agreement) to the session dealing with the specific topic.

How to carry out the exercise:

- ▶ Ask learners to work in groups to discuss the following questions.
 1. What are some of the challenges you face in your current or previous day-to-day work in the context of migration or working with migrants?
 2. Do border officials face different or additional challenges on the basis of their gender?
 3. How do you think human rights can help improve your situation?

Learners may focus on one area of work or choose issues across their experience as border officials. However, they should prioritize no more than two or three points to share during the debriefing. The trainer may mention some of the challenges stated above to help learners get started.



The training room should be a safe space for discussion; remind learners of the ground rule of confidentiality that was agreed at the beginning of the course, but emphasize that no one should feel obligated to disclose any information that they are not comfortable sharing.

It is important to recognize that this exercise comes quite early in the training course and the level of comfort for the disclosure of information by learners may still be relatively low. Depending on factors such as local culture, whether or not the learners are subordinates, training with colleagues and known peers, gender dynamics, among others, learners may be reluctant to discuss some issues, and that needs to be taken into account.

Regarding gender dynamics, women often have subordinate roles, given that border governance is still a male-dominated profession in many countries, as such they may be a minority in the group. This is particularly important for any discussion of gender issues in this exercise. Given that it may be difficult for learners to raise such issues, bear in mind that gender responsiveness in the workplace will be addressed in session 1.5.3. Also, learners may feel that they cannot discuss certain issues in depth – for example, in some contexts, law enforcement officials are not permitted to discuss their standard operating procedures (SOPs).



Debriefing

- ▶ Ask each group, in turn, to share two to three points from their discussions, and the relevant human rights they have identified.
- ▶ Briefly reinforce reflection on the points/issues raised in relation to the relevant human rights of border officials or initial thoughts about how a human rights-based approach can help address concerns (see table below for examples).



It may be useful to encourage learners to reflect on how key issues could be dealt with at the structural and institutional levels. Note those ideas on the *Gaps and Challenges* board as it is likely that many issues can be discussed in more depth in subsequent sessions of the training course. Some of the points raised may lend themselves to discussion (with examples) on the principle of accountability in session 1.5.4.

Examples of issues that may be raised in the debriefing

Issues	Human rights-based response
Border work can be dangerous	<p>Border officials may risk injury in fulfilling their duties. Their human rights, including the right to life, must be respected and protected, such as by thoroughly planning any interventions and providing training and protective equipment. See more on planning and preparation in session 3 (interception, rescue and immediate assistance), session 4 (screening and interviewing) and session 6 (return).</p> <p>Guidelines:</p> <p>1.8 and 3.15: Mechanisms including independent monitoring through which border officials can submit complaints to appropriate authorities about conduct that is contrary to human rights standards, without fear for their own employment or reprisals.</p>

	<p>3.5: Recognition of the demands of the work, support for signs of professional fatigue, secondary trauma, and so on.</p> <p>9.15: Interrupt return procedures that endanger the safety and dignity of the personnel carrying out the return.</p>
<p>Migrants are not cooperative when we screen/interview them</p>	<p>Reasons may include lack of privacy and/or confidentiality, misperception/misinformation about the procedures. States are required to provide appropriate training and guidance to border officials conducting interviews, including on interviewing techniques and appropriate questions to ask, to facilitate the fulfilment of their duties. Empathy for what migrants have been through, understanding the fear they may be experiencing at being interviewed and so on, are important steps in building rapport and cooperation. Working together with local civil society groups or other specially trained personnel can provide additional expertise and local intelligence, which may help migrants to be more forthcoming with sharing information. For further discussion, see session 4 (screening and interviewing).</p> <p>Guidelines:</p> <p>6.9 and 6.10: Provide rights-based interview procedures and training in the use of non-coercive interviewing techniques.</p>
<p>Border post is located in remote and dangerous area, without sufficient personnel</p> <p>Lack of resources to ensure the human rights of migrants arriving at borders</p>	<p>International borders should be equipped with sufficient numbers of appropriately qualified personnel, specific to the situation at the border. Border officials should have adequate training, capacity and resources to perform the tasks mandated to them in accordance with international human rights standards.</p> <p>States should allocate sufficient resources and, where necessary, request financial, technical and other assistance from States and international organizations to ensure their border governance measures and facilities are in accordance with international human rights standards.</p> <p>Guidelines:</p> <p>3.1 and 3.2: Allocate sufficient State budget and request financial and technical assistance.</p> <p>3.3: Ensure adequate training, capacity and resources for mandated tasks.</p>
<p>Poor-quality working conditions at remote border locations</p> <p>Inadequate conditions or dangerous areas may be used by managers to rationalize why women cannot be stationed there</p>	<p>All border officials, regardless of gender, have the right to enjoy just and favourable conditions of work, including safe and healthy working conditions (including reasonable working hours and rest periods).</p> <p>Everyone has the right to equal opportunity to work, including to be promoted to an appropriate higher level, based on seniority and competence. That does not mean forcing any staff of any gender into roles that they are not comfortable with or trained to handle.</p> <p>Women migrants crossing at all border posts have the right to see or to be searched and interviewed by a woman border official.</p>

	<p>Guidelines:</p> <p>3.5: Ensure just and favourable conditions of work.</p> <p>3.6: Ensure a balanced number of qualified male and female personnel.</p> <p>8.10: Ensure presence of women staff wherever women are detained.</p>
<p>Inadequate remuneration, considering the risks and responsibilities involved</p>	<p>All border officials have the right, without discrimination, to fair wages and equal remuneration for work of equal value to ensure a decent living for border officials and their families. A fair wage should, for instance, take into consideration the responsibilities, skills, education, risks and hardships related to the duties as well as physical and mental health, and personal and family life.</p> <p>Border officials should receive equal remuneration for duties that are not only similar in function, but also work of equal value as assessed by objective criteria free from gender or other bias. Furthermore, remuneration must be sufficient to provide border officials and their families a decent living, meaning that they are able to enjoy economic, social and cultural rights, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs.</p> <p>Guideline:</p> <p>3.5: Ensure fair remuneration, taking into consideration the working conditions of border officials.</p>
<p>Concern about lack of training, including on human rights</p>	<p>Border officials should be mandated to only perform tasks for which they have adequate training, capacity and resources, in accordance with international human rights standards.</p> <p>Guidelines:</p> <p>3.3, 3.7 to 3.13: Ensure border officials are mandated to carry out tasks for which they have received adequate training and capacity-building.</p> <p>Also,</p> <p>4.10, 5.8, 6.10, 8.8 and 9.17 on human rights training in relation to the principle of non-refoulement, reception work, interviewing, immigration detention, and human rights-based returns, respectively.</p>
<p>There aren't any women in my team at work</p> <p>There weren't any women in our discussion group</p>	<p>Law enforcement agencies should develop recruitment and promotion processes to ensure appropriate gender balance across all ranks and roles. It is important to ensure that the needs and rights of women migrants and other travellers can be met and protected, and that there is a sufficient number of women border officials so that the burden of work does not fall disproportionately on a small number of staff.</p> <p>Guideline:</p> <p>3.6: Ensure sufficient number of qualified personnel and ensure gender balance.</p>

Women border officials are not offered certain postings or work away from their home locations due to preconceived gender roles and stereotyping (e.g., assumptions about childcare obligations)

Women border officials are always expected to conduct the interviews with survivors of sexual violence and with children

The gendered division of labour within the domestic sphere, with caring for children or dependent adults mostly falling on women, is pervasive across societies. It is discriminatory. This attitude may manifest in the work of border officials: limiting women to junior roles, particularly in an administrative capacity; allocating the interviewing of survivors of sexual violence or children to women, without adequate support – which risks secondary trauma; and denying women certain work opportunities.

Principle:

B.8: The principle of non-discrimination shall be at the centre of all border governance measures, including in relation to staffing.

Guidelines:

3.5 and 3.6: Provide psychological support to staff; and ensure gender balance in staffing.

5.8 and 8.8: Ensure that all staff receive human rights training, including sensitivity on gender, culture and religion, in reception work and immigration detention, respectively.

8.10: Ensure the presence of women staff wherever women are detained.

Women are entitled to conditions of work not inferior to those enjoyed by men, with equal pay for equal work, including equal opportunities for promotion.

All workers are entitled to earn a decent living for themselves and their families with fair remuneration that includes additional direct or indirect allowances in cash or in kind paid to them by their employer, such as to cover childcare or the provision of on-site affordable childcare facilities.²⁸⁶

Follow-up questions to learners to encourage reflection:

4. Were the issues raised in the group discussions and in the debriefing familiar to you?
5. Were there any commonalities/differences that you want to discuss further?

1.5.3. A gender-responsive working environment at international borders

It is important to build and maintain a gender-responsive working environment at international borders. As most border officials are men, that usually informs the work culture and facilities. A gender-responsive approach to border management work requires that measures be taken to address:

- ▶ Stereotyped roles and responsibilities;
- ▶ Marginalization and discrimination;
- ▶ Sexual harassment and misogyny.

In addition to ensuring adequate facilities for border officials of all genders, increased representation of women among border personnel – across all roles and levels – is critical.

Guideline 3.6: Ensure a sufficient number of appropriately qualified personnel and gender balance.

²⁸⁶ Committee on Economic, Social and Cultural Rights, general comment No. 23 (2016), paras. 7, 32.

Note that gender does not refer only to women, or that women staff are solely responsible for ensuring attention to gender issues. However, as women are typically underrepresented in the security sector, including in border management, particular attention is required to enhance gender balance and equal opportunities for women within border institutions. A human rights-based approach recommends increased representation of women, so that there is gender parity across a range of roles and levels of authority.

- ▶ Where women are underrepresented, what measures might be taken to increase their numbers?²⁸⁷

Increasing representation of women alone is not the solution. Stereotyped roles within the security sector must also be addressed, including in terms of assignments and responsibilities; denial of training and promotion opportunities for women; marginalization, discrimination and sexual harassment, including by male colleagues.

A revision of recruitment policies may be necessary to support increased gender parity in staffing. For example, recruiting border officials from border regions, especially when they are remote, may make it more feasible for people, especially women, to work in those posts, which may overcome the notion that those areas are not appropriate for women staff.

Policies or practices that purport to protect women officers by restricting their role in or access to postings in areas that are deemed to be dangerous, are missing two points:

- ▶ The work should be safe for staff of any gender, and no officer – either man or woman – should be at a post where their safety is cause for concern;
- ▶ Migrants and other travellers will be of different genders, therefore women and men officers must be on duty to carry out searches or conduct interviews that require sensitive handling by an officer of the same gender as the migrant or traveller.

Support for colleagues who are women or members of a minority group is critical.²⁸⁸

Senior management of border agencies should be aware of the concerns of those who may be at greater risk of discrimination, such as women or LGBTI individuals, and ensure that there is no discrimination in the assignment of roles and duties to them.

Gender has an impact on the work of border officials. In some countries or cultures, the authorities and other interlocutors do not pay the same attention and respect to women border officials as to their male colleagues. Such attitudes and behaviour may be compounded by factors such as age, seniority, race and nationality.

It is not acceptable to avoid addressing such issues by assigning women border officials to other tasks. A collective effort is needed, including by supervisors; it is not a personal problem to be tackled by the individual concerned. Strategies to address the issues may include male officials and supervisors showing respect for and listening to the views of women border officials, which can communicate confidence in their abilities and professionalism to others. A context-specific analysis is fundamental to determining the best approach to take.

Border agencies should strive for:

- ▶ Gender-responsive operational policies, protocols and procedures governing the work of border officials, including standard operating procedures (e.g., in relation to gender, body searches and interviewing);
- ▶ Gender-responsive human resource policies and practices, including policies on sexual harassment, targeted recruitment to attract more women applicants, appropriate job descriptions, training of recruitment officers on gender issues, among others;
- ▶ Internal gender-responsive oversight and accountability mechanisms, and effective gender-responsive remedies for staff and migrants;

²⁸⁷ Temporary special measures, including the use of quotas for the recruitment of women or individuals from minority groups, are not discriminatory as long as they are reasonable and impermanent. See International Covenant on Civil and Political Rights, art. 25.

²⁸⁸ OHCHR, *Manual on Human Rights Monitoring*, chap. 15, pp. 18–19.

- ▶ Participation by and engagement with organizations and human rights defenders that represent and defend women’s and LGBTI rights in border management work, reforms, capacity-building efforts and the development of policies and guidance:
 - Working with groups led by and representing women, LGBTI people, persons with disabilities and ethnic and other minorities can help to collect vital information, enhance civil protection efforts, offer different perspectives on security threats, build an understanding of how gender affects lived experience, which is critical to understanding women’s decisions to migrate, how women and girls are recruited by armed groups, and so on. Women human rights defenders, as targets of groups that carry out terrorist acts, could be key stakeholders in the development of human rights-based strategies to counter terrorism.²⁸⁹

1.5.4. Accountability

A human rights-based approach seeks to establish accountability between duty bearers and rights holders.²⁹⁰

The principle of accountability requires the creation of *effective and independent mechanisms* to oversee the enforcement of rights, hold perpetrators of human rights violations accountable and provide effective remedies for anyone whose rights have been violated.

Those mechanisms need to be gender responsive and child sensitive. That will require collecting data disaggregated by sex, age, migration status and other relevant factors, on action, such as complaints, investigations, prosecutions and convictions, on excessive use of force and other human rights violations and abuses perpetrated by border authorities and private actors working at the border.²⁹¹

The data collected must be protected in accordance with human rights standards, including explicit data protection guarantees on information-sharing and exchange agreements between and within States.

Guidelines:

3.18: Collect comprehensive and disaggregated data.

10.9 and 10.11: Cooperate with other States to collect and exchange data for human rights-based governance of migration at international borders; ensure data protection.



See session 3.2.5(d) for further discussion on accountability relating to the use of force.

Accountability mechanisms, including through human rights-based codes of conduct, foster transparency and deter exploitation, collusion and mistreatment, including by employers, private-sector actors involved in border management and State authorities. There are a number of options for such mechanisms, singly or in combination, including an independent review board, a ministry, the judiciary or an ombudsperson.²⁹²

In some situations, accountability measures will require cooperation with independent border-control monitoring that is carried out jointly with other States and/or relevant entities.

²⁸⁹ Special Rapporteur on terrorism, A/64/211, paras. 46–47.

²⁹⁰ In its resolution 34/169 adopting the Code of Conduct for Law Enforcement Officials, the General Assembly noted that “every law enforcement agency should be representative of and responsive and accountable to the community as a whole” (para. (a)).

²⁹¹ Global Compact for Safe, Orderly and Regular Migration, para. 17 (Objective 1).

²⁹² General Assembly resolution 34/169, para. (d).

While establishing such procedures is outside the remit of front-line officials, the accountability of all State and non-State (private) actors involved in border management is a critical element of the rule of law.

An important element in accountability is ensuring that all border staff understand the expected standards of behaviour and the consequences of failure to adhere to those standards. That is achieved by establishing binding codes of conduct for border authorities in accordance with international human rights standards and best practice, such as the Code of Conduct for Law Enforcement Officials.

Guideline 3.14: Establish binding codes of conduct for border authorities.

For border governance measures and practices to be human rights compliant and gender responsive, it is essential that anyone who has been subjected to or who has witnessed human rights violations at international borders be able to file complaints and obtain effective remedies without fear of retaliation, including detention or deportation. Such procedures are essential to ending impunity for human rights abuses. States should establish, strengthen and support the use of systematic reporting mechanisms, including through facilitating cooperation between border authorities and other actors, including the police, national human rights institutions, parliamentarians, civil society and international organizations.

Guidelines:

- 1.7: Ensure human rights compliance of existing border governance measures.
- 1.8: Encourage independent monitoring of human rights at international borders.
- 2.7: Provide for criminal penalties for offences committed against migrants at international borders.
- 2.13: Ensure access to justice and effective remedy.

It is necessary to institute mechanisms through which border officials and others can file complaints to the appropriate authorities about conduct that is contrary to human rights standards. Staff must be able to file complaints without fear for their own employment or reprisals from their colleagues, for example, through whistle-blower mechanisms. They must also be assured of a fair hearing when complaints are made against them by their colleagues.²⁹³

Guideline 3.15: Establish complaints mechanisms.

Lessons learned from accountability mechanisms, including data collected on human rights violations and other relevant data, must inform the planning of border management work, including through gender-responsive resource allocation and budgeting. Adequate planning and allocation of sufficient resources can address the various needs and priorities of migrants of different genders, support access to and quality services for survivors of sexual and gender-based violence, as well as contribute to the implementation of policies and programmes that promote gender equality, including for border officials.



Distribute session 1 summary.

²⁹³ Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169, Annex, art. 8.

Session 2: Migrants in vulnerable situations at international borders

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Explore in more depth one of the rationales of the training course and why it is important to focus on migrants in vulnerable situations at international borders ▶ Explain the concept of migrants in vulnerable situations ▶ Consider how gender relates and intersects with issues of migrants in vulnerable situations ▶ Identify examples of vulnerable situations in countries of origin, transit and destination
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Describe why the training course gives special consideration to migrants in vulnerable situations ▶ Identify situations of vulnerability in the context of migration
Key learning points/ messages	<ul style="list-style-type: none"> ▶ Some migrants need specific human rights protection because of the situations they left behind; the circumstances in which they travelled; the conditions they face on arrival; or because of personal characteristics such as their age, gender identity, disability or health status. ▶ Although a migrant who is in or has experienced a vulnerable situation may fall outside the specific legal category of “refugee”, it is important to ensure that their specific human rights protection needs are met. ▶ An individual’s need for human rights protection can change in the course of their journey or over time.
Preparation	<ul style="list-style-type: none"> ▶ Print handout ▶ Set up the room for the carousel exercise: three flip charts or areas to/from which the learners can move with relative ease
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts; sticky notes or cards and tape, pens
Handouts or additional resources (see course material)	<ul style="list-style-type: none"> ▶ Session 2 summary

Session overview/rationale

This session sets out one of the rationales for the training – building an understanding of why it is important to focus on migrants in vulnerable situations at international borders – which is based on OHCHR and Global Migration Group, *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations* (2018), and reaffirmed in the Global Compact for Migration, objective 7 on addressing and reducing vulnerabilities in migration.

By focusing on the concept of migrants in vulnerable situations, this session seeks to sensitize border officials to the range of experiences and needs that people who arrive at borders may have. Some migrants may be disproportionately exposed to a range of risks and require specific human rights protection, which may change throughout the migration process, to ensure that they enjoy their human rights.²⁹⁴

Session content

2.1: Migrants in vulnerable situations

²⁹⁴ See OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*.

2.1. Migrants in vulnerable situations

Note on refugee protection²⁹⁵

This training course does not specifically address the issue of refugees and the specific obligations States have towards refugees under international refugee law. The information provided below, including reference to other dedicated training resources, is intended to help the trainer respond to questions from learners.

Refugees are people who have fled war, violence or persecution and have crossed an international border to find safety in another country. Refugees are entitled to all the human rights set forth in international human rights law, as are all persons. In addition, refugees are defined and protected by specific legal standards under international law.

The 1951 Convention relating to the Status of Refugees is the key legal document of the refugee protection regime. It defines a refugee as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.²⁹⁶ Based on regional conventions and jurisprudence, the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a broad definition of “refugee” to include any person faced with a “serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder”.²⁹⁷

An individual must be outside of their country of origin to be a refugee, or outside their country of habitual residence in the case of stateless persons. International refugee law provides for freedom from penalties for their unauthorized entry or presence in another country.²⁹⁸ The threat of persecution may originate from the State itself or from a situation in which the State cannot or will not provide protection, for example, from persecution by non-State actors. By definition, therefore, refugees are outside of the protection of their own Governments. The international community then assumes the responsibility of ensuring that their rights are respected.

The drivers of refugee movements include:

- ▶ Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- ▶ Armed conflict and generalized violence, which may be rooted in and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides;
- ▶ Violence perpetrated by organized gangs, traffickers, and other non-State actors, against whom the State is unable or unwilling to protect;
- ▶ Persecution on the basis of sexual orientation or gender identity.

²⁹⁵ For further guidance on refugee protection, see UNHCR, *UNHCR and International Protection: A Protection Induction Programme* (first ed.), 2006. Available at www.refworld.org/docid/466e71c32.html.

²⁹⁶ 1951 Convention relating to the Status of Refugees, art. 1.A(2). The 1967 Protocol amended the 1951 Convention to remove the geographic and temporal limits in the original text (which contained reference to “events occurring before 1 January 1951” that was understood to mean “events occurring in Europe” prior to that date, limiting the scope and application of the treaty). This training course does not address refugee rights and matters relating to asylum claims. See for example, the guidance provided by UNHCR, including in the context of its 10-Point Plan of Action on Refugee Protection and Mixed Migration, which emphasizes the need for “protection sensitive entry systems” at international borders to identify, protect against non-refoulement and ensure access to asylum procedures for persons in need of international refugee protection. See also UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998. Available at www.refworld.org/pdfid/3ae6b3338.pdf.

²⁹⁷ UNHCR, Global Compact for Refugees, A/73/12 (Part II), para. 1.

²⁹⁸ Convention relating to the Status of Refugees, art. 31.

There is no universally accepted definition of “persecution”. Whether prejudicial actions or threats amount to persecution depends on the circumstances of each case.²⁹⁹ The above definitions refer to so-called “inclusion clauses” that define positively who is a refugee. Certain persons are, however, excluded from refugee status because they have committed: a crime against peace; a war crime or a crime against humanity; a serious, non-political crime before admission in the asylum country; or acts contrary to the purposes and principles of the United Nations, including terrorist acts.³⁰⁰

Refugee status has a declaratory nature: any person is a refugee within the framework of international and regional refugee law if they meet the criteria of the definition of “refugee”, whether or not they are formally recognized by the State as being a refugee. An asylum seeker is any person who is seeking protection as a refugee but whose claim has not been finally determined.



See also session 6 on the principle of non-refoulement under international refugee law and human rights law.

2.1.1. Why focus on migrants in vulnerable situations?

The multi-causal nature of migration means that people’s migration is driven by a range of factors. Initially, situations in their home country may compel them to move, such as extreme poverty, discrimination, inequalities, denial of access to their economic, social and cultural rights, or environmental degradation, including the effects of climate change. Many people migrate to reunite with their families in another country. The decision to migrate may be informed by knowledge or perception of safer or more dignified opportunities to live or work in the targeted country of destination. Once the migration is under way, irrespective of the circumstances that informed the decision to migrate, migrants may encounter a lack of protection of their rights in countries of transit. Those diverse drivers and structural factors mean that many migrants will have protection needs, including protection from return, that cannot be disregarded. While not qualifying as refugees, migrants have human rights that must be respected, protected and fulfilled.

The human rights framework since the adoption of the Universal Declaration of Human Rights has established two concepts:

- ▶ *Agency* – we are all rights holders entitled equally to enjoy rights and dignity; and
- ▶ *Vulnerability* – to human rights violations for which States have a heightened duty of care to ensure the necessary measures to protect our rights.

Many of today’s migratory movements are not entirely voluntary, in the true sense of the term:

- ▶ For example, the High Commissioner for Human Rights has noted, with regard to the Mediterranean crossings, that “human rights violations form the backdrop of these desperate sea voyages. We have repeatedly underscored that no one who has food to eat, who is safe from torture and rape, and from falling bombs, who has health care for his family, education for her children, decent and productive work would readily embark on these perilous journeys. Amidst all the talk of ‘pull factors’, let us understand that these are the ‘push factors’, and let us be clear that today’s movements across the Mediterranean are rarely entirely ‘voluntary’ in the true sense of the term.”³⁰¹

²⁹⁹ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status Of Refugees*, 2019. Available at www.unhcr.org/publications/legal/5ddfcd47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

³⁰⁰ UNHCR, *UNHCR Resettlement Handbook*, 2011, p. 19; Convention relating to the Status of Refugees, arts. 1(f) and 33(2).

³⁰¹ OHCHR, “‘Callous’ EU politics on migrants costing lives – Zeid”, press release, 20 April 2015. Available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15867&LangID=E.

- ▶ Everybody makes decisions to leave, to move, to stay – incomplete decisions, decisions between bad options, but they are decisions. The Global Compact for Migration ends the argument that migrants always move in a voluntary manner – that they are never compelled to leave, that they are always free to return home – by recognizing that not all can.³⁰²
- ▶ When migrants move in the absence of free choice, options narrow and decision-making opportunities become limited. While some migrants' journeys are direct and fast, for many others, the journey towards their intended destination could take weeks, months or even years. Some may never complete their planned migration for a range of reasons, including substantial delays, countries of transit become countries of destination or fatalities en route. Lack of resources, absence of documents and increased deterrence measures, combined with reduced opportunities to obtain authorization for regular entry at international borders, all present challenges and delays to migrants' plans. Migrants' routes, means of transportation and even their intended destination can change at different phases along the migration trajectory, and migrants often fall in and out of various legal categories as they move. An individual's need for protection can change – often dramatically – in the course of their journey.

Many migrants fall outside specific legal categories, such as refugee or trafficked person. We need to understand the protection gaps experienced by migrants who do not fit the criteria under such categories, but are nonetheless in need of human rights protection.

It is important to reiterate that, when persons are entitled to specific legal protection under international instruments, it is necessary to guarantee those protections, including ensuring meaningful access to fair asylum procedures.

When persons fall outside the specific legal category of a refugee, it is key to be cognizant that many migrants are in need of specific human rights protection as a result of the conditions they are leaving behind and/or the circumstances in which they were compelled to move.³⁰³

Only by understanding and identifying protection gaps in the context of contemporary mobility can we take steps to address them.

Guideline 3.12: Sensitize and train border authorities to support migrants at risk.

2.1.2. Migrants in vulnerable situations: concept

Migrants in vulnerable situations are persons in the context of migration who are “unable effectively to enjoy their human rights and are at increased risk of violations and abuse”.³⁰⁴

- ▶ Those persons are entitled to call on a *State's heightened duty of care*.

Where an individual is at risk of having their human rights violated, they are entitled to call on the duty bearer, who is obligated to provide protection of their rights. States have recognized the heightened duty of care towards migrants in vulnerable situations.³⁰⁵ The concept of vulnerability is a foundational element of the human rights framework. Together with the requirement to uphold human dignity, the need to recognize and address vulnerability underpins the legal obligation of States to respect, protect and fulfil human rights.

³⁰² Global Compact for Safe, Orderly and Regular Migration, paras. 12, 18 and 18(b) (Objective 2), 21, 21(g) and (h) (Objective 5).

³⁰³ The Secretary General noted in this regard that, “the gradual expansion of refugee protection notwithstanding, many people are compelled to leave their homes for reasons that do not fall within the refugee definition in the 1951 Convention, including disasters or the erosion of livelihoods as a result of the adverse impacts of climate change and food insecurity.” See A/70/59, para. 18.

³⁰⁴ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 5.

³⁰⁵ *Ibid.*; Global Compact for Safe, Orderly and Regular Migration, para. 23 (Objective 7).

In adopting the 2030 Agenda for Sustainable Development, States resolved to ensure that no one would be left behind, stating: “As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first”.³⁰⁶

Specifically in relation to migrants, in 2018, States committed to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance.³⁰⁷

States have endorsed this attention to migrants in vulnerable situations, in objective 7 of the Global Compact for Migration: “We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law”.³⁰⁸

More specifically, States committed to “adapt options and pathways for regular migration in a manner that ... responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration”.³⁰⁹

- ▶ It is important to identify individuals in vulnerable situations in order to understand *what specific protections they are entitled to* and to refer them to the appropriate protection mechanisms and services.

Failure to identify migrants in vulnerable situations may result in important protection gaps and heighten the risks that migrants face. The ability to identify migrants in vulnerable situations presents an opportunity to understand the diversity of migratory experiences and thereby provide a more effective response.

Gender-responsive, safe, effective and appropriate referral pathways should be in place and implemented in those cases, including clarity as to roles and responsibilities. Close partnership with civil society organizations and United Nations partners can also be important, as is effective follow-up after a referral has taken place.

- ▶ It is important to recognize that even in vulnerable situations, *migrants exercise autonomy and make their own decisions*.

The Special Rapporteur on the human rights of migrants noted that “migrants are most often incredibly resilient and courageous, making life-altering decisions on a regular basis. However, through policy and practice decisions which result in a lack of effective access to justice, States create precarious statuses or regulatory frameworks which allow many to abuse and exploit migrants with impunity”.³¹⁰

Multiple and intersecting forms of discrimination and associated inequalities, which are socially constructed and often maintained through State institutions such as the executive, legislature and implementing law enforcement and judicial systems, form the basis of an individual’s vulnerability to human rights violations, not the individual themselves. Labelling entire subsections of society as inherently vulnerable has led to the reproduction of inequality along distinct identity lines.

³⁰⁶ Transforming our world: the 2030 Agenda for Sustainable Development, General Assembly resolution 70/1, Annex, para. 4.

³⁰⁷ Global Compact for Safe, Orderly and Regular Migration, para. 12.

³⁰⁸ Ibid., Annex, para. 23 (Objective 7).

³⁰⁹ Ibid., Annex, para. 21 (Objective 5).

³¹⁰ Special Rapporteur on migrants, A/71/285, para. 59.

2.1.3. What is meant by vulnerable situations?

The vulnerable situations that migrants face can arise from a range of factors that may intersect or coexist simultaneously, influencing and exacerbating each other, and/or evolving or changing over time as circumstances change.³¹¹ Vulnerable situations may be:

- ▶ *Situational* (situations that made people leave their country of origin, or circumstances in which they moved and/or once they arrived at their destination);
- ▶ *Personal* (relating to discrimination or marginalization on the basis of one or several factors of their personal characteristics, circumstances or identity).

Some migrants need specific protection because of:

- ▶ *Situations that made them leave their country of origin.*³¹² For example, the results of slow-onset climate change such as land and forest degradation or drought, extreme poverty, denial of access to their rights to health, food, decent work, education or the need to reunite with family.
- ▶ *Circumstances in which they moved and/or once they have arrived.*³¹³ Increasingly, restrictive migration and border governance policies mean that migrants' journeys are long, multi-directional and fragmented, making the transit/journey an important space where migrants need human rights protections (e.g., due to their experiences during their migration, including in countries of transit, having to take dangerous means of transportation through deserts, rivers or on sea routes, or facing conditions on arrival such as pushbacks, practices of deterrence at international borders or inadequate reception conditions or lack of access to services). Some of the human rights concerns that migrants may face include:
 - Sexual and gender-based violence, including harmful practices;
 - Violent crime;
 - Kidnapping;
 - Trafficking or forced labour;
 - Abusive smuggling;
 - Arbitrary detention;
 - Torture or trauma while in transit;
 - Family separation;
 - Hunger, dehydration, poor health and lack of access to adequate medical care;
 - Denial of access to sexual and reproductive health services;
 - Lack of access to means of communication.

Restrictive migration and border governance policies that affect options for many migrants to travel in safe and regular ways, with detrimental effect on the human rights of migrants include: criminalization of irregular migration; militarization and securitization of border governance measures; border closures focusing on prevention of irregular migration; law enforcement approaches to counter smuggling and trafficking, and others which force migrants to find other, often less safe, ways to reach their destination.

Many such policies have gender-specific dimensions or differential gendered effect, for example, policies banning women's migration for domestic work to a particular State; limited access by women to regular migration pathways due to the gendered labour market that largely restricts them to the informal sector and outside of work visa options; lack of access to official identity papers for stateless persons, trans, intersex and non-binary persons where the State does not permit changes in line with their gender identity or expression; and so on.

³¹¹ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 5.

³¹² *Ibid.*, p. 6.

³¹³ *Ibid.*

Migrants are compelled to use dangerous means of transportation in hazardous conditions and to resort to the use of smugglers and other types of facilitators. While many migrants who use the services of smugglers complete their journeys without harm, the necessarily clandestine nature of such journeys can place migrants at risk of violence, exploitation, trafficking and other human rights abuses.

Indirect journeys can be marked by hunger, deprivation of water, lack of personal security and lack of access to medical care, including sexual and reproductive health care. Many migrants can spend long periods in transit countries, often in irregular and precarious conditions. While in transit, migrants may be subjected to violence, including sexual and gender-based violence and treatment, which may amount to torture and other cruel, inhuman or degrading treatment or punishment, at the hands of private and State actors, including security forces. Furthermore, migrants are often unable to access justice and are at risk of a range of human rights violations. The inadequate and harsh conditions in which migrants are often received at borders can also further violate their human rights.³¹⁴

Distinguishing trafficking in persons from smuggling of migrants

Trafficking in persons and smuggling of migrants are both processes which may be difficult to distinguish in practice, including at international borders.³¹⁵

Differences between trafficking in persons and smuggling of migrants, based on agreed international definitions³¹⁶

	<i>Trafficking in persons (adults)</i>	<i>Trafficking in persons (children)</i>	<i>Smuggling of migrants</i>
<i>Definition framework</i>	Act (what is done) + Means (how it is done) + Purpose (why it is done)	Act (what is done) + Purpose (why it is done)	Act (what is done) + Purpose (why it is done)
<i>Act</i>	One of the following: recruiting, transporting, transferring, harbouring, receiving a person		Procuring the irregular entry of another person into another State
<i>Means (trafficking only)</i>	At least one of the following: Use of force, threat of force, coercion, abduction, fraud, deception, abuse of power, abuse of position of vulnerability, giving or receiving benefits	-	

³¹⁴ Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008), para. 12; OHCHR, A/HRC/31/35; A/HRC/33/67, para. 10; OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, pp. 6–7.

³¹⁵ OHCHR, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2010 (HR/PUB/10/2), p. 34.

³¹⁶ Based on UNODC, *Anti-human trafficking manual for criminal justice practitioners*, Module 1, 2009, Table 1, p. 2. Available at www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf.

<i>Purpose</i>	Exploitation	Exploitation	Financial or material gain
<i>Is it a human rights violation?</i>	Yes	Yes	No
<i>Is it a crime in international law?</i>	Yes – it is a crime against the person	Yes – it is a crime against the person	Yes – it is a crime against the State
<i>Is the trafficked or smuggled person criminalized in international law?</i>	No	No	No – the Smuggling of Migrants Protocol calls for States to criminalize smuggling, not the person who is smuggled
	According to human rights guidance, States should ensure that trafficked persons are not prosecuted, detained or punished for their irregular entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons ³¹⁷		
<i>Consent of the trafficked or smuggled person</i>	Irrelevant once the means are established ³¹⁸	Irrelevant, as the means do not need to be established	Neutral: the Protocol does not include in its wording the necessity of establishing the consent of the smuggled migrant ³¹⁹
<i>Transnationality</i>	Not required	Not required	Required
<i>Involvement of an organized crime group</i>	Not required	Not required	Not required

Unlike smuggling, human trafficking is always for the purpose of exploitation of the trafficked person.³²⁰ International law does not stipulate a definition of exploitation, and there is variance between States on how exploitation is defined and implemented, meaning that a migrant could be considered exploited in one country, but the same treatment may not constitute exploitation in another country. The different interpretations, together with stereotypes and a lack of knowledge about trafficking in persons, mean that law enforcement officials and other practitioners may not always recognize when something is or is not a situation of human trafficking.³²¹

³¹⁷ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 (see E/2002/68/Add.1), Guideline 4.5.

³¹⁸ For further discussion, see UNODC, “The role of ‘consent’ in the Trafficking in Persons Protocol”, Issue paper, 2014. Available at www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf.

³¹⁹ Although many people assume that migrants consent to their smuggling, it is important to be aware that their consent may be limited (e.g., migrants may consent to irregular entry to a country, but not to the treatment they suffer in the course of their journey). Where it is assumed that consent is part of the smuggling definition, this has led to the understanding that migrants are themselves culpable for the crime of smuggling because they gave their consent. However, there is no ‘definitional’ reason according to the Smuggling of Migrants Protocol, to have to establish the consent of the migrant. For more, see Global Alliance Against Traffic in Women, Smuggling and Trafficking: Rights and Intersections, 2011. Available at www.gaatw.org/publications/Working_Papers_Smuggling/WPonSmuggling_31Mar2012.pdf.

³²⁰ Trafficking in Persons Protocol, preamble and arts. 3(a), 3(b), 9(5).

³²¹ The examples of exploitative purpose given in the Trafficking in Persons Protocol, are not exhaustive. In some contexts, there has been a policy and practice focus on trafficking into the sex industry, sometimes directly conflating trafficking with prostitution. This is not correct: the Protocol does not equate prostitution with trafficking. The final compromise language agreed in the negotiations of the Protocol, “exploitation of the prostitution of others and other forms of sexual exploitation” was accompanied by an Interpretative Note confirming that the Trafficking in Persons Protocol “addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons”. For prostitution or sex work involving adults to fall within the definition of trafficking in persons all three definitional elements (act, means, and purpose) would need to be present. See, UNODC, “The concept of ‘exploitation’ in the Trafficking in Persons Protocol”, Issue paper, 2015, pp. 7, 27. Similarly, the Committee on the Elimination of Discrimination against Women distinguishes between trafficking and prostitution, see the Committee’s general recommendation No. 19 (1992), para. 16. However, it is the most commonly investigated and prosecuted form of trafficking-related exploitation, leading to trafficking into other labour sectors, and trafficking of men and boys often being overlooked, and services for those affected under-resourced. At international borders, this can lead to border officials operating with gender-stereotyped ideas about who may be a trafficked person, for example focusing more on women or girls from countries or regions associated with prostitution in the popular discourse.

There is a risk of being trafficked whether migrants move through regular or irregular channels.³²² Migrating may increase the risk of migrants being targeted by traffickers, but not all exploitation of migrants occurs in the human trafficking context. Migrants who are not trafficked can be and very often are exploited.³²³

While trafficking in persons always constitutes a human rights violation, migrant smuggling, as seen through a human rights lens, does not in itself constitute a violation.

Sometimes smugglers can provide the only way for migrants to escape desperate situations. States are obligated to protect the rights of individuals who have been smuggled, and specifically to protect them from smuggling-related violence by individuals or groups, as well as to provide assistance to migrants whose lives or safety are endangered through smuggling.³²⁴ Further, the purpose of smuggling of migrants is for “financial or other benefit”, as included in the definition “to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups, such as religious or non-governmental organizations”.³²⁵ At the same time, migrants who have turned to smugglers often have little other choice in how they move. In that unequal power relationship, migrants are at risk of abuse and exploitation, including being forced into situations of trafficking.

States have recognized that, as part of their commitment to saving the lives of migrants in transit, it is important to “enable migrants to communicate with their families without delay to inform them that they are alive by facilitating access to means of communication along routes and at their destination, including in places of detention, as well as access to consular missions, local authorities and organizations that can provide assistance with family contacts, especially in cases of unaccompanied or separated migrant children, as well as adolescents”.³²⁶

As they move, some people are inherently more at risk of human rights abuses than others due to persisting unequal treatment and discrimination, based on factors such as age, sex, ethnicity, nationality, religion, language, indigenous status, sexual orientation, gender identity or expression, or migration status. The focus of the human rights framework is on the individual, not on particular groups of migrants.

- ▶ The physical and/or psychological conditions of individuals may be a factor that put their rights at disproportionate risk when they are migrating. Some migrants need specific protection because of personal characteristics, circumstances or identity:³²⁷
 - Children, including unaccompanied or separated children;
 - Older persons;
 - Persons at risk due to their actual or assumed sexual orientation or gender identity;
 - Persons with disabilities;

³²² For example, inhumane living and exploitative labour conditions for some migrant workers on temporary or seasonal work permits may constitute human trafficking if the migrants were, for example, deceived or coerced into the situation (i.e., if the act and means elements of the definition of trafficking were present as well as the exploitative purpose element).

³²³ Global Migration Group, “Exploitation and abuse of international migrants, particularly those in an irregular situation: A human rights approach”, Thematic paper, 2013.

³²⁴ See Smuggling of Migrants Protocol, arts. 4, 16(2)–(3).

³²⁵ See Report on Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, para. 88; UNODC, “The concept of ‘financial or other material benefit’ in the Smuggling of Migrants Protocol”, Issue paper, 2017.

³²⁶ Global Compact for Safe, Orderly and Regular Migration, para. 24(c) (Objective 8).

³²⁷ See OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 7.

- Pregnant or nursing women or girls and other pregnant individuals who may not identify as women,³²⁸
- Persons with acute or chronic health conditions, including HIV/AIDS.

Note that it is discrimination (external factors), rather than the personal characteristics, circumstance or identity of the individual that put migrants in vulnerable situations. For example, the challenge faced by migrants with disabilities can be the absence of ramps to access migrant shelters or the lack of provision of information about their migration proceedings in Braille, and not that they have a disability per se; migrant women may face a disproportionate risk of rape and other forms of sexual violence, not because they are women, but because of gender discrimination and violence from State and private actors. Migrants may face barriers to access remedies, particularly if they are in an irregular situation, which can lead to a cycle of impunity.

Any of those factors may be exacerbated by structural discrimination and inequality, including on the basis of gender or socioeconomic position. Women and trans migrants may also suffer the consequences of restricted access to identity documents, education, training, reliable information on migration and financial resources; due to social norms and pervasive discrimination, they are less likely to receive visas for employment that open up access to regular migrations than are cisgender men. Such barriers in turn limit their ability to navigate risks during their journey and at destination.³²⁹

2.1.4. Ensuring a human rights-based approach to migrants in vulnerable situations

A human rights-based approach to migrants in vulnerable situations recognizes in laws, policies and practices that both situational and personal vulnerability are created by external factors. Therefore, such an approach seeks above all to empower migrants to claim their rights and not to stigmatize or deny them agency.³³⁰

As a matter of principle, and in order to ensure that every migrant is able to access appropriate protection of their human rights, the situation of each person must be assessed individually. It is not necessary to create or use a different legal framework for migrants in vulnerable situations. The existing human rights standards apply for all migrants.

As a contextual issue, it is important to be aware that vulnerable situations may be created or exacerbated by racism, racial discrimination, xenophobia and related intolerance against migrants, and the harmful stereotypes often applied to them, including on the basis of actual or assumed religion or belief. Widespread misrepresentations about the scale and nature of migration can contribute to xenophobia. Manifestations of xenophobia in restrictive immigration policies are not just limited to extremist parties, but also have wider influence, through what is known as the *contagion effect*, whereby more traditional parties adopt tougher stances on issues such as security, migration and integration as a means to counter the rise of anti-rights and right-wing populist parties.³³¹ A vicious cycle can be created as particular groups of migrants, or even migrants generally, may be framed as threats to society and ever harsher migration measures may be put in place to counter the “threat”.

Anxieties about national security and terrorism threats have produced a far-reaching web of surveillance and other practices that result in racial discrimination on the basis of citizenship or immigration status.³³² Restrictions on freedom of movement against nationals of countries

³²⁸ The majority of people that border officials encounter who have been pregnant or have given birth will identify as women or girls. However, some trans and intersex men and non-binary people may also get pregnant, and it is important to ensure that all individuals are able to access necessary services and appropriate human rights-based protections.

³²⁹ Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008), para. 10.

³³⁰ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, footnote 10.

³³¹ Special Rapporteur on racism, A/HRC/35/41, para. 48.

³³² Special Rapporteur on racism, A/HRC/38/52, paras. 55–59.

or individuals of a particular faith, justified by counter-terrorism rhetoric, are discriminatory under international law; they are disproportionate to any stated aim and a waste of resources needed for meaningful counter-terrorism efforts. Nonetheless States have instigated a range of strategies, such as administrative bans against leaving or entering a country.

2.1.5. Gender in relation to migrants in vulnerable situations

Guideline 6.14: Ensure that border authorities do not presume women to be vulnerable.

Gender does not itself constitute a vulnerable situation, but it interrelates with situations that migrants experience in their countries of origin, in transit, at destination and on return. Gender may affect the risks of human rights abuses that migrants face, as well as their recourse to assistance, justice and remedy.

- ▶ Not all women migrants are in vulnerable situations, but due to pervasive gender-based *discrimination*, some will require a heightened duty of care.
- ▶ It is important to *respect the individual autonomy* of the migrant, regardless of their gender.

The framing of migrants in vulnerable situations should not be understood as synonymous with a gender analysis of migration.

Women currently make up about one half of the world's migrant population.³³³ It is important not to assume that all migrant women are vulnerable and in need of protection or lack agency. To do so infantilizes women, that is, effectively treats women as if they are young children. Such approaches are discernible in interventions that treat all women coming from a particular country as victims of trafficking, for example. It denies the possibility that women have assessed the risks and made their own decision to migrate.

It is important to remain cognizant of the effects on women's migration of gender-based and multiple other forms of discrimination: for example, discriminatory laws in a country of origin that deny women the right to nationality and restrict their right to pass their nationality to their children have direct consequences on women's and children's ability to secure the necessary documentation to migrate through regular channels laws or social norms that allow men to exercise marital power over their wives or parental power over adult daughters; and other legal or de facto conditions that limit women's rights, including in relation to their migrating.

Border officials are required to ensure adequate attention to any gender-specific needs relating to a migrant's situation at the border: for example, ensuring that systems and procedures provide that any migrant, regardless of gender, who has been a victim or witness of sexual and gender-based violence, is able to access the services they need, including with regard to sexual and reproductive health. Too often, men and boys are not recognized as targets of such violence and are unable to access the necessary assistance and support.

It is important to recognize that women do face pervasive discrimination on the basis of their gender. Gender-based discrimination influences women's experience of migration, sometimes creating or worsening vulnerable situations: for example, nationality laws that discriminate based on gender can further limit women's enjoyment of other rights, including the right to freedom of movement.³³⁴

It is equally important to use an inclusive gender lens for all migrants at the border, as gender may interrelate with factors to create vulnerable situations for all migrants: for example, men

³³³ United Nations, Department of Economic and Social Affairs, Population Division data for 2020.

³³⁴ Working Group on discrimination against women, "Discrimination against women in nationality", Position paper, May 2017. Available at www.ohchr.org/Documents/Issues/Women/WG/DiscriminationAgainstWomenNationality.pdf; Special Rapporteur on racism, A/HRC/38/52, paras. 32–36.

also face risk of rape and other forms of sexual violence in various circumstances. However, ignorance and stigma mean that men's and boys' experiences are often overlooked, and they may not have access to the services they need.



See discussion on gender in session 1.2, especially in relation to checking assumptions.

2.1.6. Exercise: Identifying vulnerable situations in countries of origin, transit and destination



Duration: 30 minutes
(exercise: 15 min.; debriefing: 15 min.)

Aim of the exercise:

To encourage learners to reflect on, and identify, experiences and circumstances that may place individuals in vulnerable situations.

How to carry out the exercise:



This is suggested as a carousel exercise. However, if time is short, the exercise can be carried out without rotation, that is, using one flip chart per group.

- ▶ Place three flip charts (on stands) around the training room. Write one of the following phrases on each chart:
 - A. Cause people to leave their country
 - B. Occur during transit/at international borders/once they reach their destination
 - C. Linked to an individual's identity or circumstances
- ▶ Divide learners into three groups and assign each group to a flip chart.
- ▶ Ask learners to list the situations relating to A, B and C on their respective flip charts. With rotation: ask them to move to another flip chart and add to the list. Repeat the rotation until all the groups have had a chance to add their suggestions to each flip chart.
- ▶ Allow about 10 minutes at the first flip chart; subsequent rounds should be shorter.



Debriefing

- ▶ Invite each group to present the list on one flip chart, in plenary.



The three slides may be useful for the debriefing as they contain examples and discussion prompts. They are not exhaustive. The background information provided throughout this session can further support discussion on the human rights concerns faced by migrants and how border officials can be alert to and adequately support migrants in vulnerable situations.

2.1.7. Considerations for identifying migrants in vulnerable situations

As border officials may be the first and only contact an individual has with a State actor, and the only time border officials will be able to discharge the State's heightened duty of care to migrants in vulnerable situations, it is critical that border officials are aware of the range of human rights needs that migrants in vulnerable situations may have. In that regard, it is also important for border officials to keep in mind that *migrants in vulnerable situations*:

- ▶ May or may not have physical signs of injury;
- ▶ May not volunteer information on or may be reluctant to discuss their experiences;
- ▶ May have certain needs, such as for medical, and sexual and reproductive health services;
- ▶ May display other indicators of trauma: impaired memory, difficulty focusing, inability to trust, tendency to startle easily, anxiety, nightmares and inability to sleep, headaches, loss of appetite and digestive problems;
- ▶ May not belong to nationality groups from countries experiencing conflict or those often designated as "refugee-producing countries".

It is necessary to carry out a sensitive inquiry that is gender and age responsive to avoid generating unnecessary distress and retraumatizing the migrant.

Not all migrants who are in, or have experienced, vulnerable situations will show signs of being traumatized; but it is necessary to consider and be alert to the possibility.

Many factors expose migrants to trauma during their journeys, including the drivers of their migration; the stress of the journey, including weighing up risks; fear of discovery or rejection at borders; being victims of, or witnesses to, human rights abuses; caring for family members during the journey; racism and xenophobia; being exposed to violence and ill-treatment, including gender-based violence; poor health; and inadequate nutrition.

Migrants are often coping with the effects of multiple traumatic events and stressors. For example, in the context of screening and interviewing with State officials, if migrants do not feel safe, due to the effects of trauma, including possibly post-traumatic stress disorder, and other psychological conditions, they are less able to claim their human rights and seek assistance. That also makes it very difficult for them to properly participate in any border screening that is not gender responsive and trauma informed, thereby reducing its effectiveness.³³⁵

Migrants should be individually assessed on arrival at international borders, without discrimination or prior assumptions, including in relation to all the arguments as to why they should not be returned or removed from the territory. Proper identification and documentation is critical for trauma victims to access adequate treatment.



Distribute session 2 summary.

³³⁵ OHCHR, A/HRC/31/35, p. 10.

Session 3: Ensuring human rights in interception, rescue and immediate assistance

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Introduce the content of Guidelines 4 and 5, which covers human rights obligations in interception, rescue and immediate assistance ▶ Present practical steps to be taken at different stages of rescue and interception, in order to ensure human rights ▶ Consider when and how it is acceptable to use force in a human rights-based approach at international borders
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Appreciate the key steps to be taken during: <ul style="list-style-type: none"> • planning and preparation • interception, rescue • immediate assistance ▶ Identify core considerations concerning the use of force
Key learning points/messages	<ul style="list-style-type: none"> ▶ Border officials play an essential role in protecting the lives and safety of all migrants, including those in vulnerable situations, in interception, rescue and immediate assistance. ▶ Planning for interception, rescue and immediate assistance is vital. ▶ Dangerous interception methods must be avoided. ▶ Any use of force by law enforcement should be exceptional and must meet all requirements of legality, necessity, proportionality, non-discrimination, precaution and accountability. ▶ The risk of harm must never outweigh the advantage of using force.
Preparation	<ul style="list-style-type: none"> ▶ Print handouts
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; true/false cards
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ True/False cards ▶ Key steps for interception, rescue and immediate assistance ▶ Use of force continuum ▶ Core considerations concerning the use of force

Session overview/rationale

This session introduces learners to the content of Guidelines 4 and 5, which covers applicable human rights obligations in interception, rescue and immediate assistance. Interception and/or rescue are often the first point of contact between border officials and migrants at international borders.

The session covers the duties to save lives, provide immediate assistance and ensure the safety of migrants and staff. Recognizing that this is an area of work that carries risk, the session also addresses when and how force can be used in a human rights-compliant manner.

Session content

3.1: Human rights considerations in interception, rescue and immediate assistance

3.2: When and how may force be used at international borders?

3.1. Human rights considerations in interception, rescue and immediate assistance

Guideline 4.3: Train border officials to protect lives and safety and ensure human rights in rescue and interception.

First of all,

- ▶ Ask learners who among them work, or have worked, in interception, rescue and/or immediate assistance, so as to get a sense of the experience and expertise in the room.
- ▶ Ask learners to recall the key principles to uphold at international borders.



See session 1.4.2 for the key principles to uphold at international borders.

In the context of interception and rescue, the main principles to uphold include:

- Primacy of the obligation to protect human rights;
- Provide assistance and protection from harm;
- Framework of legality, necessity and proportionality to determine permissible use of force, including firearms and restraints;
- Principle of non-refoulement, including chain or indirect refoulement;
- Prohibition of collective expulsion.



Non-refoulement and prohibition of collective expulsion are key obligations in interception, and will be discussed in session 6 (return).

3.1.1. What is meant by interception, rescue and immediate assistance?



See Glossary for definitions of “interception”, “rescue” and “immediate assistance”, as well as “place of safety”. Although each concept will be dealt with separately in this session, it is not uncommon for border officials to be confronted with all at the same time.



Show photographs of interception, rescue and provision of immediate assistance in various contexts (e.g., at sea, on land, at airports) to help generate discussion of those different interventions.



However, the images should supplement not replace the discussion of the definitions. At the same time, be mindful of how certain images may contribute to certain perceptions and misperceptions of migration as a crisis or even trigger fears and anxieties. Images should therefore be used with the purpose of reflecting on situations that learners may face in their work contexts.

- ▶ *Interception* refers to all operations by a State, outside or within its national territory, to stop individuals or groups of individuals for law enforcement purposes, such as examination of their documentation and their vehicles/vessels or for counter-terrorism

purposes. In the context of cross-border movement, interception may involve measures to prevent or interrupt the movement of persons without the required documentation.³³⁶

The term “interdiction” is also sometimes used to describe the physical interception of vessels, especially at sea (within territorial waters or on the high seas), that are suspected of carrying irregular migrants or asylum seekers. The term is also used in reference to the interception of movement of prohibited commodities.

- ▶ *Rescue* is an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety at an international border.³³⁷

Given the obligation under international human rights law to make every effort to protect migrants’ right to life wherever they are at risk, on water or on land, rescue is a vital element of border management work.³³⁸

In the context of rescue at sea, one of the oldest principles of the law of the sea and a well-established principle of customary law requires States and private vessels to respond to situations of distress and to rescue and provide assistance to any person, including on the high seas beyond States’ territorial waters.³³⁹ The flag State – that is, the State under whose jurisdiction a vessel sails – has a duty to ensure its vessels render assistance and rescue people in distress at sea.³⁴⁰

The definition of rescue at sea implies disembarkation. Although there is no agreed criteria for disembarkation, with the safety and well-being of migrants in mind, disembarkation should be carried out promptly and in a place of safety. Disputes relating to disembarkation or so-called “non-SAR (search and rescue) considerations”, such as those related to the asylum or human rights protection needs of migrants, for instance, should be resolved after disembarkation, so as not to prejudice the provision of immediate assistance.³⁴¹

- ▶ *Place of safety*: There is no agreed definition of “place of safety” and agreeing on a place of safety for the purposes of disembarkation can often be contentious, in practice. A place of safety can be understood as the place to which persons should be disembarked or transferred following rescue or interception and where the rescued persons’ safety and life are no longer threatened; basic human needs, such as food, shelter and medical needs, can be met; and transportation arrangements can be made for the rescued persons’ next or final destination.³⁴²

A place of safety should not be understood as restricted solely to the physical protection of people. It necessarily also entails respect for their human rights, including the right to food, water, shelter and health, and protection from onward refoulement.³⁴³ That needs to take into account

³³⁶ There is no internationally agreed definition of “interception”. The definition used in this Trainer’s Guide builds on a working definition proposed by UNHCR. See UNHCR, *Interception of asylum-seekers and refugees: the international framework and recommendations for a comprehensive approach*, 2000, para. 10.

³³⁷ International Convention on Maritime Search and Rescue of 1979, Annex, Chapter 1, paragraph 1.3.2. States have a duty to ensure any ship flying its flag renders assistance, in particular to the rescue of persons in distress (United Nations Convention on the Law of the Sea, art. 98). Furthermore, States have committed “to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, in accordance with international law”. See Global Compact for Safe, Orderly and Regular Migration, Annex, para. 24 (Objective 8).

³³⁸ The right to life is protected under the International Covenant for Civil and Political Rights, art. 6; see discussion in session 1.3.3(a).

³³⁹ United Nations Convention on the Law of the Sea, art. 98; Convention for the Safety of Life at Sea, Regulation 33.1; International Convention on Maritime Search and Rescue, Regulation 2.1.1; International Convention on Salvage, art. 10(1). Note that the territorial zone of a State extends up to 12 nautical miles (1 nautical mile = 1852 m) from its baseline, and the State has full jurisdiction and control over its territorial waters.

³⁴⁰ United Nations Convention on the Law of the Sea, art. 98(1).

³⁴¹ See International Maritime Organization (IMO), *Guidelines on the Treatment of Persons Rescued at Sea*, Resolution MSC.167(78), 2004.

³⁴² IMO, UNHCR and ICS, *Rescue at Sea: A Guide to Principles and Practice Applied to Refugees and Migrants*, p. 13.

³⁴³ Parliamentary Assembly of the Council of Europe, resolution 1821 (2011), para. 5.2.

gender-specific concerns in certain places that may generally be considered “safe ports/places” but may not be for all migrants, for example, LGBTI migrants in contexts of criminalization.

- ▶ *Immediate assistance* is the provision of assistance to any person in distress to provide for their initial medical or other needs.

Guideline 5: Protect human rights in the context of immediate assistance.

States have an obligation to provide assistance to any person in distress at sea, land or air borders, regardless of their nationality or status or the circumstances in which they are found, provide for their initial medical or other needs, and deliver them to a place of safety.³⁴⁴

Assistance must be provided unconditionally: for example, access to a shelter should not be conditional on agreeing to be returned to country of origin. Where necessary, assistance should take priority over border control or police or other enforcement procedures.³⁴⁵

In certain situations, migrants arriving at an international border will be accommodated in reception facilities. Their right to liberty must be upheld³⁴⁶ and international human rights standards must be met in order to ensure that all migrants are provided with any assistance necessary, on a non-discriminatory basis, that is culturally appropriate, gender responsive and sensitive to age and disability, if any. For example, it is necessary to identify and eliminate barriers to the ability of migrants with disabilities to access the assistance they need.³⁴⁷

In all reception facilities, women and girls must not suffer discrimination in the allocation or control of resources. There should be women staff present wherever women or girls are accommodated. All centres should provide well-lit, safe and private, gender-responsive water, sanitation and hygiene (WASH) facilities, separate housing for women and men, except where families make an informed request to be accommodated together; safe and culturally-appropriate spaces for women, where they can rest and receive information and other services; and parent/newborn areas.³⁴⁸

3.1.2. Discussion: Human rights particularly at risk in interception, rescue and immediate assistance



The discussion in this session builds on the discussion of human rights particularly at risk at international borders in session 1.3.3. Below is a brief consideration of human rights that might be at risk in the context of interception, rescue and immediate assistance. Note that the list is not exhaustive. The trainer should adapt the content of the session to include rights that might be more pertinent in the relevant context, including by referring to those in sessions 1.3.3 (at the border), 4.1.3 (screening and interviewing), 5.1.2 (immigration detention) and 6.1.2 (return).

³⁴⁴ Search and Rescue Convention, Annex, Chapter 2, para. 2.1.10 states, “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”.

³⁴⁵ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 4, Guideline 4.

³⁴⁶ When migrants are held in reception facilities where their movements are restricted, it indicates that such facilities are functioning as places of detention (see session 5 for discussion on immigration detention).

³⁴⁷ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Guideline 5.3; OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 4, Guideline 4.

³⁴⁸ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 11, Guideline 3.



The slide for this discussion is interactive so that the trainer can display the question only, encourage learners to do a quick brainstorming, then reveal the examples.

Principle C.10: States shall protect and assist migrants at international borders without discrimination. Human rights obligations including in respect of civil political economic social and cultural rights must take precedence over law enforcement and migration management objectives.

Guideline 4.7: Sensitize border officials of the primacy of the obligation to protect human rights, including lives and safety.

(a) Right to life

Rescues are conducted to protect life and to retrieve persons in distress. Border officials should make every effort to protect migrants' right to life wherever they are at risk—at sea or on land.³⁴⁹

(b) Right to liberty and security of person

Following interception and rescue, migrants are disembarked and often hosted initially in reception centres. In some places, those centres may effectively function as places of detention. That would constitute a violation of migrants' right to liberty. Migrants should not be accommodated in closed shelters, jails or migration detention centres.



See session 5 on immigration detention.

A human rights-based approach to the use of force includes, under certain conditions, the use of restraints that limit the individual's right to personal liberty.



See session 3.2.5 for application of the general principles on the use of force.

(c) Right to privacy

Reception processes must respect migrants' right to privacy, including their communications and personal data.



Migrants' right to privacy, including data protection, is discussed in more detail in session 4.2.5.

(d) Right to freedom of movement

When migrants arriving at the international border are accommodated in reception facilities, their day-to-day movements must not be restricted. When migrants are detained on arrival, regardless of the term used to describe the facility, that would constitute immigration detention.



See session 5 on immigration detention.

³⁴⁹ Ibid., Principle 4, Guideline 3.

Interceptions can, in certain cases, restrict migrants' right to leave any country, including their own.³⁵⁰

(e) Right to family life

Interception, rescue and immediate assistance must not separate families. Families should generally be housed together, and the various forms of family should be recognized. Gendered, hetero-normative or other stereotyped or prejudicial assumptions should not influence the registration or reunification of family representatives.³⁵¹ Assistance provided should include the facilitation of family reunification for those who have been separated. Where migrants have gone missing in transit, the authorities should work to keep their families informed on the search progress.³⁵²

(f) Right to health

Cruel, inhuman or degrading reception conditions may put the health and safety of migrants at risk and expose them to other human rights violations.³⁵³

Immediate assistance should include individual health and medical screenings with referrals for further medical attention as necessary, including for emergency sexual and reproductive health services and mental health referrals, where appropriate.

Guideline 5.2: Provide individual health and medical screenings.

(g) Right to food

States have a core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters. In the context of interception, rescue and immediate assistance, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide for) that right directly.³⁵⁴ That would mean making appropriate food available for purchase, if migrants have the means, or providing it for free, if they do not, and ensuring specific attention to the needs of migrants in vulnerable situations. Furthermore, in reception facilities, the needs of children, as well as other vulnerable groups, such as pregnant women or girls and people with specific health needs, should be prioritized and any gender inequalities addressed to ensure women can enjoy equal access to food.³⁵⁵

(h) Right to water

Plans for interception and rescue should include materials for emergency health care, food and water supplies. Reception facilities should ensure adequate nutritional and culturally appropriate food, clean water, sanitation and adequate health services, including sexual and reproductive health care and menstruation-related needs.

³⁵⁰ Respecting human rights at international borders applies to individuals leaving a State as well as those trying to enter it. See International Covenant on Civil and Political Rights, art. 12.2 on liberty of movement. However, as per art. 12.3, that right can be restricted if provided for by law, necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, so long as this is consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. See also, Human Rights Committee, general comment No. 27 (1999) on freedom of movement, paras. 8–10, 17.

³⁵¹ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 9, Guideline 4.

³⁵² Global Compact for Safe, Orderly and Regular Migration, para. 24(d) (Objective 8).

³⁵³ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, p. 7.

³⁵⁴ Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), paras. 6, 15.

³⁵⁵ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 30; Committee on the Elimination of Discrimination against Women, general recommendation No. 37 (2018), paras. 66, 72(a) and (c); Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 31.

(i) Right to shelter

The right to shelter, in the context of interception, rescue and immediate assistance, derives from the right to adequate housing and applies to everyone, that is, individuals as well as families, with “family” understood in a wide sense and without discrimination, including on the basis of age, gender, group or migration status.³⁵⁶ Special care must be taken to protect the rights of and provide shelter for all individuals who might be at heightened risk of human rights abuses, including children, older persons, persons with disabilities, people living with HIV/AIDS and victims of sexual and gender-based violence, in a non-discriminatory manner and according to their specific needs.

The design and implementation of shelter programmes can help ensure equitable and safe access to shelter, construction materials and other essential supplies. That should include the meaningful participation of individuals representative of the target group, that is, women, girls and boys, LGBTI people, persons with disabilities, and not only men, on a range of issues such as security and privacy, psychosocial support, and sexual and reproductive health, as part of the work to prevent and respond to sexual and gender-based violence. Access to adequate shelter that is secure and free from violence is linked to the prevention of interpersonal or domestic violence. It is not permissible to restrict the movement of women, children, LGBTI migrants, persons with disabilities or other groups of migrants on the grounds that they might face sexual, gender-based or other violence or harm inside or outside a facility.³⁵⁷ Child siblings should be accommodated together, and any child who arrives with, or who has, adult relatives living in the country should be allowed to stay with them, unless such action would be contrary to the best interests of the child.³⁵⁸

(j) Right to information

In the context of rescue at international borders, States have committed to enable migrants to communicate with their families without delay to inform them that they are alive by facilitating access to means of communication along routes and at their destination, including in places of detention, as well as access to consular missions, local authorities and organizations that can provide assistance with family contacts, especially in cases of unaccompanied or separated migrant children, as well as adolescents.³⁵⁹

On arrival, migrants need information on border procedures and what will happen next, as well as information on access to any services they may require. States have affirmed the importance of providing accurate and timely information at all stages of migration.³⁶⁰

(k) Right to defend human rights

Everyone has the right to defend human rights, regardless of factors such as nationality or migration status. A human rights defender refers to individuals or groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights.³⁶¹ The individual or group does not need to self-identify as a human rights defender to be one.

Guideline 2.6: Ensure that private individuals, including shipmasters, who carry out rescues of migrants are not criminalized.

³⁵⁶ International Covenant on Economic, Social and Cultural Rights, art. 11(1), as an element of the right to an adequate standard of living; Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing, para. 6.

³⁵⁷ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 13, Guideline 5.

³⁵⁸ Committee on the Rights of the Child, general comment No. 6 (2005), para. 40.

³⁵⁹ Global Compact for Safe, Orderly and Regular Migration, para. 24(c) (Objective 8).

³⁶⁰ *Ibid.*, para. 19 (Objective 3).

³⁶¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 1; Special Rapporteur on human rights defenders, A/HRC/37/51, paras. 8, 12.

The right to defend human rights extends to humanitarian and human rights workers who are involved in providing assistance to migrants, including rescue, and advocating for their rights. Human rights defenders assisting people on the move, including migrants, are often ordinary people who have themselves been displaced or have chosen to migrate, or who have witnessed the suffering of people on the move. They may not even be aware that they are acting as human rights defenders. Defenders of the rights of people on the move work in an increasingly hostile environment, marked by the closing of civic space generally, and attacks and threats to human rights defenders more specifically. In such an environment, they face particular challenges, including criminalization, owing to the nature of both the issues they champion and the activities they undertake.³⁶² In the Global Compact for Migration, States affirmed that the provision of assistance of an exclusively humanitarian nature to migrants is lawful.³⁶³

Women human rights defenders are women and girls working on any human rights issue, as well as people of all genders who work to promote women's rights and rights related to gender equality, including sexual rights and LGBTI rights.³⁶⁴ Given pervasive gender discrimination, women human rights defenders face additional barriers to engagement because of who they are and the issues they address.

3.1.3. Planning and preparing for interception, rescue and immediate assistance

Every operation, activity, procedure and routine requires planning and preparation, resources and a method, including a risk assessment. This is especially true in interception, rescue and immediate assistance.



Distribute the handout on key steps for interception, rescue and immediate assistance.

Guideline 4.8: Carry out risk assessments and plan rescue operations.

(a) Human rights-based planning

The requirement for planning with clear, human rights-based objectives should be at the heart of all border governance measures. That means ensuring that institutional policies and guidelines, including standard operating procedures (SOPs), are human rights based so as to support the integration of human rights considerations at the planning stage. That can help to identify roles and responsibilities and ensure that an efficient and effective system is in place to protect the safety and rights of all individuals involved in interception and rescue operations. It is good practice to have a set of questions to guide any planning. Closer collaboration and involvement of civil society organizations in the development of those plans can help with a range of issues, including, for example, human rights of women and gender equality defenders, to ensure gender responsiveness in the plans.

Planning should include the appropriate number and type of staff, with appropriate gender balance; necessary transportation, emergency health equipment and goods, such as essential medicines; trained personnel to use them;³⁶⁵ as well as food and water supplies. The plan should also address the methodology, including steps to ensure the use of the minimum force necessary.

³⁶² Special Rapporteur on human rights defenders, A/HRC/37/51, generally and specifically paras. 13, 19, 54–58.

³⁶³ Global Compact for Safe, Orderly and Regular Migration, para. 24(a) (Objective 8).

³⁶⁴ Special Rapporteur on human rights defenders, A/HRC/40/60, para. 12; see also www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_WHRD_WEB.pdf.

³⁶⁵ A human rights-based approach involves competent medical staff in any rescue or interception or at the point of disembarkation, who are qualified to administer any medicines (see session 3.1.6 on human rights considerations with regard to immediate assistance).

(b) Clarify the objective and assess the rights that may be at risk

Determine the objective of the operation and ensure that all members of the team undertaking the interception and/or providing assistance understand the goal; assess the rights that could be at risk; and know the options that will be available to the team to achieve the objective while minimizing the risk for migrants, border authorities and others assisting in the interception or rescue.

Border officials should have identified places of safety and safe ports in the relevant area to enhance protection of migrants in the event of situations of distress. Such locations should also be agreed with neighbouring countries, where necessary. Any disputes arising in relation to disembarkation should be decided swiftly in accordance with international human rights law, maritime law and, where applicable, international refugee law, particularly in light of border officials' obligations concerning the protection of the right to life and the principle of non-refoulement.



Remind learners that places of safety are not simply locations where migrants will be physically safe; but must also be locations where all their human rights are respected.

Guideline 4.13: Ensure coordination and cooperation for disembarkation.

(c) Plan the methodology

Decide on the methodology for the operation, including how to avoid dangerous interceptions, and ensure that only minimum force is used, if necessary.

Coordinate with other agencies, especially in the preparation of assistance, and ensure that effective and safe referral pathways are in place. Such agencies may include national human rights bodies, international organizations, and civil society organizations.

(d) Prepare the team and equipment

Ensure the appropriate number and type of staff, necessary transportation, emergency health equipment and personnel, food and water supplies.

Ensure the provision and maintenance of rescue beacons along dangerous migration routes so that migrants whose lives and safety are in danger can signal for help and be rescued.

Guidelines 4.2 and 4.9: Ensure adequate rescue services.

Every operation, activity, procedure and routine should be based on, or take into account, a risk analysis. The interests of migrants, including those who are victims of human rights abuses, suspected of terrorism offences or other crimes, and concern for the safety and dignity of border officials, should be at the centre of that analysis. In other words, human rights consequences, including a gender analysis, should be considered at all times.

Even when there is very little time, border officials should be trained to always analyse information about an incident and consider various response scenarios. The underlying rationale is that there are always moments when the border officials involved can choose if and how to respond, and they must make effective use of those moments to respond appropriately and minimize risk for themselves and others, including any third persons present at the scene, while maximizing human rights protections.

For example, a decision is needed as to how to carry out a rescue when a boat is in distress and the people on board are panicking. An approach that uses force from the outset is likely to put people at risk; similarly, a decision to use a small vessel to conduct the rescue in locations where it is known that hundreds of migrants need to be saved could also put lives at risk, as well

as impact the conditions for the crew of the rescuing ship. The standard operating procedure (SOP) should prioritize the safety and lives of migrants, as well as the lives of border officials.

Guideline 4: Ensure human rights in rescue and interception, in particular 4.7, 4.8 and 4.9 on strengthening rescue capacity.

3.1.4. Human rights considerations in interception

(a) Avoid dangerous interception methods

Guideline 4.5: Avoid dangerous interception methods.

Border officials should take care to avoid all dangerous interception measures – that is, measures that pose a risk to the safety and lives of migrants, including those that could amount to violation of the principle of non-refoulement or the prohibition of collective and arbitrary expulsions.³⁶⁶

An example is when States put in place “pushback” policies for irregular migrants, including asylum seekers, which constitute a threat to the right of every individual to life and security of person and, in some circumstances, may be in contravention of the principle of non-refoulement. Pushbacks or other arbitrary and collective expulsion practices should be prohibited in all areas where the State exercises jurisdiction or effective control, including outside its territory.



See the discussion on the principle of non-refoulement and prohibition of collective and arbitrary expulsions in session 6.

Another example is the erection of fences, walls and other physical barriers to entry at land borders that have raised concerns about their negative impact on migrants’ human rights, including restricting or denying access to a territory and screening and identification procedures, including asylum procedures, as well as accelerated or even summary returns.³⁶⁷

(b) Ensure the safety of officials and others

As a general rule, the safety of the border officials and others assisting in the interception or rescue must come first. If those actors are rendered unable to perform their duties, the possibility of providing assistance is also lost. General standard operating procedures (SOP) should be rights based and gender responsive to provide the necessary safeguards for the well-being of all border officials, including the provision or availability of adequate communication equipment and backup support.

- ▶ *Use of force*: The use of force, including the use of restraints, during interception operations should also be strictly limited to what is necessary and proportionate for the legitimate aim. Border officials are obligated to always consider how to de-escalate the use of force. They should be provided with safe and non-harmful equipment to restrain migrants, and trained to use restraints only in cases where it is determined (on a case-by-case basis) necessary and proportionate to a legitimate objective – such as preventing a person who is attempting to flee – and without injuring restrained persons.



The use of force is dealt with in more detail in session 3.2.

³⁶⁶ This training course covers the principle of non-refoulement and the prohibition of collective and arbitrary expulsions (see session 6 on human rights-based return) and this Trainer’s Guide will make reference to relevant principles and guidelines.

³⁶⁷ OHCHR, A/HRC/31/35, paras. 19–23.

(c) Respect the inherent human dignity and privacy of the individual when conducting searches

- ▶ A *search* is an act by which a law enforcement official or any person authorized by law inspects a person and the area immediately within the person's control, including clothes and any objects they are carrying, or a vehicle for a legitimate law enforcement purpose.³⁶⁸

The safety of the border officials may require that intercepted persons be searched as soon as possible for potential weapons or other harmful objects in their possession. Searches should be conducted in line with international human rights law, in a manner that is respectful of the inherent human dignity and privacy of the individual and in full conformity with the principle of non-discrimination, the prohibition of cruel, inhuman or degrading treatment, and the principles of proportionality, legality and necessity.³⁶⁹

Beyond universal checks, such as going through a metal detector at an airport, any further screening that applies only to certain groups or individuals must be justified on a case-by-case basis and not implemented on the basis of generalizations about ethnicity, religion, race, national origin, sex, gender identity and expression, sexual orientation or other personal factor.³⁷⁰

Searches must be carried out using the least intrusive means possible, and never used to harass, intimidate or unnecessarily intrude upon an individual's privacy.³⁷¹ All searches should be subject to oversight and judicial scrutiny to affirm that there was a well-founded reason for the search and that it was proportionate to the situation or the suspected crime. Effective remedies should be provided for any violation of rights and freedoms.³⁷²

- *Gender considerations:* Searches can have a disproportionate impact on women and should be respectful of factors such as gender, age and religion. Searches should be conducted only by officials of the same gender as the individual being searched.³⁷³

Trans migrants may be at particular risk of violations of their human rights in the context of searches. Policies should be in line with international human rights standards, including recognizing gender identity, removing abusive requirements for recognition, respecting gender expression and ensuring that migrants are treated in accordance with their self-identification.³⁷⁴ Any trans or non-binary travellers/migrants to be searched should be allowed to choose the gender of the officials carrying out the searches, including of specific body parts; it must be understood that the person may be using certain items to express their gender.³⁷⁵

³⁶⁸ United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, 2014, p. 2.

³⁶⁹ See, for instance, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 21, prohibiting confiscation and/or destruction of identification cards or other documents; also, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly resolution 70/175, rule 50; United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, 2014, p. 11.

³⁷⁰ Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 20; United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, para. 30.

³⁷¹ Nelson Mandela Rules, rule 51; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229, rules 19, 21.

³⁷² United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, paras. 33, 56.

³⁷³ Human Rights Committee, general comment No. 16 (1988), para. 8; Special Rapporteur on torture, A/HRC/31/57, paras. 19, 23, 70(i).

³⁷⁴ OHCHR, *Living Free and Equal*, p. 43.

³⁷⁵ *Ibid.*, p. 128.

Searches should respect the individual, their right to privacy, and their physical and psychological integrity, and should never be conducted with the sole aim of checking or assigning a gender. Such invasive body searches can be traumatizing and may constitute torture or ill-treatment.

- *Religious considerations:* Searches requiring the moving aside or removal of any religious dress/covering should be carried out away from public view and only in the presence of officials of the same gender as the person being searched.
- *Searching children:* Searches of children should be guided by the principle of the best interests of the child and the individual should be treated as a child first and foremost. Searches of child migrants should be conducted only by officials of the same gender as the child or of the child's choosing. The search should be undertaken in the presence of a parent or guardian or any adult who the child would like to be present, or a child protection officer, if no such adult is available.

(d) Identify persons in vulnerable situations

Guideline 4.3: Identify persons at imminent risk of death.

Border officials should seek out and identify persons who are at imminent risk of death or are severely injured, as well as pregnant and nursing women and girls and other individuals who may not identify as women; individuals or families with infants or small children; children, whether accompanied or not; older persons; persons with disabilities; and other persons in vulnerable situations. The officials should also look for signs that would indicate the need for health services, including mental health, and sexual and reproductive health care, and activate safe, effective and appropriate established referral pathways.

Border officials should also be alert to indicators of any criminal activity relevant to the particular area in which they work, including human trafficking and other human rights violations. It should be remembered that migrants who are smuggled or have otherwise sought to cross the border irregularly should not be treated as criminals. Any migrants whose human rights have been abused or who are victims of crime have the right of access to justice and an effective remedy, including victim-centred and gender-responsive reparations.

Guideline 2.4: Ensure the non-criminalization of migration.



On the non-criminalization of migration, see sessions 1.3.4 and 1.4.3.

3.1.5. Human rights considerations in rescue

(a) Prioritize saving lives

The right to protection against arbitrary deprivation of life is a right from which no derogation (exemption, limitation or suspension) is permitted. The effective protection of the right to life is the prerequisite for the enjoyment of all other human rights.³⁷⁶

³⁷⁶ Human Rights Committee, general comment No. 36 (2018), para. 2.

(b) Search and rescue at international borders

Border officials encountering individuals in distress have the obligation to relieve imminent danger to lives and safety as their first priority, and to ensure the human rights, safety and dignity of all persons rescued. That includes ensuring the effectiveness and resourcing of the search and rescue regime and cooperation with others, including non-State actors. In that regard, organizations and individuals who rescue individuals should not be criminalized or punished.³⁷⁷

Guidelines 2.6, 4.1, 4.3 and 4.6: Ensure private individuals are not penalized or criminalized for carrying out rescues or providing immediate assistance; and encourage the development of rights-based codes of conduct for private actors.

International maritime law requires that ships proceed instantly to the rescue of all persons in distress at sea without regard to the circumstances in which they are found. Arguments that detours may disrupt the ship's own journey or that it is a cargo ship not intended to carry a large number of passengers or that the shipmaster has not received specific instructions and so on are irrelevant. The top priority is to save lives, unless the rescue operation may endanger the lives of crew members or the ship itself. Coastal States are obligated to establish, operate and maintain an adequate and effective search and rescue service.³⁷⁸ Just as shipmasters have an obligation to render assistance, States have a complementary obligation to coordinate and cooperate so that persons rescued at sea are disembarked in a place of safety as soon as possible.

Guideline 4.4: Encourage private shipmasters to carry out rescues at sea.

(c) Provide and maintain rescue beacons along dangerous migration routes

In keeping with the priority in rescue operations to protect migrants' right to life, including through inhospitable or dangerous land or water routes, States should ensure that rescue services are adequately resourced and have the necessary equipment such as rescue beacons.³⁷⁹



See also session 3.1.3 above on planning and preparing for interception, rescue and immediate assistance.

3.1.6. Human rights considerations with regard to immediate assistance

- ▶ *Rescued persons should be taken to a place of safety and offered immediate assistance.*

A place of safety is a place where migrants' safety is no longer threatened, including by ensuring that disembarkation does not lead to onward refoulement, and where their human rights (at a minimum, adequate food, shelter and health) can be met.³⁸⁰

³⁷⁷ See also, OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 4, guidelines 1, 3 and 7.

³⁷⁸ United Nations Convention on the Law of the Sea, art. 98(2).

³⁷⁹ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 4, Guideline 3.

³⁸⁰ International Maritime Organization (IMO), *Guidelines on the treatment of persons rescued at sea*, Resolution MSC.167(78), 2004, in particular Guidelines 6.17 and 6.19; IMO, Search and Rescue Convention amendments, May 2004, Chapter 3, new para. 3.1.9: "The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety".

Officials should provide immediate assistance, including emergency medical services, and adequate food and water, blankets, clothing, sanitation and sanitary items, and the opportunity to rest.

Guideline 5.1: Provide immediate assistance where necessary.

(a) Provide individual health and medical screenings

Guideline 5.2: Provide individual health and medical screenings.

As mentioned in the previous sessions, all rescued or intercepted migrants have the right to receive, without discrimination, emergency medical care required to preserve life or avoid irreparable harm to their health.

Competent medical personnel should be present at the point of rescue, interception or disembarkation to undertake screenings and refer persons, through adequate pathways, for further medical action and health services, as necessary, before they are placed in accommodation at reception centres or elsewhere. Health care should be age, gender, culturally and linguistically appropriate, and provided by qualified staff whose primary role is to ensure the health of persons in detention. Medical screening should be conducted with respect for the migrants' autonomy, right to privacy and informed consent; it should not be used to deny entry, except possibly in a declared public health emergency.³⁸¹

The principle of non-discrimination recognizes health or disability status among the prohibited grounds for discrimination and requires that States do not treat persons intending to enter or reside on their territory differently solely on prohibited grounds, unless there is an objective and reasonable basis for doing so.³⁸²

Emergency medical care is the provision of care that is required to preserve life or to avoid irreparable harm to health, including gender-specific health-care services such as emergency obstetric and newborn care, prenatal and postnatal health care, post-rape care, emergency contraception and other sexual and reproductive health services. Such care must be provided on an equal basis as that provided to nationals of the State concerned, regardless of the status or situation of the migrant, and should never be withheld due to the inability to pay.³⁸³

(b) Provide temporary accommodation that is compliant with human rights standards

Guideline 5.3: Provide immediate assistance in reception processes.

³⁸¹ See discussion on the right to health in session 1.3.3(j).

³⁸² IOM, WHO, OHCHR, *International Migration, Health and Human Rights*, pp. 32–33. As discussed in session 1.1.7 of this Trainer's Guide, according to international human rights law, any difference in treatment that has a negative impact on a particular group, such as migrants, has to be justified as being necessary to achieve a compelling purpose and be the least restrictive (least discriminatory) means of achieving that purpose; otherwise it would constitute an impermissible discrimination. Public health concerns would appear to offer a compelling purpose that might justify some forms of restrictions, but denial of entry on the basis of positive screening for a treatable disease (outside of a declared public health emergency) would be too broad and coercive: it would not be the least restrictive means to achieve the end goal of protecting public health. See WHO, *International Health Regulations*, third edition, 2005, which provides guidance on preventing the international spread of diseases while limiting unnecessary restrictions on the free movement of travellers. Available at www.who.int/topics/international_health_regulations/en/.

³⁸³ International Covenant on Economic, Social and Cultural Rights, art. 12; Convention on the Rights of the Child, art. 24; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 28; OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, pp. 50–51.

Guidelines 5.6, 5.7 and 5.8: Criteria in respect of temporary reception facilities.

Ensure that reception facilities are accessible to all migrants, including those with disabilities, pregnant and nursing women and girls, and other pregnant individuals who may not identify as women.

The reception facility or shelter should provide migrants with sufficient age-, disability- and gender-sensitive resources to meet their needs, including their right to privacy, and to protect them from threats to their safety.³⁸⁴

Migrants should not be accommodated in closed facilities operated by State or private actors, or jails or migration detention centres. The shelter or reception facility should not restrict migrants' day-to-day movements unnecessarily, including de facto restriction of movement, in particular of women, children, LGBTI persons, or persons with disabilities, due to fear of sexual, gender-based or other violence inside or outside the facility.



See session 5 for gender considerations regarding migrants in detention.

Women and men who are not part of a family group should be housed separately, unless otherwise requested by a member of the family group. The provision of accommodation for families should recognize that various forms of family exist, and provision should be made for separate accommodation if requested by a family member, for example, in cases of domestic violence.³⁸⁵ Women staff should be present wherever women or girls are accommodated.

Children should be accommodated with their families or confirmed guardians, and not be housed with unrelated adults; siblings should be kept together. Qualified authorities, such as child protection officers, should maintain regular supervision and assessment of temporary care arrangements for unaccompanied or separated children.³⁸⁶ In gender-segregated housing, trans migrants should be housed with migrants of the gender with which they self-identify.

(c) Cooperate with other bodies, including human rights defenders

- ▶ A *human rights defender* is someone who, individually or with others, acts to promote or protect human rights. An individual or group does not need to self-identify as a human rights defender to be one.

It is important to note that human rights defenders are not only found within non-governmental organizations (NGOs) and intergovernmental organizations, but in some instances, may also be government officials, civil servants or members of the private sector. Border officials can be front-line human rights defenders.³⁸⁷

Cooperating with international organizations (such as United Nations agencies), civil society organizations and human rights defenders, including those that promote the rights of migrants, women and LGBTI people, could be especially useful in providing assistance, services and information, as well as identifying and referring migrants in vulnerable situations.

All monitoring of border control operations should encompass the actions of all State and private actors involved.³⁸⁸

³⁸⁴ The Commission on Human Settlements considers adequate shelter as “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost”. See also Global Strategy for Shelter to the Year 2000, General Assembly resolution 46/163; and discussion of the right to shelter in session 3.1.2(i).

³⁸⁵ See discussion and references at session 1.3.3(g).

³⁸⁶ Committee on the Rights of the Child, general comment No. 6 (2005), paras. 39–40.

³⁸⁷ See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 1; OHCHR, “About human rights defenders”. Available at www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx.

³⁸⁸ Recognizing that the establishing of such monitoring mechanisms is not within the remit of front-line border officials.

Guideline 5.4: Cooperate in the context of immediate assistance, including identification and referrals.

(d) Provide basic information, including on migrants' rights, asylum and other protection procedures, and effective referral pathways

Provide migrants with accessible information about their rights and how to claim them; access to health and medical care, including mental, and sexual and reproductive health; asylum processes or other protection alternatives; accessing legal aid, shelters and safe spaces; and organizations that provide such services.

Such information should include migrants' right to consular assistance, if they so wish, respecting their right to privacy.

Guideline 4.11: Provide accessible information about rights, including to consular assistance.



See discussion on the rights to privacy and security of person, below.

All information should be in a language that the migrants understand and in accessible formats, such as age-appropriate, large print, easy-to-read, audio or Braille.³⁸⁹

(e) Protect the right to privacy and the right to security of person

The right to privacy may be restricted only when lawful, necessary and proportionate to a legitimate aim.



See session 1.1.7 for a discussion of those tests, and session 1.3.3 for a detailed discussion on the right to privacy.

Consequently, photographs, declarations, personal data or belongings should not be taken or used, unless they are necessary and proportionate to a legitimate purpose, in accordance with international human rights law.

- ▶ Everyone is entitled to the *right to privacy*, regardless of their migration status.³⁹⁰

Guidelines 1.2 and 4.12: Media reporting, privacy and data protection.

Border officials should try to anticipate any possible encounters with the media during interception, rescue, disembarkation, provision of immediate assistance and reception, and plan how to safeguard the privacy of intercepted migrants. Border officials should ensure that migrants are not photographed, filmed or otherwise recorded by the media without their informed consent, out of respect for their privacy and their safety. However, that duty of care should not be used to prevent those migrants who wish to speak with the media from doing so; like everyone else, migrants have a right to impart information.³⁹¹

³⁸⁹ Convention on the Rights of Persons with Disabilities, arts. 9 and 21; Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014) on accessibility, paras. 7, 21, 40, 42.

³⁹⁰ International Covenant on Civil and Political Rights, art. 17.

³⁹¹ See International Covenant on Civil and Political Rights, art. 19(2) on freedom of expression: "this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Sharing information with the authorities, including consular authorities, of the migrant's country of origin without their consent could put at risk the individual, family members and/or associates still residing in the country of origin. Border officials need to be mindful of the particular risks, including stigmatization, posed to certain groups, such as asylum seekers, LGBTI migrants or victims of gender-based violence, if they are brought to the attention of consular authorities without their knowledge and informed consent.

Guidelines 4.11 and 5.5: On consular authorities and assistance.

3.1.7. Gender considerations in interception, rescue and immediate assistance

It is essential to ensure that protocols on interception, rescue, disembarkation, immediate assistance and reception address the particular experiences, views and needs that women, girls, men, boys, including LGBTI people, and non-binary individuals may face in those situations.

Assistance should be non-discriminatory, culturally appropriate, gender responsive and sensitive to age and disability.

(a) "Dignity kits" should be available at arrival points

- ▶ *Dignity kits* should include sanitary napkins/menstrual pads; underwear; flashlight; laundry detergent; body soap; toothbrush; and toothpaste.

By providing much needed supplies in dignity kits, humanitarian actors enable women and girls to use their limited resources to purchase other important items they may need, such as food.³⁹²

(b) All reception centres should be gender-responsive

Receptions centres should have space, support and provisions to accommodate migrants of different genders, including sanitary facilities, gender-segregated shelter (except where families make an informed request to be accommodated together) with staff of the same gender as the migrants, who have been trained on gender-specific needs and human rights.

(c) Safe water, sanitation and hygiene (WASH) facilities

WASH facilities can be sites of sexual and gender-based violence, therefore, it is crucial that they are designed in such a way as to minimize any risk of violence. For example, there should be gender-segregated toilets and bathing facilities, that are well-lit, safe, private and gender-responsive.

Authorities should consult women, girls, trans and non-binary people to design safe routes from the main shelter area to sanitation facilities with doors that can be locked from the inside, and so on.³⁹³



For further discussion of WASH considerations, see session 1.3.3.

(d) Safe and culturally appropriate women-only spaces

Such spaces are especially important for migrant women who have experienced trauma, including sexual and gender-based violence, or who are still at risk of violence or exploitation.

They should be spaces where women can rest, seek and receive information, and where other services are available.

³⁹² United Nations Population Fund (UNFPA), *Minimum Standards for Prevention and Response to Gender-Based Violence in Emergencies*, 2015, p. 47.

³⁹³ *Ibid.*, p. 60.

It is important that women are able to receive accurate and timely information at all stages of migration directly, without mediation by male family members, for example.

(e) Specialized support should be available to survivors of sexual and gender-based violence and other trauma

It is important that staff working with trauma survivors understand and are sensitive to the diverse forms of violence and other causes of trauma, including intimate partner violence, that migrants' may have experienced or witnessed, and intersectional discrimination that affect different groups of individuals and which may influence their coping strategies, resilience and recovery capacities. This can inform strategies to respect and strengthen their autonomy and eliminate factors that could revictimize them.

3.1.8. Missing and deceased migrants

Protocols should be in place for special measures to be taken with regard to missing and deceased migrants at international borders, including the following:

- ▶ Designate contact points for families looking for missing migrants, through which the families can be kept informed of the status of the search and obtain other relevant information, in line with the right to privacy and protection of personal data.
- ▶ Facilitate the recovery, identification and transfer of the remains of migrants who have died during the journey. Ensure that the remains of deceased migrants are treated in a dignified, respectful and proper manner, including in cases of unidentified individuals.³⁹⁴

3.2. When and how force may be used at international borders



Several of the guidelines cited in this session are outside the remit of front-line border officials and operational staff. They have been included as a guide to the human rights-based approach to managing the use of force.

3.2.1. Exercise: What is meant by use of force?



Duration: 20 minutes
(group discussion: 10 min.; debriefing: 10 min.)

Aim of the exercise:

To encourage learners to identify instances or practices in their daily work that could amount to the use of force, and to consider the identified examples from a human rights perspective. This should be a quick exercise. The trainer could discuss the questions in plenary.

How to carry out the exercise:

- ▶ Ask each group to discuss briefly and note their responses to the following:
 1. Give examples of “use of force” by border officials.
 2. When is such “use of force” appropriate?



Debriefing

³⁹⁴ Global Compact for Safe, Orderly and Regular Migration, para. 24(f) (Objective 8).

- ▶ Ask each group to give one point from their discussion. Go around the room until the groups have shared all the points.
- ▶ Respond immediately to points that require clarification, and take notes (on the *Parking Lot*) during the debriefing so as to refer to them during the session.

Law enforcement officials worldwide, including border officials, play an important role in protecting society from violence, enforcing justice and securing the rights of people. The human rights system will not be effective without them and, in some cases, without the use of force.³⁹⁵ However, the use of force should not be central to border control.

A militarized response, including through the deployment of military equipment, to people seeking to cross international borders is at odds with efforts to ensure safe migration because it increases the risk of individuals being subjected to a wide range of abuses.³⁹⁶ Moreover, immigration deterrence policies are inherently punitive, ranging from securing the more accessible border entry points — thereby purposefully funnelling the migration routes into more hazardous terrain — to imposing strict detention and return policies.³⁹⁷

Those policies increase the likelihood that migrants will be in vulnerable situations during their journeys. Migration is not a crime under international law, and an ethic of care rather than force towards migrants should prevail.

It is with this in mind that the training course addresses the use of force. Although it is sometimes necessary to use force, border officials should be given proper guidelines on the use of force and the appropriate mechanisms for accountability that should be in place.³⁹⁸

The use of force is linked to the State's obligation to protect the right to life, although other human rights violations may also be at stake when the authorities use force.



See session 1.3.3 (a) on the right to life.

The first step in securing the right to life is the establishment of an appropriate legal framework on the use of force by border officials, which sets out the conditions under which force may be used in the name of the State, with a system of accountability when those conditions are transgressed.³⁹⁹ Without accountability, force could be used to intimidate and preclude the exercise of migrants' rights and freedoms.⁴⁰⁰

Governments and law enforcement agencies should ensure that the ethical issues associated with the use of force and firearms are constantly under review.⁴⁰¹



The *Code of Conduct for Law Enforcement Officials* and the *Basic Principles on the Use of Force and Firearms for Law Enforcement Officials*, as well as various texts by human rights mechanisms interpreting State obligations for law enforcement, provide guidance to States on the conditions under which force may be used by law enforcement officials – including border officials – and the requirements of accountability.⁴⁰²

³⁹⁵ Special Rapporteur on summary executions, A/HRC/26/36, para. 22.

³⁹⁶ Special Rapporteur on summary executions, A/72/335, para. 12.

³⁹⁷ *Ibid.*, para. 10.

³⁹⁸ Special Rapporteur on summary executions, A/HRC/26/36, para. 23.

³⁹⁹ *Ibid.*, para. 26.

⁴⁰⁰ *Ibid.*, para. 27.

⁴⁰¹ *Basic Principles on the Use of Force and Firearms for Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, para. 1.

⁴⁰² *Code of Conduct for Law Enforcement Officials*; *Basic Principles on the Use of Force and Firearms for Law Enforcement Officials*.

3.2.2. Definition of the use of force

- ▶ *Use of force* refers to the use of physical means that may harm a person or cause damage to property.

Physical means include the use of:

- Hands or other parts of the body (by officials);
- Instruments, weapons or equipment, including less lethal weapons, such as batons, water cannons;
- Chemical irritants, such as tear gas or pepper spray;
- Restraints, such as handcuffs;
- Firearms.

The actual use of force has the potential to inflict harm, cause (serious) injury, and may be lethal in some instances.⁴⁰³

- ▶ Any use of force by law enforcement should be exceptional and must comply with the principles of *legality, precaution, necessity, proportionality, non-discrimination, and accountability*.⁴⁰⁴

A human rights-based approach to law enforcement, including in the context of border governance, must incorporate human rights considerations at the planning stage of any operation, including mitigation measures when risks to human rights are identified. Orders and briefings should take into account human rights issues, and clear directives should be given on how to protect human rights in the specific situation.⁴⁰⁵



Refer to the discussion on requirements of the three-part test (legality, necessity and proportionality) in session 1.1.7, which will be further developed in this session (3.2).

3.2.3. Exercise (true/false): Legal framework on the use of force



This is a quick exercise to get an idea of learners' knowledge. Learners will need the true/false cards for this exercise.



Duration: 5 minutes

Aim of the exercise:

To engage learners on the topic of use of force, and to get a sense of their attitudes and prior knowledge.

How to carry out the exercise:

- ▶ Ask learners to answer YES/TRUE or NO/FALSE to the following statements, using the true/false cards in their course folders.

⁴⁰³ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 1.

⁴⁰⁴ Code of Conduct for Law Enforcement Officials, art. 3 and commentary; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, pp. 16–20.

⁴⁰⁵ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 47.

1. The legal framework mainly concerns the use of firearms and other lethal force.
Correct answer: [NO/FALSE]
2. The legal framework does not limit the use of restraining measures, such as handcuffs.
Correct answer: [NO/FALSE]
3. The use of torture is never justified and always prohibited.
Correct answer: [YES/TRUE]

3.2.4. General principles on the use of force

Any use of force by law enforcement, including border officials, should be in accordance with the principles of *legality*, *precaution*, *necessity*, *proportionality* and *non-discrimination*. The principle of *accountability* comes into play once the decision to use force is made.



See OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, 2017.

(a) The principle of legality

Use of force is considered legal only if it is used with the aim of achieving a legitimate law enforcement objective. A law enforcement objective is considered legitimate only if it is recognized under national and international law.⁴⁰⁶

Any use of force by border officials must be in accordance with domestic laws and regulations that, in turn, are compliant with relevant international norms and standards. The officials must also have received training on the use of force.

Force may be used to the extent necessary to achieve a legitimate purpose. Where this is not the case and the force applied is excessive or arbitrary, it is by definition unlawful.⁴⁰⁷

States and law enforcement agencies are required to “adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials”, commensurate with due respect for human rights and ethical principles. The laws and rules on the use of force must be clear and unambiguous to safeguard against abuse and available to the public.⁴⁰⁸

- ▶ Legitimate purposes include:⁴⁰⁹
 - To defend oneself or others against the imminent threat of death or serious injuries;
 - To prevent the perpetration of a particularly serious crime involving grave threat to life to ensure compliance with lawful police instructions;
 - To arrest non-cooperative or dangerous suspects;
 - To break up a violent crowd.

Any force that is used as punishment will not meet the test of legality.⁴¹⁰

- ▶ *The use of torture is always prohibited* and can never be justified.

It is prohibited to use force to obtain information or a confession, which are not considered legitimate objectives. Similarly, the “protect life” objective – whereby a life may be taken

⁴⁰⁶ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 1.

⁴⁰⁷ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 2.

⁴⁰⁸ *Ibid.*, p. 16; Human Rights Committee, general comment No. 6 (1982), para. 3; Special Rapporteur on summary executions, A/HRC/26/36, para. 56.

⁴⁰⁹ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 1.

⁴¹⁰ *Ibid.*, p. 16.

intentionally only to save another life – does not justify breaching the absolute right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment.⁴¹¹

(b) The principle of precaution

Law enforcement operations and actions shall be planned and conducted taking all necessary precautions to avoid or, at least, minimize the risk of recourse to force by law enforcement officials, as well as members of the public, and to minimize the severity of any injury that may be caused.⁴¹²

It is important to stress that law enforcement officials at all levels should take precautions to avoid or minimize the use of force, *in advance* of any escalation of events that raises the question of using force.⁴¹³

Such precautionary measures could include prior planning, use of self-defence equipment and familiarizing oneself with the applicable standards for the use of force. Self-defence equipment should not merely be used if available, as is required by necessity, but must be made available in the first place. States shall ensure that “all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force”.⁴¹⁴

(c) The principle of necessity

Use of force is considered necessary only if non-violent means remain ineffective or without any promise of achieving a legitimate law enforcement objective.⁴¹⁵

Officials who are authorized and trained to do so may use force only when strictly necessary and to the extent required for the performance of their duties, and as an exceptional measure. Although officials may be authorized to use force as is reasonably necessary, they are not obliged to, and no force going beyond that which is reasonably necessary may be used.⁴¹⁶ That means that officials should apply non-violent means to achieve the same goal as far as possible, for example, through negotiation or mediation. Law enforcement officials should only resort to a forcible measure if that measure can alleviate the threat posed and if other means are deemed ineffective, in which case, the level of force used should be escalated as gradually as possible.⁴¹⁷

In the context of border controls, border officials should bear in mind that many migrants, particularly those in vulnerable situations, may have been seriously traumatized in their country of origin or during their journey, which may cause them to act aggressively or unreliably or even attempt to escape. Migrants may refuse to give fingerprints or provide biometric data, but such refusal does not justify or necessitate the use of force; rather, it should be dealt with through an ethic of care and, where necessary, administrative sanctions.

When the use of force is reasonably necessary in the circumstances, only the minimum force required to achieve that objective shall be used. For example, the use of a baton may be permissible to subdue a person who is resisting arrest and using violence, but as soon as they are under control, the baton should no longer be used.

⁴¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2); Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, A/RES/43/173, Annex, Principle 6. See discussion on the right to freedom from torture and other forms of cruel, inhuman or degrading treatment at session 1.3.3(b).

⁴¹² Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principle 5(b).

⁴¹³ Special Rapporteur on summary executions, A/HRC/26/36, para. 63; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 19.

⁴¹⁴ Special Rapporteur on summary executions, A/HRC/26/36, para. 52; Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principles 2, 19; also 18 and 20.

⁴¹⁵ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 4.

⁴¹⁶ Code of Conduct for Law Enforcement Officials, art. 3 and commentary. With regard to training, see Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principles 18–21; also, OHCHR, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, 1997, para. 457.

⁴¹⁷ Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principle 4; Special Rapporteur on summary executions, A/HRC/26/36, para. 61; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 16.

The requirement of necessity also includes a temporal component, which means that force can be lawfully used only against a person who presents an *imminent* threat and for a split second or at most a few seconds. Officials must rapidly assess whether the law enforcement objective is accomplished or can be accomplished. Once the objective has been met or it becomes clear that it cannot be met, the use of force is no longer necessary and should be stopped.⁴¹⁸

Guideline 3.11: Build the human rights capacity of border officials.

(d) The principle of proportionality

Law enforcement officials must ensure that the type and level of force used is proportionate to the threat posed. The resulting harm must also be proportionate to the threat. Law enforcement officials should never use force that is excessive in relation to the legitimate objective they seek to achieve. In addition, they must always consider and minimize the possible incidental impact of their use of force on bystanders, passers-by, medical personnel and journalists. Any incidental impact must be strictly proportionate to the legitimate objective they seek to achieve.⁴¹⁹

In the context of the use of force, the tests of proportionality and necessity are closely related; proportionality is essentially a part of the necessity assessment.

The proportionality test sets a ceiling on the use of force based on the threat posed by the person targeted and determines the point at which the force (or any escalation of force) necessary to achieve the legitimate objective must stop.

If the harm caused by the use of force outweighs the benefit of its use (i.e., the achievement of the legitimate objective), the use of force is no longer proportionate.

The use of torture is *never* necessary or proportionate. Torture is *always prohibited* and non-derogable.

Principle of proportionality in relation to the physical means of force

- Use of lethal force: When (potentially) lethal force is used, the proportionality requirement can be met only if such force is used in order to save life.⁴²⁰
- Use of firearms: Given that there is a higher likelihood of serious injury and lethal outcomes with the use of firearms, law enforcement officials shall not use firearms against persons except in self-defence or to defend others against the imminent threat of death or serious injury. In addition, intentional lethal use of firearms may be made only when strictly unavoidable to protect life.⁴²¹
- Use of less-lethal weapons: less-lethal weapons should be used with great care since, if misused or abused, use of such force may amount to ill-treatment and can even result in death.

E.g., when border officials are pursuing a migrant with irregular status, if the circumstances of the pursuit cause the official to compromise the life of the migrant or of others, such loss of life would be disproportionate to the legitimate objective of enforcing the migration process. If all proportionate measures prove insufficient to apprehend a fleeing undocumented migrant, they must be permitted to flee.⁴²²

⁴¹⁸ Special Rapporteur on summary executions, A/HRC/26/36, paras. 59, 60; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 17.

⁴¹⁹ Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principle 5(a).

⁴²⁰ Special Rapporteur on summary executions, A/HRC/26/36, para. 67.

⁴²¹ *Ibid.*, para. 58; Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principle 9; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, pp. 21–22.

⁴²² Special Rapporteur on summary executions, A/HRC/26/36, para. 66; A/61/311, paras. 41, 44.

(e) The principle of non-discrimination

In carrying out their functions, law enforcement officials shall not discriminate against any person on the basis of the prohibited grounds of race, colour, national, ethnic or social origin, language, sex, religion, political or other opinion, descent, birth, caste, age, disability, health status, migration status, sexual orientation, gender identity or other grounds.

The principle of non-discrimination is fundamental to States' duty to implement their human rights obligations, including a rights-based approach to border security work. In that respect, the legal and operational framework for border governance protects against both direct and indirect discrimination, including institutional racism, that can result in law enforcement exercising higher levels of violence against certain groups of people, based on prohibited grounds. Similarly, counter-terrorism practices based on assumptions that persons of a certain racial, national or ethnic origin or religion are particularly likely to pose a risk may lead to actions that are incompatible with the principle of non-discrimination.



See session 1.4.2 on the principle of non-discrimination, and the discussion on profiling in session 4.2.4.

- ▶ As noted earlier, the *principle of accountability* comes into play once the decision to use force is made (see [session 3.2.5\(d\)](#) below).

3.2.5. Application of the general principles on the use of force

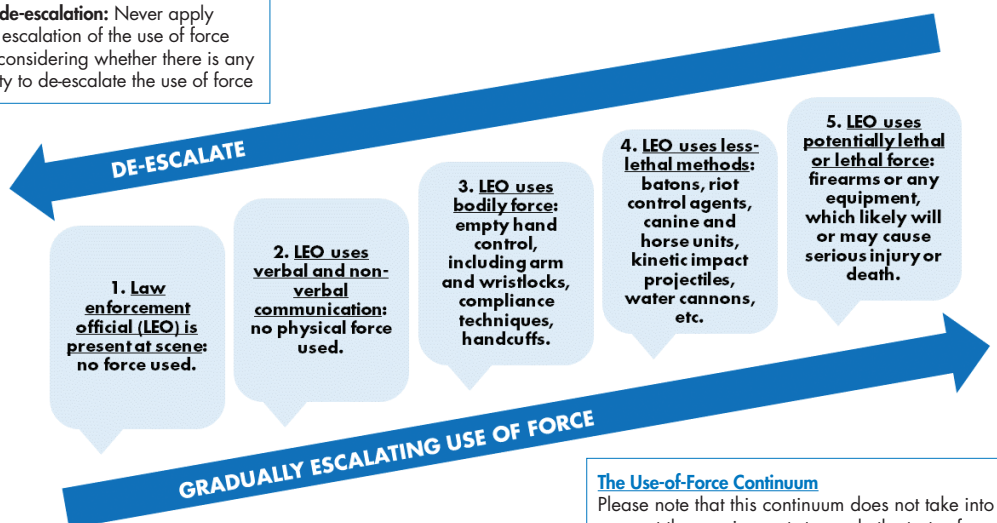
(a) Use-of-force continuum

The use-of-force continuum is a concept that can support border officials when deciding on whether and how to use force to ensure respect of the principles set out in the previous session.

The continuum concept helps law enforcement officials to choose among different instruments and types of force to escalate or de-escalate the use of force, depending on the situation. For the continuum to be effective, law enforcement officials should be trained in the use of various instruments and techniques of force, so that they are aware of the potential impact of each, and can make an informed decision as to when to choose what instrument or technique.⁴²³

Use-of-force continuum: from least to most lethal use of force

Aim for de-escalation: Never apply gradual escalation of the use of force without considering whether there is any possibility to de-escalate the use of force



⁴²³ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 65.



Distribute the use-of-force continuum handout.



The continuum is presented more comprehensively in the handout than in the slide presentation.

It is important to note that the use-of-force continuum does not take into account the requirements to apply the tests of necessity and proportionality. It also does not assess whether the use of force can be de-escalated (see more on this below). The use-of-force continuum of force should not be understood to imply that law enforcement officials are obligated to move up and/or down the continuum step by step, depending on the resistance encountered. Indeed, in reality, law enforcement officials will not and should not try every means at their disposal in turn, but rather, based on their assessment of the situation and in line with the legal framework and the policies in effect, they will choose what they believe to be the most appropriate response to a given situation.

Keep in mind that situations change and any use of force must be continuously re-assessed to ensure it is still justified. It is much easier to move up the use of force continuum than down so as to de-escalate the use of force/situations effectively.⁴²⁴

(b) Aim to de-escalate the situation

Border officials should always look for any possibility to de-escalate the use of force.

Senior officials should ensure that officers under their command are trained on de-escalation strategies such as:

- tactical disengagement, and
- verbal de-escalation communication,

which, as appropriate, can slow down the situation to gain time until more specialized crisis intervention units or supervisors arrive.

If it becomes necessary to escalate the use of force, the level of force should be carefully assessed to determine whether it could be de-escalated or escalated as gradually as possible, in accordance with the test of necessity.

- ▶ Officials tasked with responding to situations that may require the use of force should be trained on how to de-escalate tension, make use of communication skills, such as mediation and negotiation, and understand the different tactics that they might deploy.⁴²⁵
- ▶ Officials should focus on how to de-escalate a situation in order to prevent the use of force; and if force has to be used, they should make sure it is the minimum force necessary and that it is always proportionate to the threat.⁴²⁶

(c) Human rights considerations relating to the use of restraints

Do NOT use restraints

The following restraint measures should never be used; they never meet the necessity and proportionality requirements.

- ▶ Instruments of restraint should never be applied as a punishment.⁴²⁷
- ▶ Chains and irons should not be used as restraints:

⁴²⁴ Ibid., p. 72.

⁴²⁵ Ibid., p. 55.

⁴²⁶ Ibid., p. 49.

⁴²⁷ Ibid., p. 82; Nelson Mandela Rules, rule 43.2.

- Chains, irons or other instruments that are inherently degrading or painful must not be used as restraints.⁴²⁸ Restraints that connect limbs with chains to handcuffs and belts should be avoided; and weighted or non-adjustable restraints such as fixed rings, leg irons, fetters or shackles should be prohibited.⁴²⁹
- ▶ Non-medically justified measures or treatment, such as tranquilizers, sedatives or other medication should not be used:
 - Sedatives, neuroleptics or other drugs should never be used for restraining purposes.⁴³⁰
- ▶ Instruments of restraint should never be used during pregnancy and especially during labour or delivery and immediately after birth.⁴³¹

Restraints may be used ONLY

As a precaution and for no longer than strictly necessary, provided that they are removed when the individual appears before a judge or administrative authority, or on medical grounds.

- ▶ If the person is a threat to themselves or a third person or persons;
- ▶ As a precaution against escape, including during transfer, and for no longer than strictly necessary:
 - The age, gender and physical characteristics (e.g., size, physical condition, etc.) of a person are factors to be taken into account in deciding whether or not restraints such as handcuffs should be used or continued. For example, if a person has a condition that may be aggravated when handcuffed, it might make their use unreasonable and amount to excessive force.⁴³²

Restraints should be removed as soon as their use is no longer necessary. In any case, restraints should be removed once the person has been taken to a secure holding area.⁴³³

Use of handcuffs

The use of handcuffs is governed by the basic principles on the use of force. The method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed.⁴³⁴ Using restraints such as handcuffs is not always required and may create unnecessary discomfort for the individual. Instruments of restraint should be imposed only when no lesser form of control would be effective to address the risks posed by unrestricted movement.⁴³⁵ If their use cannot be avoided, handcuffs should be used with the following considerations:

- ▶ Safe and non-harmful materials should be available.
- ▶ Regularly check that handcuffs are not cutting into the skin or blocking the blood circulation of the detained person.
- ▶ Never handcuff anybody to fixed points or solid infrastructure such as walls, ceilings, floors, central heating radiators and so on.

⁴²⁸ Nelson Mandela Rules, rule 47(1).

⁴²⁹ *Ibid.*, rule 47(1); OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, pp. 83–84; The Special Rapporteur on violence against women commented that “shackling pregnant inmates is representative of the failure of the prison system to adapt protocols to unique situations faced by the female prison population”, A/68/340, para. 57; see also A/HRC/17/26/Add.5, paras. 42–44.

⁴³⁰ Interim report of the Special Rapporteur on torture, A/68/295, para. 58. Note that the original Standard Minimum Rules for the Treatment of Prisoners (1955) provided for the administration of chemical restraints, however the 2015 revised Nelson Mandela Rules removed that provision, as adhered to in this training course.

⁴³¹ Nelson Mandela Rules, rule 48(2); Bangkok Rules, rule 24.

⁴³² OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 82.

⁴³³ *Ibid.*, p. 83.

⁴³⁴ Nelson Mandela Rules, rule 48(1)(b).

⁴³⁵ *Ibid.*, rule 48(1)(a).

- ▶ Restraints should be removed as soon as possible after the risks posed by unrestricted movement are no longer present.⁴³⁶
- ▶ The condition of the individual should be monitored to ensure that there is no particular risk of injury or death.⁴³⁷

Use of restraints in the context of migration

In the context of migration, the use of restraints is sometimes not in line with the basic principles on the use of force.

- ▶ With regard to the principle of legality, for example, where national laws criminalize entry, attempted entry or stay without the correct authorization, restraints and other use of force are sometimes used to achieve law enforcement objectives defined in national law. However, as international norms and standards highlight that irregular migration is not a criminal offence, those objectives may not correspond with legitimate objectives for the use of force recognized under international law.
- ▶ With regard to necessity, particular concerns relate to practices that restrain migrants as a matter of course, without assessing whether or not each individual poses a risk to the safety of the border official, of others or to themselves. They thereby fail to meet the principle of necessity. And, when such measures are in part used as punishment and a deterrent against irregular migration, they are inappropriate and degrading.
- ▶ The principle of proportionality is relevant to the types of restraints used. The simultaneous use of handcuffs and foot chains, belly shackles for pregnant women, sedatives and other drugs can never be considered necessary or proportionate. Besides handcuffs, other restraints, such as limb restraints or leg cuffs, carry even more worrying medical implications and should be used only by officials with appropriate training, including on the health risks associated with the use of such devices, such as deep vein thrombosis or positional asphyxia.⁴³⁸

Furthermore, it is worth considering that the use of handcuffs may be particularly traumatic and degrading, also resulting in stigma and harmful stereotyping against migrants who have not committed a crime, since irregular entry or stay is an administrative – not a criminal – offence.



Distribute the handout on core considerations concerning the use of force.

(d) The principle of accountability

Under international human rights law and international principles on the use of force, States are obligated to ensure that law enforcement officials are held accountable for their actions, including any decision to use force.

Authorities need to be accountable, and redress must be available to those affected by the use of force by the authorities. The best practice is to establish an independent, external oversight mechanism with the necessary powers, resources, independence, transparency and reporting capacity, community and political support, and the involvement of a wide spectrum of civil society, including migrants' rights groups, women's human rights defenders and LGBTI people's rights/gender equality defenders.⁴³⁹

The system for reporting and reviewing incidents where force has been used by law enforcement officials, including border officials, needs to include criminal, administrative and disciplinary

⁴³⁶ Ibid., rule 48(1)(c).

⁴³⁷ OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 83.

⁴³⁸ Ibid., pp. 83–84.

⁴³⁹ Special Rapporteur on summary executions, A/HRC/14/24/Add.8, para. 74.

sanctions with adequate measures to ensure that those in authority are held responsible.⁴⁴⁰ Those procedures need to be gender-responsive, including in the process, monitoring and remedial action or redress. In addition, supervisory officials should conduct periodic and unannounced checks at borders and other areas of immigration enforcement to monitor the conduct of officials under their command.

Guidelines 2.9 and 2.10: Adopt a legal and policy framework on the use of force at international borders.

Ensuring professional conduct by border authorities is vital for public trust, safety and the implementation of States' human rights commitments, as well as for ensuring the safety and well-being of border officials themselves. Officials who have reason to believe that a violation, including relating to the use of force, has occurred or is about to occur should report the matter to their hierarchical superior and, where necessary, if no other remedies are available or effective, to other appropriate authorities or organs vested with reviewing or remedial power.

Border authorities should put in place effective gender-responsive mechanisms through which border officials can make complaints to the appropriate authorities about any conduct by their colleagues that is contrary to human rights standards, without fear for their own employment or reprisals from their colleagues. They should not suffer administrative or other penalties because they have reported that a violation has occurred or is about to occur.⁴⁴¹

The use of force, including any use of restraints, should form part of the border officials' protocols and reporting procedures, with officials accounting for the justification of the use of force and the period of time that restraints were used before their eventual removal.⁴⁴²

Officials who refuse to obey unlawful orders to use force should have immunity from prosecution for that refusal.⁴⁴³

Guideline 3.15: Put in place complaints mechanisms for border officials.

States are obligated to provide effective remedies for human rights violations.⁴⁴⁴ To be effective, remedies must: (a) be known and accessible to anyone with an arguable claim that their rights have been violated; (b) involve prompt, thorough and impartial investigation of alleged violations; and (c) be capable of ending ongoing violations.



The right to an effective remedy is discussed in session 1.3.3.

See also the description of three elements of accountability in the notes on the handout containing international and regional human rights instruments in session 1.1.6.

⁴⁴⁰ Special Rapporteur on summary executions, A/HRC/26/36, paras 81–85; Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, Principles 22–26; see also *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, 1997, paras. 458 and 459; OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, Part V.

⁴⁴¹ Code of Conduct for Law Enforcement Officials, 1979, art. 8 and commentary, para. (b); *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, 1997, para. 460.

⁴⁴² OHCHR and UNODC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p. 83.

⁴⁴³ *Ibid.*, p. 46: It should be noted that those who obey such orders are not excused from liability because of those orders.

⁴⁴⁴ International Covenant on Civil and Political Rights, art. 2(3)(a).

Session 4: Ensuring human rights- based screening and interviewing at international borders

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Introduce learners to the key principles, practical steps and considerations to be taken into account, at different stages of screening and interviewing at borders ▶ Examine the use of profiling and highlight the need for attention to migrants and other individuals in vulnerable situations
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Articulate the key human rights considerations for screening and interviewing individuals at international borders ▶ Apply the knowledge acquired in the training course so far in role-play activities on human rights-based screening and interviewing of migrants in vulnerable situations ▶ Recognize the importance of a gender-responsive approach to screening and interviewing
Key learning points/ messages	<ul style="list-style-type: none"> ▶ Human rights-based screening and interviewing should always be based on an individualized approach and assessment. ▶ Avoiding stereotyping and discriminatory approaches is essential for a human rights-based approach and for effective border security and counter-terrorism investigations. ▶ One of the objectives of screening and interviewing is to identify individuals who may be in vulnerable situations and facilitate referrals to the appropriate support services. ▶ The right to privacy should be protected throughout screening and interviewing, including with regard to the collection and storage of migrants' personal data.
Preparation	<ul style="list-style-type: none"> ▶ Print handouts ▶ Prepare the materials for the two role-play exercises ▶ Decide how to arrange the room for the role-play exercises ▶ Review the instructions for the role-play activities (sessions 4.3 and 4.5) in light of the room size and set up, number of learners, as well as any interpretation needs ▶ Prepare title cards for the flip charts to be used in the carousel exercise in session 4.4.1
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts and pens; timer; bell/alarm to signal the end of the role-play exercises; sticky notes/cards and tape to stick them on the flip charts
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ Materials for the role-play exercises: migrant profiles, travel documents, tickets, officer reporting forms and so on ▶ Key steps for interviewing ▶ Interviewing migrants in vulnerable situations ▶ Session 4 summary

Session overview/rationale

Through interactive presentations and role-play exercises, this session explores a human rights-based approach to screening and interviewing at international borders to ensure that migrants are always treated as individual rights holders, protected from discriminatory approaches, and able to secure referrals to the specialists and services they may need to realize their rights. The role-play exercises provide the opportunity for learners to apply the knowledge they have acquired in the training so far through simulations of screening and interviewing of migrants at an international border. The exercises encourage learners to empathize with migrants, understand the gender specificities, identify vulnerable situations that migrants might be in, and examine possible referral options. The session concludes with a reflection on special considerations in screening and interviewing migrants in vulnerable situations.

Session content

- 4.1: Screening and interviewing at international borders
- 4.2: Key human rights considerations and practical measures for screening and interviewing
- 4.3: Exercise (role play): Screening at the border
- 4.4: Practical steps to ensure human rights-based and gender-sensitive interviews
- 4.5: Exercise (role play): Interviewing at the border
- 4.6: Exercise (brainstorming): Considerations when screening or interviewing migrants in potentially vulnerable situations

4.1. Screening and interviewing at international borders

Ask learners, who among them conduct, or have conducted, screenings or interviews at borders, so as to get a sense of the experience and expertise in the room.

4.1.1. What is screening?

- ▶ In this training course, *screening* refers to the initial interaction between border officials and arriving or departing individuals for the purposes of immigration control, border governance, risk assessment, including in the context of counter-terrorism, and preliminary identification of persons in vulnerable situations.

Such interactions may occur in the context of controls at clearly defined border crossings, interception at sea, border areas or designated buffer zones and controls beyond borders (e.g. checkpoints).

Screening officials are responsible for identifying any initial indication of irregularity in immigration control, potential security risk and/or human rights protection needs that might necessitate referral to an interview.

Screenings tend to be very brief: for example, automatic scans using biometric information take, on average, 10 to 20 seconds per traveller.

When there are concerns in terms of documentation, risk assessment, protection needs and so on, individuals are likely to be referred to another official for an interview. In general, the border officials carrying out the screening is responsible for identifying any initial indication of irregularity relating to immigration control, potential security risk and protection needs. An in-depth review of individual cases, as well as decision-making on asylum applications, for example, should be carried out by specialized and trained officials.

Although often associated with entry into a country, screening also takes place at departure or predeparture, including through the requirement of providing advance passenger information (API), passport and visa checks, among others. That screening serves to monitor individuals' compliance with laws and policies, including those aimed at preventing nationals from leaving the country (e.g., migrant labour exit bans, enforcement of criminal laws) or against travel to certain countries or conflict areas by individuals who may be intending to be, or returning as, foreign terrorist fighters.

4.1.2. What is interviewing?

The interview is the second step at the border, after an individual has gone through the primary screening.

- ▶ In this training course, *interviewing* refers to the interview between a border official and an individual after the initial screening at the border.

Border officials may carry out an interview to obtain more information concerning the individual's situation and immigration status, identify a possible situation of vulnerability and associated protection needs, and/or determine any security risk posed by the person.

Note that such interviews are to be distinguished from the more specialized, in-depth interviews or assessments conducted by trained experts to address issues requiring further investigation, for example, migrants in vulnerable situations. Based on the information gathered during the interview, border officials can make the appropriate referrals to the relevant experts for a specialized interview.

Examples of specialized interviews include those for asylum assessment, age verification of child migrants, identification of trafficked persons, and they would also be used for criminal law enforcement purposes, such as interrogation of individuals suspected of participating in criminal activities, including terrorist acts.

4.1.3. Discussion: Human rights particularly at risk in screening and interviewing



The discussion in this session on human rights particularly at risk at international borders builds on the discussion in session 1.3.3 (at the border), and on information on Principle B (the principle of non-discrimination) in session 1.4.2. The right to freedom of religion or belief will be discussed for the first time here (see 4.1.3(e)). Note that the list of rights is not exhaustive. The trainer should adapt the discussion to include rights that might be more pertinent in the relevant context, including by referring to and building on the human rights discussed in sessions 3 (interception, rescue and immediate assistance), 5 (immigration detention) and 6 (return).



The slide for this discussion is interactive so that the trainer can display the question only, encourage learners to do a quick brainstorming, then reveal the examples.

(a) Right to equality, non-discrimination

The principle of non-discrimination applies to the implementation of all human rights and prohibits any direct or indirect distinction, exclusion, restriction or preference, or other prohibited differential treatment. Travel bans in the name of national security on migrants or travellers from specific States where the majority of the population belongs to a particular faith community, or profiling practices based on assumptions that persons of a certain gender and racial, national or ethnic origin or religion are particularly likely to pose a risk are incompatible with the principle of non-discrimination in international human rights law, as they fail to integrate an individualized approach. For example, discriminatory profiling may occur based on perceptions

of race, ethnicity or religion that is driven by the assumption that such individuals are likely to be in an irregular situation.

Those assumptions may be gendered; for example, men who are visiting or immigrating may be referred to secondary/enhanced screening and interview for the sole reason that they are men within a certain age range and from countries in which a terrorist group was present or active. That is an example of discriminatory profiling based on harmful stereotypes at the intersection of gender, age and nationality.

Profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia among the general public towards persons of certain ethnic or religious backgrounds.



See session 1.1.6 on legal human rights sources, and session 4.2.4 below on profiling in the context of international borders.

(b) Right to due process

States are required to ensure that there are processes in place to ensure that individuals who are screened and those who are interviewed, are treated fairly and with dignity, and that decisions are made on a case-by-case basis in accordance with the law. In situations in which individuals' rights may be limited due to screening and interviewing, procedures should be in place to ensure that any limitation meets the tests of legality, necessity and proportionality, in compliance with due process safeguards.

(c) Right to freedom of movement

Everyone has the right under international law to leave their country. Preventing an individual from leaving their country of origin or residence due to information that emerges during screening may constitute a restriction on their enjoyment of that right if the restriction is not necessary or proportionate to the concern. An example would be age- or gender-based bans on migration, such as cases in which women below a certain age or who have young children are prevented from migrating for domestic work, or when the labour migration pathway to a particular country is closed to women domestic workers following reports of serious human rights violations.⁴⁴⁵

Increased travel restrictions arising from counter-terrorism measures have also led to the inclusion of entire families on "no-fly" lists. Such restrictions unduly penalize family relationships and undermine the enjoyment of the right to freedom of movement.

(d) Right to security of person

Individuals have a right to be screened or interviewed without sustaining any intentionally inflicted or foreseeable physical or psychological injury. Any personal searches of individuals should be conducted by a border official of the same gender, with trans or non-binary individuals allowed to choose the gender of the officials carrying out the searches.



See sessions 3.1.4(c) and 4.2.5(d) for further discussion on searches.

There should be no unlawful use of force, including inappropriate physical searches or inappropriate use of restraining measures.



See session 3.2 on the use of force.

⁴⁴⁵ Special Rapporteur on migrants, A/HRC/41/38, para. 35.

(e) Right to freedom of religion or belief

Everyone has the right to freedom of religion or belief.⁴⁴⁶ Freedom to manifest one's religion or beliefs may be subject to such limitations only as prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. The observance and practice of religion or belief may include not only ceremonial acts, but also such customs as the observance of dietary regulations, dress codes, participation in rituals associated with certain stages of life and the use of a particular language customarily spoken by the group.⁴⁴⁷ Migrants and visitors to a State are entitled to the rights to enjoy their own culture, to profess and practice their own religion and to use their own language.⁴⁴⁸

Unlike some other rights, the right to freedom of religion or belief cannot be restricted on the grounds of national security, and the non-discriminatory nature of the right ensures that nationality cannot form a basis for imposing restrictions on minorities or migrants.

Migrants often experience challenges with regard to their ability to freely exercise their right to freedom of religion or belief. For example, a respectful approach is required when screening individuals of particular religions that allows the individual to observe the requirements of their faith while complying with border security procedures. Actual or assumed religion is often used as a reason for screening and as the basis of applying counter-terrorism measures at international borders. Profiling practices based on assumptions that persons of a certain religion are particularly likely to pose a risk may result in border control practices that are incompatible with the principle of non-discrimination.

Gender considerations: There are ways in which counter-terrorism measures use gender stereotypes as a proxy for profiling, including on the basis of religion. Such measures stigmatize and marginalize people of those faiths, and women – particularly those who wear visible religious dress, such as the hijab – may bear the brunt of such discrimination. States that ban the wearing of full-face veils – and, therefore, any woman traveller or migrant who is wearing them – are not fulfilling their obligations with regard to the right to freedom of religion and belief.

If it is necessary to request that a person remove an item of religious dress to confirm their identity during screening, they should be escorted to an area where it can be removed in privacy with an official who is the same gender as, or the gender chosen by, the person being screened. If a woman exhibits reluctance to comply with a request to remove clothing/religious dress or to raise their veil, it should not be considered as non-cooperation or non-compliance, but rather a personal concern, if she is coming from a country or culture where such removal carries punishment.

Border officials should consider alternatives, such as technical means, depending on the purpose of the request: for example, a database security check, and the individual should be fully informed about the situation. Furthermore, in the absence of any relevant indicators of crime, no force should be used.



See session 3.2 on how to assess the use of force.

(f) Right to privacy

In the context of border security and management, automatic screening through the use of digital data, such as advance passenger information (API), passenger name record (PNR) and biometric data gives rise to concerns relating to the right to privacy and data security. International human rights law requires States to provide an articulatable and evidence-based justification for any interference with the right to privacy, whether on an individual or mass scale. Such restrictions, including surveillance of travellers' communications, must comply with the principles of legality, proportionality and necessity, regardless of the nationality or location

⁴⁴⁶ International Covenant on Civil and Political Rights, art. 18.

⁴⁴⁷ Human Rights Committee, general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 4.

⁴⁴⁸ Human Rights Committee, general comment No. 23 (1994) on the rights of minorities, para. 5.2.

of the individuals who are under direct surveillance. It should be noted that systems such as API and PNR that rely on information in an individual's legal documentation will reproduce discrepancies such as when the self-identified gender of trans and non-binary persons is not recognized in their official documents. Failure of official documentation to respect and legally recognize a migrant's self-identified gender identity puts trans and non-binary individuals at risk of human rights abuses, including harassment, humiliation, arrest, violence and extortion.⁴⁴⁹

Sex, gender identity, sexual orientation, age, race, social class, social origin, religion, human rights activism, opinions and their expression can be factors in determining who is subjected to a higher degree of surveillance, making certain individuals more likely to suffer violations of their right to privacy. For example, it has been reported that counter-terrorism measures disproportionately affect women and trans migrants, for example, by applying increased travel document security that risks unduly penalizing trans, intersex or non-binary persons whose physical appearance and data are subject to change.⁴⁵⁰



See session 4.2.5 for further discussion on privacy.

(g) Right to freedom of expression

The right to freedom of expression encompasses the right to seek, receive or impart information, including online. Such information includes political discourse, commentary on public affairs, discussion of human rights, journalism and religious discourse, even that which causes offence.⁴⁵¹ Some States are starting to require travellers' social media account information as a precondition of entry or are expanding screening processes to include searches of individuals' mobile phones and other computer equipment. That may mean that the freedom of expression exercised in one country could result in the denial of entry to another, for example, when a traveller is denied entry to a country on the grounds that they had supported a boycott action against the State they are seeking to enter. States are still obligated to respect, protect and promote individuals' right to privacy.

(h) Right to family life

Adult family members should be interviewed separately to ensure individualized consideration of their cases and identify possible protection needs, such as domestic violence. However, separate interviews should not result in families being unnecessarily separated subsequent to screening and interviewing procedures.

(i) Right to health

Being prevented from leaving a country or questioned about reasons for visiting can be stressful, particularly for individuals who have experienced trauma. In addition, any delay to entry may interfere with medication schedules. Border officials should ensure that persons waiting to be screened and interviewed, especially during delays for secondary screening, are able to access necessary medications and the underlying determinants of health (e.g., safe water, food and sanitation).

There should be no entry restrictions imposed on discriminatory grounds, such as health, for example, against people living with HIV/AIDS, or women, girls and other individuals who may not identify as women who are pregnant. Any individual who is pregnant, who has just given birth and/or is nursing should have access to maternal health services, pre- and post-natal care, emergency obstetric services, and sexual and reproductive health goods, facilities information

⁴⁴⁹ Independent Expert on sexual orientation and gender identity, A/73/152, paras. 36, 37.

⁴⁵⁰ Special Rapporteur on the right to privacy, A/HRC/40/63, para. 80; Special Rapporteur on terrorism, A/64/211, para. 48.

⁴⁵¹ Human Rights Committee, general comment No. 34 (2011), para. 11. The right to freedom of expression, including the right to information, may be restricted when provided by law and necessary for respect of the rights or reputations of others or for the protection of national security, of public order (ordre public), of public health or morals (International Covenant on Civil and Political Rights, art. 19(3)).

and services, as necessary. Compulsory testing for conditions such as HIV/AIDS, tuberculosis and pregnancy is prohibited as part of a human rights-based migration policy.

Guidelines 6.5, 6.7 and 7.6: Ensure health screenings and services.

Screening for public health concerns at international borders is legitimate for restricting the spread of pandemics if it is human rights compliant.



See session 4.2.4(c) for further discussion on health screening.

(j) **Right of the child to have their best interests taken as a primary consideration**

Border authorities must ensure that, when screening or interviewing children, the best interests of the child are appropriately integrated and consistently applied in every action taken by border officials. The different experiences, views and interests of children of all genders (i.e., girls, boys and children who identify with other identities) should be taken into account. The best interests principle applies whether the child is a migrant or the child of migrants, travelling with family, separated or unaccompanied; and must be implemented by State officials, as well as any private actors providing services in the screening and interviewing processes.

All policies and administrative decisions concerning or applied to children must demonstrate that the child's best interests have been a primary consideration. That may entail creating a child-friendly environment for interactions with children, such as interviews by trained or specialized staff, so that the border official is not directly opposite the child as an interrogator and who can provide the appropriate information in a child-friendly manner in a language that the child can understand. It may also be necessary to create conditions that enable children to express their opinions and to ensure that their opinions are given due weight.⁴⁵²

Principle A.6: The best interests of the child shall be a primary consideration applicable to all children who come under the State's jurisdiction at international borders, regardless of their migration status or that of their parents. States shall ensure that children in the context of migration are treated first and foremost as children and ensure that the principle of the child's best interests takes precedence over migration management objectives or other administrative considerations.

4.2. Key human rights considerations and practical measures for screening and interviewing

4.2.1. Determine each individual's situation and reason for entry/departure

- ▶ *Treat every person as an individual and consider their particular circumstances.*

Border officials should treat every person arriving or departing at the border as an individual and consider their particular circumstances, without discrimination. Each individual's situation and reason for entry or departure should be determined appropriately in line with the functional

⁴⁵² Committee on the Rights of the Child, general comment No. 14 (2013), paras. 14(b) and 15(g).

responsibilities of the border official (e.g., they are not required to determine child protection circumstances as that should be the subject of referral).

Principle C.12: States shall consider the individual circumstances of all migrants at international borders with appropriate attention being given to migrants who may be at particular risk at international borders who shall be entitled to specific protection and individualized assistance that takes into account their rights and needs.

Guidelines 6.1 and 6.8: Ensure determination of each individual's situation in screening processes.

Adopting a rights-based approach to dealing with individuals means recognizing every person as a rights holder and ensuring that their human dignity is respected in screening and interviewing:

- Screen each adult family member separately;
- Identify and appropriately refer individuals in vulnerable situations, including asylum seekers, victims of trafficking, victims of crime and others;
- Facilitate gender- and age-responsive access to justice and effective remedies in cases of human rights violations.

For example, the safety and rights of trans and non-binary persons can be put at risk in screening and interviewing when their names and/or gender markers in official documents do not match their gender identity or expression. Although the human rights-based approach is to issue legal identity documents that reflect the gender of the person concerned based on their self-identification, many States do not yet do that.⁴⁵³

If there is reason to believe that it would be in the best interests of the child to screen them separately (e.g., if there are concerns about their safety within their family), they should be screened only in the presence of trained child protection officers. Unless the screening identifies a risk to the child within the family, they should be returned to their family immediately after screening.

- ▶ *States are obligated to guarantee the right to due process and to an effective remedy, wherever they have jurisdiction or effective control.*

To that effect, officials should carry out an individual assessment in accordance with due process guarantees and procedural safeguards, including the individual's right to appeal any decision and the right to an effective remedy for human rights violations. The assessment should be conducted in an intersectionality-aware manner, giving due consideration to the different lived realities of migrants, including ensuring age- and gender-responsiveness.

Helping migrants to understand their human rights and the relevant procedures and processes at the border is an important step to guaranteeing the right to due process.

- ▶ *Everyone has rights, even those who are considered a potential risk.*

Individuals suspected or convicted of involvement in terrorist acts or other crimes are entitled to respect for, protection and fulfilment of their human rights.

There is no international definition of terrorism or extremism, and definitions vary among States, with some adopting vague and overly broad definitions that cover peaceful dissent or acts that are lawful under international human rights or humanitarian law.⁴⁵⁴ Consequently, an individual considered to be a "terrorist" in one country, may not be so in another country. Border officials

⁴⁵³ Independent Expert on sexual orientation and gender identity, A/73/152, paras. 36–38; OHCHR, A/HRC/29/23, paras. 69, 79(i); OHCHR, *Living Free and Equal*.

⁴⁵⁴ Special Rapporteur on terrorism, A/71/384, paras. 25, 45, 46.

need to actively investigate why the person is considered a terrorist rather than merely accepting the designation without question.

Among other concerns that can have family-specific and gendered consequences are broad definitions of offences related to terrorism. For example, offences that criminalize material support and association with terrorists, may lead to family members of alleged terrorists being swept up in counter-terrorism operations without adequate safeguards for their human rights. Vaguely drawn up counter-terrorism laws have been used to punish those who do not conform to traditional gender roles and to suppress social movements that seek gender equality in the protection of human rights. For example, Governments have alleged terrorism links to justify the arrest and persecution of “suspected homosexuals” and regularly accuse women’s human rights defenders, including those working with migrants, of being members of terrorist groups.

4.2.2. Identify individuals who may be in vulnerable situations

Guidelines:

5.4: Cooperate with protection bodies, including civil society.

7.2: Develop guidelines and procedures to ensure identification and referral of migrants.

7.1 and 7.4: Establish referral mechanisms and use specialized service providers.

7.11: Ensure monitoring and accountability.

- ▶ Identify individuals who may be at particular risk of human rights violations and abuse, such as:
 - Unaccompanied or separated children;
 - Survivors of torture or trauma;
 - Refugees;
 - Persons with disabilities;
 - Victims of sexual and gender-based violence;
 - Trafficked persons.

As discussed in session 2, individuals arriving at borders may have different experiences, views and needs, or face different human rights risks. Border officials should be aware of those differences.

As it will support their own professional efforts, border officials should be active partners in ensuring that effective referral systems are put in place and followed. That allows for individuals at the border who may be at particular risk of human rights violations and abuse to be referred to the relevant specialized authorities, who will carry out an accurate identification and referral according to the migrants’ human rights protection needs. Such a system could include deployment from a roster of human rights experts.

Referral pathways to services need to be safe, effective, appropriate and gender responsive. They should always operate with the informed consent of the individual and include follow-up, as well as monitoring and accountability. Border officials should be trained to use referral mechanisms, and be provided with information and facilities to give them the means to do so; they should also have clear processes in place for cooperating with relevant national protection bodies, international organizations and civil society organizations in the provision of assistance, specifically in the identification and referral of migrants who may be at particular risk at international borders, including migrants, women and LGBTI human rights defenders.

It is also important to build the capacity of border officials to effectively implement such referral pathways and apply the relevant guidelines/policies.

Border checkpoints are one of the first locations where migrants in vulnerable situations may be identified and can declare their circumstances. Consequently, screening of individuals should be conducted in an area that allows and facilitates identification of migrants in vulnerable situations.

In instances where migrants in vulnerable situations may not have official authorization to enter the country, an individualized assessment should be carried out.

Border officials need to ensure that procedures are in place that enable them to facilitate timely and accurate identification and referral so that migrants in vulnerable situations can receive the necessary human rights protection interventions. For example, there should be a gender-responsive process to ensure that migrants who have experienced gender-based violence are given the space and support they need to disclose a full account of their experiences, without which they may not be referred for the appropriate assistance they need and to which they are entitled. That is a particular concern when screening processes are more focused on returning migrants than on identifying situations of vulnerability and human rights abuses. So-called “fast-track” screenings carried out by non-specialist border officials at the point of interception on land or at sea and without the presence of legal counsel or the possibility of an effective appeal are incompatible with procedural requirements of the prohibition of collective expulsions and the principle of non-refoulement.



The principle of non-refoulement and prohibition of collective expulsions are discussed in more detail in session 6 on human rights-based return.

4.2.3. Provide accessible information

Guidelines:

7.5: Provide information on the right to claim asylum.

7.9 and 7.10: Provide accessible information.

All migrants at international borders should have access to and/or be provided with information on their rights and how to access them. Where feasible, that information should be made available before migrants and travellers reach the border checkpoint. States have recommended that newly arrived migrants be provided with targeted, gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations, including information on compliance with national and local laws, obtaining work and resident permits, status adjustments, registration with authorities, access to justice to file complaints about rights violations, as well as access to basic services.⁴⁵⁵

Some migrants will need particular/specific information:

- ▶ Those seeking asylum or who may otherwise require human rights protection:
 - The right to claim asylum, identification as a victim of trafficking, or other appropriate protection, and referral for access to fair and efficient procedures
 - The rights and benefits that they may claim
- ▶ Those denied entry or departure:
 - The reasons for their exclusion
 - Their right to challenge the decision before a court or other independent and effective authorities, orally and in writing
- ▶ Migrant children:
 - Child-friendly information in age-appropriate language and formats.



See notes on the best interests of the child in session 4.1.3(j).

⁴⁵⁵ Global Compact for Safe, Orderly and Regular Migration, para. 19(d) (Objective 3).

4.2.4. Avoid discriminatory profiling

Profiling entails the use of information about a person to establish whether or not they are likely to pose a security or other risk.

For example, factors such as travel from conflict zones may be used as part of profiling for a security risk. It may be done either automatically through the collection of data remotely or in person, for example, through questioning at the border or on consideration of information provided by the migrant on landing/arrival cards.

- ▶ *Profiling* is generally defined as the systematic association of sets of physical, behavioural or psychological characteristics with particular offences, and the use of those characteristics as a basis for making law-enforcement decisions.

Profiles can be either *descriptive*, that is, designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning the act; or *predictive*, that is, designed to identify those who may be involved in some future or as-yet-undiscovered crime.⁴⁵⁶



See Glossary for a definition of profiling.

Profiling measures must comply with the principles of legality, necessity, proportionality and non-discrimination if they constitute restrictions on certain rights.

Although profiling can be a permissible and useful law enforcement tool, the use of broad profiles that reflect unexamined generalizations may constitute disproportionate interference with human rights. Any differential treatment of migrants at international borders must be in pursuit of a legitimate aim and must be proportionate and necessary.

States must ensure that the *purpose or result* of profiling is not discriminatory.

In particular, profiling based on stereotypical assumptions that certain individuals, on the basis of factors including (actual or presumed) race, national or ethnic origin, religion, gender or age, or a combination of factors, are particularly likely to commit crime, including terrorist acts or be more likely to migrate irregularly, may lead to practices that are incompatible with the principle of non-discrimination. Non-discrimination is a fundamental principle of international human rights law and is embedded in numerous professional codes of conduct, including the Code of Conduct for Law Enforcement Officials.⁴⁵⁷ States have called for the end of the use of profiles that are based on racial characteristics.⁴⁵⁸

States must ensure that any adverse decisions based on automated or in-person profiling can be challenged by the individuals concerned and must respect their right to remedy.



On the right to remedy, see notes in session 1.3.3(m).

Improper use of profiling during screening and interviewing may be directly or indirectly discriminatory.

- ▶ *Direct discrimination*: When an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground.

For example, refusing entry to a country or assessing an individual's security risk *based purely on prohibited grounds* such as ethnicity, religion, national or social

⁴⁵⁶ Special Rapporteur on terrorism, A/HRC/4/26, para. 33.

⁴⁵⁷ Code of Conduct for Law Enforcement Officials, art. 2 and commentary, (a).

⁴⁵⁸ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, A/CONF.189/12, Programme of Action, para. 72.

origin, disability, sex, gender identity or sexual orientation, without any objective justification. Selecting for enhanced screening only migrants with surnames that are recognizably from a particular religion or ethnicity would be discriminatory on the grounds of religion, ethnicity and/or national or social origin.

- ▶ *Indirect discrimination*: When laws, policies or practices appear to be neutral and applicable to all, but have a disproportionate impact on the exercise of rights by certain people on the basis of prohibited grounds of discrimination. Profiling that is applied generally, but that has *disproportionate prejudicial* effects against people owing to their personal characteristics, such as their ethnicity, religion, national or social origin, disability, sex, gender identity, sexual orientation and so on may be discriminatory; it is not the treatment itself that differs but rather the effects of the treatment.

For example, questions on place of birth may be indirectly discriminatory as an indicator of ethnicity; any resulting differentiation in treatment of an individual that cannot be objectively justified would amount to discrimination.

Decisions taken on a discriminatory basis that result in migrants being refused entry to the State *without individual consideration* may be a breach of the prohibition of collective expulsions.



Prohibition of collective expulsions is discussed in more detail in session 6.2.3.

Profiling based on a person's declared opinions, views or sympathies may engage other human rights. International human rights law protects the rights to freedom of expression and opinion,⁴⁵⁹ freedom of thought,⁴⁶⁰ protection of personal honour and reputation,⁴⁶¹ and freedom of association⁴⁶² and assembly,⁴⁶³ among others. Penalizing individuals because of something they said or their past associations will have a chilling effect on the exercise of those human rights.

Policies that impose indiscriminate requirements for checking travellers'/migrants' use of social media, correspondence or call data are unlikely to be considered proportionate. Policies that identify groups of people for checks based on discriminatory or political grounds are not human rights compliant.



See note on freedom of expression in screening and interviewing in session 4.1.3(g).

See issues relating to the right to privacy in session 4.2.5.

(a) Profiling for counter-terrorism purposes

As with all other applications of profiling, profiling in the context of counter-terrorism work should be non-discriminatory; based on intelligence; in conjunction with observational techniques and behavioural analysis; and applicable to all travellers; or conducted on a genuinely random basis.

United Nations human rights bodies have explicitly reminded States that measures taken to counter terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and that migrants must not be subjected to racial or ethnic

⁴⁵⁹ International Covenant on Civil and Political Rights, art. 19.

⁴⁶⁰ *Ibid.*, art. 18.

⁴⁶¹ *Ibid.*, art. 17(1).

⁴⁶² *Ibid.*, art. 22.

⁴⁶³ *Ibid.*, art. 21.

profiling or stereotyping.⁴⁶⁴ For example, when border control policies and practices single out certain groups of migrants for questioning based on their country of origin or nationality and a terrorist presence in those countries. Such profiling could also intersect with other factors such as age, gender or religion, for example, when border officials single out military-age men of a particular nationality, faith or race.

Populist political rhetoric sometimes claims that mixed migration movements are misused to hide or provide a safe haven for terrorists: a concern that is amplified with increasing concern about foreign terrorist fighters returning to their countries of origin. However, that allegation is not supported by evidence. Research to date has found little evidence that terrorists take advantage of such movements to carry out acts of terrorism or that people who move in such ways are more prone to radicalization than others.⁴⁶⁵

Law enforcement practices based on terrorist profiling that aim to prevent terrorist attacks constitute a legitimate aim; the question is whether they are a proportionate means of achieving that aim. The concern is that terrorist profiles are regularly inaccurate and both over- and under-inclusive, given their use of factors such as ethnic appearance, gender, age and national origin as proxies for religion. Those factors are not reliable indicators of radicalization, causing law enforcement to overlook a range of potential terrorists who do not fit the assumed profile, and harmfully stereotyping, stigmatizing and alienating many who have no links with terrorism. It should be considered that the vast majority of people of faith are not involved in terrorist acts. The harmful consequences of such counter-terrorism policing, including the erosion of trust between law enforcement (in some cases, the State more broadly) and targeted communities, is also a factor in any proportionality assessment.⁴⁶⁶

Profiling based on prohibited grounds is not just likely to be discriminatory, but it is also ineffective; using multiple indicators and drawing on intelligence have been shown to be more effective and more rights compliant.⁴⁶⁷ Those indicators may include criteria for observational techniques and behavioural analysis, as long as behavioural indicators are implemented in a neutral manner and are not used as proxies for ethnicity, national origin, religion or gender, among other factors. Where that is not possible, searches should be indiscriminate and apply to all travellers so that individuals are selected for searches at random, rather than on a religious or ethnic basis. As opposed to profiling, random searches may thus be more effective.⁴⁶⁸ The Security Council has affirmed that approach, encouraging States to employ evidence-based traveller risk assessment and screening procedures, including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law.⁴⁶⁹



See notes on the right to freedom of religion or belief in screening and interviewing in session 4.1.3(e).

⁴⁶⁴ Committee on the Elimination of Racial Discrimination, general recommendation 30 (2004), para. 10. The Special Rapporteur on countering terrorism has gone further and asserted that: “terrorist-profiling practices that involve distinctions according to a person’s presumed race cannot be supported by objective and reasonable grounds, because they are based on the wrongful assumption that there are different human races and, therefore, inevitably involve unfounded stereotyping through a crude categorization of assumed races, such as “white”, “black” and “Asian”. See A/HRC/4/26, para. 44.

⁴⁶⁵ Special Rapporteur on terrorism, A/71/384, paras 8–10.

⁴⁶⁶ Special Rapporteur on terrorism, A/HRC/4/26, paras. 45–58.

⁴⁶⁷ *Ibid.*, paras. 52–55, and 60.

⁴⁶⁸ United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, para. 38.

⁴⁶⁹ Security Council resolution 2178 (2014), para. 2.



With any sort of profiling, there is the danger that limited focus misses other important information.

If time and the training room set up allows, the trainer might want to show the awareness test at www.youtube.com/watch?v=Ahg6qcg0ay4.⁴⁷⁰

It demonstrates that if you do not know what you are looking for, you will miss it; and if you are intent on looking for specific data, you may miss other important information.

Examples of that in screening and interviewing includes alertness to indicators considered to be risk factors for trafficking in persons for sexual exploitation, so that signs of labour trafficking or abusive smuggling are missed, and the data set on types of trafficking (that inform anti-trafficking programming) are skewed as a result.

(b) Gender stereotyping

Profiling based on gender stereotypes, such as assuming that women are inherently vulnerable, have been documented in migration and borders policies. For example, the Governments of many countries have responded to calls to eradicate human trafficking by restricting women's rights to freedom of movement and mobility, using "profiles" of potential victims that leads to discrimination against women and girls, not only based on their sex, but also on their economic and marital status.⁴⁷¹ Reliance on such profiling would also miss cases in which men and boys are being trafficked or otherwise exploited or abused, excluding them from protection measures.

Gender stereotyping is also a factor in profiling when men and adolescent boys are disproportionately targeted because they are perceived as a security threat: for example, arrivals from conflict areas, or from States with terrorism or a record of gang activity. In addition to discriminating against men and boys, such gender stereotyping risks ignoring women as potential terrorists, which undermines the ability of counter-terrorism measures to identify terrorism suspects, and may serve to promote the recruitment of women terrorists.

Some counter-terrorism measures have used gender stereotypes as a proxy for profiling on the basis of race, national or ethnic origin or religion: for example asking men their views on women's equality, asking women who wear a veil/hijab why they do so and so on. Such terrorist-profiling practices are discriminatory because they equate gender inequality with persons of a certain race, national or ethnic origin, or religion and predict that men from those groups are more likely to be involved in terrorist acts.⁴⁷²

Individuals who wear visible religious dress may bear the brunt of counter-terrorism measures that profile on the basis of religion, or of wider societal discrimination that is informed by such stereotyping. That profiling has affected Muslim women wearing hijabs, niqabs or burqas, as well as Sikh men wearing turbans, for example.



See also the discussion on stereotyping and other factors that may affect communication during interviewing in session 4.4.2(e).

(c) Health screening

Guidelines 6.5, 6.6 and 6.7 on health screenings.

Another type of profiling or screening that may take place at international borders relates to public health concerns. While compulsory testing of migrants present at the border (e.g. HIV or

⁴⁷⁰ Test Your Awareness: Do the Test, 10 March 2008. Observers are asked to count the number of basketball passes made by the team wearing white sweaters. Then they are asked if they saw the moonwalking bear. The test replays to show viewers what they may have missed.

⁴⁷¹ Special Rapporteur on violence against women, E/CN.4/2000/68, para. 47.

⁴⁷² Special Rapporteur on terrorism, A/64/211, para. 37.

pregnancy tests) may represent a violation of their rights, non-discriminatory and rights-based health screening for the purpose of restricting the spread of pandemics is legitimate. Such measures were used in some countries in the immediate response to severe acute respiratory syndrome (SARS) in 2002/2003, when screening was used to identify those needing health care or short-term close monitoring and in response to the COVID-19 pandemic.

Any health screening at the border must be human rights compliant and any restrictions on migrants' rights resulting from health screenings (e.g. quarantine, refusal of entry and so on) must be based in law, non-discriminatory, necessary, proportionate and subject to regular review. Although tightened border controls may sometimes be used to implement health screenings during a pandemic, they should not be used as a way to limit the right of entry to a country and measures should be in place to ensure continued access to individual assessments, determination of the best interests of the child, and international protection under international human rights and refugee law. Measures at borders during pandemics should also not imply mandatory or indefinite detention. Quarantines may be used to prevent transmission by isolating travellers from areas with community transmission or contacts of known cases.⁴⁷³ They should therefore be time limited and imposed only if no alternative protective measure can be taken by authorities to prevent or respond to the spread of infection. Under no circumstances should the isolation or quarantine be used to justify discrimination or the imposition of harsher or less adequate conditions on a particular group, including children.⁴⁷⁴

The health conditions experienced by migrants should not be used as an excuse for imposing arbitrary restrictions on the freedom of movement, stigmatization, deportation, denial of access to services, and other forms of discriminatory practices.⁴⁷⁵

Health screenings should always be conducted by trained health professionals in confidence, providing survivor-centred care through voluntary testing, with informed consent, and with adequate pre- and post-test counselling.

Safeguards should be in place for health screenings to ensure non-stigmatization, privacy and dignity, and the screening procedure should be carried out based on the informed consent of the individual and be beneficial to both the individual and the public. Such screening should also be linked to accessing risk assessment, treatment, care and support.

Invasive physical screening to determine an individual's gender identity or to assess their sexual orientation may constitute torture or other cruel, inhuman or degrading treatment or punishment.⁴⁷⁶

Border officials should ensure that any necessary health screenings or physical examinations take into account the specific situation and needs of migrants who are survivors of sexual and gender-based violence and trauma. Those needs may include post-exposure prophylaxis for HIV, emergency contraception, antibiotics, preventive treatment for sexually transmitted infections (STIs), and pregnancy tests.⁴⁷⁷



See also the discussion on the right to health in sessions 1.3.3(i) and 4.1.3(i).

⁴⁷³ WHO, Interim Guidance: Considerations for quarantine of contacts of COVID-19 cases, 2020, p. 1.

⁴⁷⁴ OHCHR and WHO, IASC Interim Guidance on COVID-19: Focus on persons deprived of their liberty, 2020, p. 5.

⁴⁷⁵ WHO, Framework of Priorities and Guiding Principles to Promote the Health of Refugees and Migrants, c. 2017, Guideline 5.

⁴⁷⁶ Independent Expert on sexual orientation and gender identity, A/HRC/38/43, paras. 28–29 and 100; Special Rapporteur on torture, A/HRC/22/53, paras. 76, 79; OHCHR, *Living Free and Equal*, pp. 40, 43–44.

⁴⁷⁷ For further information on specialized health-care services for survivors, see UNFPA, *Minimum Standards for Prevention and Response to Gender-Based Violence in Emergencies*, pp. 27–28.

4.2.5. Respect the right to privacy

Guidelines

3.16: Use of border surveillance technology.

4.12: Personal property and data, and the right to privacy.

6.3 and 6.4: Data collection and the use of technology in screening processes.

Individuals should have an area for autonomous development, interaction and liberty, a private sphere with or without interaction with others, free from State intervention and excessive unsolicited intervention by other uninvited individuals.⁴⁷⁸



See also, session 1.3.3(e) on the right to privacy.

(a) Data collection and storage

All collection and storage of migrants' data must:

- ▶ Be authorized by accessible and precise domestic law that is in line with international human rights law;
- ▶ Pursue a legitimate aim;
- ▶ Meet the tests of necessity and proportionality;
- ▶ Be conducted under judicial or executive authorization and meaningful independent oversight.

States are legally obliged to afford the same privacy protection for nationals and non-nationals and for those within and outside their jurisdiction.

Although not within the remit of border officials, it is important to recognize that domestic legislation and other relevant regulations that guarantee human rights protections must inform policies and procedures, including standard operating procedures (SOPs), on border management, including in relation to data storage – how it is stored, the duration and purpose of storage, and all issues concerning access.

The collection, storage and use of personal data for screening amounts to an interference with the right to privacy.⁴⁷⁹ However, the right to privacy can be restricted when the requirements of international human rights law are met: for example, when there is an objective assessment that there is a legal basis for the interference that it is not arbitrary,⁴⁸⁰ it is necessary and proportionate, any potential for discriminatory design or impact is addressed and the interference does not impair the essence of the right.⁴⁸¹ Personal data continues to belong to the individual, even after it has been collected by the State or others, such as a company contracted for border management work.

The right to privacy also encompasses the right of individuals to know who holds information about them and how that information is used. That is particularly important in the context of

⁴⁷⁸ Special Rapporteur on freedom of opinion and expression, A/HRC/23/40, para. 22.

⁴⁷⁹ International Covenant on Civil and Political Rights, art. 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy".

⁴⁸⁰ Human Rights Committee, general comment No. 16 (1988), para. 4: "the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".

⁴⁸¹ As an example, a counter-terror data-mining initiative (search of personal data sets according to presumed characteristics of suspects) based on a discriminatory profile identified 32,000 persons for close examination and led to no criminal charges for terrorism-related activities, see Special Rapporteur on terrorism, A/HRC/4/26, para. 35.

screening and interviewing when individuals want to challenge their inclusion on a terrorist watch list or a “no-fly” list or other such database that may affect their ability to leave or enter a country. The lack of transparency in the listing process and of due process for the individual listed remain human rights concerns. Being wrongly included on such a list can have long-term consequences for the individual and their family, especially considering the length of time that such data may be stored. At a minimum, the persons affected have a right to know that personal data has been retained and processed, to have access to the data stored, to rectify data that is inaccurate or outdated and to delete or rectify data unlawfully or unnecessarily stored.

Current best practice standards ensure that individuals are presented with clear and understandable information about the State body or other organization holding or processing their data so that they understand why their personal data will be used and how long the data will be stored, as well as details of any other organization that will have access to/share their personal data. Before any data is collected, individuals should be informed about their data protection rights (i.e., access, correction, deletion, complaint, withdrawal of consent).

The greater the interference with protected human rights, the more compelling the justification must be. There is a proliferation of digital border surveillance systems, capable of mass surveillance and raising questions about data security, as well as human rights protections for travellers, including the right to privacy. Although the prevention, suppression and investigation of acts of terrorism would amount to a legitimate aim for interference with an individual’s right to privacy, mass surveillance programmes pose a significant challenge to the legality requirement of the right to privacy.

Mass, non-targeted and indiscriminate collection of data, such as through bulk access to digital communications, is also unlikely to meet the requirements for necessity and proportionality, in particular the requirements to ensure individualized assessment and to implement the least intrusive instrument among those which might achieve the desired result.⁴⁸² In the context of border management and security, in particular when there are counter-terrorism concerns, an assessment of proportionality involves striking a balance between the societal interest in the protection of privacy, including online privacy, and the undoubted imperatives of effective counter-terrorism and law enforcement. Nonetheless, there needs to be governmental transparency on surveillance policies, laws and practices to ensure their coherence with international human rights law and accountability.

(b) Data security

- ▶ *Biometric data* constitutes sensitive data that requires additional safeguards and protection;
- ▶ Take measures to ensure the *security of the data and the infrastructure* that enable processing, including collection, storage, sharing and disposal, by State and private actors;
- ▶ Only use personal data for the *purpose specified* at the point of collection;
- ▶ Handle data in a *confidential manner*, ensuring a high level of data security to prevent unauthorized access, loss or damage;
- ▶ Limit the *duration of storage* to the time necessary to achieve a legitimate aim;
- ▶ Ensure appropriate *safeguards* in relation to the individual’s access to their own data.

Biometric-based technologies are increasingly used to control migration, both at borders and within countries. The creation of mass databases of *biometric data* raises significant human rights concerns. Such data is particularly sensitive, as it is by definition inseparably linked to a

⁴⁸² Human Rights Committee, general comment No. 27 (1999), para. 14. Note also the assertion that “merely to assert – without particularization – that mass surveillance technology can contribute to the suppression and prosecution of acts of terrorism does not provide an adequate human rights law justification for its use. The fact that something is technically feasible, and that it may sometimes yield useful intelligence, does not by itself mean that it is either reasonable or lawful (in terms of international or domestic law)”. Special Rapporteur on terrorism, A/69/397, para. 11.

particular person and that person's life and has the potential to be gravely abused. For example, identity theft on the basis of biometrics is extremely difficult to remedy and may seriously affect an individual's rights. Moreover, biometric data may be used for different purposes from those for which it was collected, including unlawful tracking and monitoring of individuals. Given those risks, particular attention should be paid to questions of necessity and proportionality in the collection and storage of biometric data.

The *collection of personal data* should always be for an identified purpose specified by the entity that is doing the collection or processing of the data. Changes of purpose without the consent of the person concerned should be avoided and when undertaken, should be limited to purposes compatible with the *initially specified purpose*. Data collected for migration purposes should be limited for that purpose and not be used for broader law enforcement purposes, intelligence activities nor profiling or risk assessments.

The use of watch lists circulated to airlines and security officials with instructions to detain and question any passenger with a certain name may result in the use of information for secondary purposes, and may also result in that data being shared with other institutions, without the knowledge or consent of the individuals concerned. Such lists raise issues of data integrity due to errors in the data collected that may result in restrictions on travel without the individuals having been presented with, and able to defend themselves against, evidence of any wrongdoing.

For example, owing to the lack of an internationally agreed definition of terrorism, the broad use of the "terrorist" label to secure surveillance of individuals and groups by some police or intelligence agencies has led to peaceful protestors being included on the watch lists. Subjecting individuals to such surveillance without their knowing that they are on such a list, and without effective independent oversight, could constitute a violation of the right to privacy, impacting other rights such as freedom of movement and the right to leave any country, and raising questions about the lawfulness of such lists.⁴⁸³

There is an ongoing discussion on what circumstances really require biometric data for the effective protection of migrant children: such data should be used only for child protection purposes.

Any sharing and transfer of personal data to other State or private entities in other countries can be allowed only if the recipient of the data provides a level of protection of personal data, that is, at a minimum, compliant with data protection principles and international human rights law. Such data should not be used for law enforcement purposes nor intelligence activities if that was not the intended purpose when the data was collected.

Concerns about data storage include the likelihood of the use of the data no longer corresponding to the purpose for which it was originally collected, which would breach human rights guidance, and the obsolescence of data over time, which could negate its usefulness. Any personal data collected and stored should be relevant to the purposes for which they are to be used, and – to the extent necessary for those purposes – should be accurate, complete and kept up to date.

The duty to respect the privacy and security of communications implies that individuals have the right to share information and ideas with one another without interference by the State or a private actor, secure in the knowledge that their communications will reach and be read only by the intended recipients. The collection and *retention* of communications data, including mandatory data retention laws that require telecommunications and Internet service providers to preserve communications data for inspection and analysis, constitute an interference with the right to privacy, whether or not the data are subsequently accessed or analysed by a public authority.

Many *private actors* such as telecommunications and Internet service providers are involved in the collection, processing and storing of personal data in the context of screening and interviewing at international borders. For those actors to be compliant with a human rights-based approach, they should disclose which personal data are collected, how long they are stored and for what purpose, how they are used and with whom, and under what circumstances they are shared.⁴⁸⁴

⁴⁸³ Special Rapporteur on terrorism, A/HRC/13/37, paras. 26, 28, 36, 37, 52.

⁴⁸⁴ United Nations, *Guiding Principles on Business and Human Rights*, Principle 21.

Border authorities need to ensure adequate procedural safeguards, including through policies and standard operating procedures, in line with existing international and domestic legal obligations, including international human rights law, to ensure that any collection and storage of individuals' data is secure and meets the principles of non-arbitrariness, lawfulness, legality, necessity and proportionality. Furthermore, effective and independent *oversight* of data security that is resourced to provide remedies for any breaches of an individual's right to privacy or other human rights is needed.

To ensure meaningful oversight on the collection, use and storage of travellers' personal data, good practice would be to establish and maintain independent, effective, adequately resourced mechanisms using mixed models of internal oversight within border agencies, and impartial judicial, administrative and/or parliamentary domestic mechanisms capable of ensuring transparency and accountability.⁴⁸⁵

Guideline 4.6: Ensure accountability of private transport companies.

(c) Handling personal property

Confiscation of personal items should be done only when authorized by law, in clearly defined, limited circumstances.⁴⁸⁶

- ▶ Provide receipts for all confiscated property;
- ▶ Return confiscated items as soon as possible.

Personal items include travel and identity documents, documents authorizing entry or stay, residence or establishment in the territory, work permits, money, mobile phones, personal documentation.

Guidelines 4.12 and 6.2: Ensure appropriate handling of private property in screening processes.

(d) Searches

Any search of an individual at international borders should be conducted in line with international human rights law (i.e., legality, necessity, proportionality and non-discrimination) and in a manner that is respectful of the inherent human dignity and privacy of the individual being searched.

Officials conducting searches of migrants should ensure their approach and actions are age- and gender-sensitive.⁴⁸⁷

- ▶ If body searches of women are foreseeable, women border officials should be present to perform them. Where that is not possible, a woman must be in attendance as a witness at all times when women migrants are searched: for example, it may be possible to request a representative of a trusted women's organization to be present as an observer if no women border officials are available.
- ▶ For personal searches of trans or non-binary individuals, the individual should be allowed to choose the gender of the officials carrying out the search.⁴⁸⁸



See notes on conducting searches, including gender considerations, in session 3.1.4(c).

⁴⁸⁵ OHCHR, A/HRC/27/37, para. 38; Special Rapporteur on terrorism, A/69/397, para. 45–50.

⁴⁸⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 21, prohibiting confiscation and/or destruction of identification cards or other documents.

⁴⁸⁷ Nelson Mandela Rules, 2016, rule 50; United Nations, CTITF and OHCHR, *The Stopping and Searching of Persons in the Context of Countering Terrorism*, p. 11.

⁴⁸⁸ OHCHR, *Living Free and Equal*, pp. 43, 128.

4.2.6. Do no harm

It is important to be aware that a person to be screened or interviewed may be in a vulnerable situation and require specific attention. Border officials must make every effort to avoid causing harm, including traumatization or retraumatization, to migrants in vulnerable situations who are seeking to cross the border.

- ▶ Border officials need to ensure a proper assessment of gender dynamics and cultural norms that may result in migrants being exposed to further harm, including retraumatization, stigma, marginalization and/or violence on the part of alleged perpetrators, or their families and communities. At the same time, it is important not to make assumptions about needs or condition based on stereotypical views. For example, it should not be assumed that all victims of sexual violence would find the process of recounting their experience traumatizing; in fact, if well conducted, such a process could be healing and empowering.⁴⁸⁹
- ▶ Border officials must be able to refer individuals who may be at particular risk at the border to the relevant authorities who will undertake an accurate identification and referral. For example, migrants who are survivors of torture and/or sexual and gender-based violence, children, persons with disabilities, among others.
- ▶ Border officials should avoid asking questions that require the individual to recall traumatic experiences, as it may lead to retraumatization and further distress. Specialists/experts in the referral process may be able to assist in collecting any necessary information from individuals in such vulnerable situations.

4.3. Exercise (role play): Screening at the border

This is the first of two role-play exercises in this session. Learners will work in pairs – one taking on the role of a migrant, and the other, the role of a border official – in order to simulate an initial screening at a border.



Duration: 60 minutes
(role play: ±25 min.; debriefing: 30 min.)

Aim of the exercise:

To encourage learners to put the knowledge they have acquired during the session into practice, and to encourage them to empathize with migrants, identify the vulnerable situations they might be in, and consider referral options.

How to carry out the exercise:

- ▶ Preparing for the screening



There should be at least two facilitators for this activity.

The instruction slide may need to be revised to take into account room size, set-up, number of learners, and interpretation needs.

It may be useful to work with fewer migrant roles to facilitate the debriefing.

- *Preparation of migrant roles and associated documents:* A number of migrant profiles, stories and documents have been prepared for this activity to reflect some of the circumstances and experiences that may place migrants in vulnerable situations. The roles can be revised, based on the local context, or adapted depending on the number of learners.

⁴⁸⁹ OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 25.

- *Preparation of border official roles:* Have ready sufficient screening reports containing possible actions to take and referral options, as well as background information and watch lists that would normally be in the border computer system or available in a real-life situation.
- *Preparation of the room:* During the break, set up the room with the required number of tables/desks to serve as border screening stations. Determine and mark where the learners who are playing the migrants will line up for screening.



Use a stopwatch/timer to time each round of screening. As this exercise could generate a lot of noise, it would be useful to have a bell or something loud enough for everyone to hear when a round has ended.

► Instructions to learners



Overall instructions are available on the slides.
Hand out information on the roles of border officials and migrants separately.

- *Present the overall instructions to all the learners in plenary:* Take enough time to do this to make sure everything is clear to everyone. Further instructions will be provided once the roles are assigned.
- *Assign the roles of border officials and migrants:* Divide learners into two groups and assign the roles of border officials and migrants. The size of each group will depend on the number of learners present. The trainer should aim for the maximum number of officials in this screening exercise.



In the second role-play exercise (interviewing in session 4.5), the roles can be reversed, so that everyone has a chance to conduct a screening/interview and to be a migrant. If space is limited, it may be necessary to alter the proportions and instructions, e.g., border officials can take turns screening migrants, or can interview several migrants, making sure that they have different profiles.

- *Brief learners on their roles:* Divide learners into their respective roles (officials and migrants) and take each group to different parts of the room. Brief each group on their role and how the exercise will be conducted.
 - *Migrants:* Distribute the migrant materials (migrant profiles and stories, travel documents, if any). Each migrant profile contains a short description of the specific migrant – gender, age, nationality, etc. Some migrants have regular documents, but most are travelling with forged, incomplete or no documents. The migrants should have/know all the information about their migration story. Show them where to queue for screening and explain that they should return to the queue once they have been screened for additional rounds until the exercise is finished. They should stay in their role and keep their travel documents; they must not return to the same screening official in subsequent rounds. Learners may be taking on migrant roles that are of a different age, gender, nationality than their own.
 - *Border officials:* Distribute the materials to the border officials and brief them about the materials provided: background information (e.g., names on a terrorist watch list); screening report containing possible actions and referral options – to be completed after the screening; tell them where to sit/stand at the screening stations. The border officials have to ask questions to find out as much information possible about the migrant and their migration story. It is important that the border officials pay attention to what the migrants are telling them, and not make assumptions based on the appearance of the person being screened.



Depending on the context in which the training is delivered, decide on the location: at an airport, a sea or a land border, and adapt as appropriate. If necessary/depending on size of group, two or more officials can be assigned to each station and take turns being “on duty”.

- ▶ Conducting the screening (3 min. each)

Once everybody is ready, the trainer signals for the migrants in the queue to go to one of the screening stations. Start the timer: allow 3 minutes for each screening, once the migrants have reached the screening stations.

At the end of the first round (3 min.), the trainer should signal to stop the exercise. Everybody must stop, even if the border officials have not completed the screening, or the migrants have not completed their story.

Repeat the 3-minute screening cycles until all the border officials have screened at least one migrant or as long as time allows. Migrants should repeat their roles going to a different screening station at each round.



Debriefing

- ▶ At the end of the exercise, ask learners to reflect on the following questions:
 1. What was your reaction to the exercise?
 2. Were there any specific situations that made you feel uncertain or uncomfortable?
 3. How did you feel throughout the exercise?
 4. What decisions did you make/what action did you take?
 5. Why those decisions/actions?
 6. What would you do differently, if anything?
 7. Did any gender-specific considerations emerge for either the border official or migrant role?

The debriefing is an important opportunity for learners to share their experiences as border officials and migrants. Everyone should be encouraged to discuss, either in groups or in plenary, how they felt in their roles.⁴⁹⁰

It is common for border officials to report that they did not think the 3-minute time limit was sufficient. However, in practice, initial screenings could be even shorter; although in many cases, the border official may have already had access to the individual’s personal data (see [session 4.1.1](#)).

Note which border officials picked up that some of the migrants were children, and treated them appropriately, and when referrals to specialists or for further interviewing were necessary.

The table below contains an overview of each migrant’s situation and would be useful for guiding the debriefing discussion.

⁴⁹⁰ The decision to discuss in groups or plenary is based on time and group dynamics. If learners are comfortable discussing in plenary and time allows, then do so; if learners are reticent about sharing with the whole group or if time does not allow, ask them to discuss in groups and have one person/group report back in plenary.

Migrant stories (screening exercise)

Migrants	Discussion points and referrals
<p>1. Vanessa</p> <ul style="list-style-type: none"> ▶ 20-year-old woman from Ambrosia ▶ Documents are false ▶ Other information: Says “I am a refugee and I’m eight months pregnant.” 	<p>Advanced stage of pregnancy: right to health, in particular, maternal health care, including emergency obstetric services, prenatal and postnatal care</p> <p><i>Referrals:</i> asylum process; health/medical screening including specialist maternal health services</p>
<p>2. Abouna</p> <ul style="list-style-type: none"> ▶ 32-year-old woman from Arcadia ▶ Documents in order, including return ticket (return date is in two weeks’ time); has only the very minimum required finances ▶ Other information: Says, “My situation back home is impossible. I am desperate. There, I cannot get a job and my mother is very sick. I do not know anyone in Arcadia.” 	<p>Driver of migration: lack of economic and social rights</p> <p>Possibility that she may overstay and remain in a vulnerable situation as she lacks social networks</p> <p><i>Referrals:</i> organizations providing legal aid to individuals in vulnerable situations, including migrants</p>
<p>3. Fatima</p> <ul style="list-style-type: none"> ▶ 24-year-old Indigenous woman from Costaguana ▶ No documentation ▶ Other information: Member of one of the Indigenous peoples of Costaguana; does not speak the majority language of Costaguana ▶ Indicates, through sign language, that she does not want to go back to Costaguana 	<p>Language issues: the officer will not be able to communicate with her in any meaningful way</p> <p>Indigenous persons in Costaguana are often unable to access proper documentation due to high costs; unable to easily travel to the capital city; do not speak the majority language; direct or indirect discrimination</p> <p><i>Referrals:</i> secondary screening with specialist interpretation; asylum or other human rights protection process</p>
<p>4. Prajid</p> <ul style="list-style-type: none"> ▶ 24-year-old man from Carombya ▶ Passport in order, but no valid visa ▶ Other information: Passport has many recent stamps from other countries in the region– indicating a long transit; wound marks on arms and neck 	<p>Possible signs of abuse, torture or other ill-treatment experienced during long journey.</p> <p><i>Referrals:</i> specialist health screening to assess need for psychosocial assistance and other support for victims of torture and trauma</p>
<p>5. Maia</p> <ul style="list-style-type: none"> ▶ 19-year-old woman from Molvania ▶ Forged documentation ▶ Other information: Not easily answering questions; looks tired, as well as highly anxious; has copy of a contract to work as a secretary for a senior executive in the country; says she is accompanied by a man who has already gone through screening 	<p>Possible signs of trafficking (but bear in mind that many people look tired from travelling or find it anxiety-inducing; care should be taken if relying on certain indicators in isolation, such as signs of nervousness)</p> <p>Note that trafficking is not a risk just for those with no or false papers; it can happen to migrants with regular status as well as nationals/citizens</p> <p><i>Referrals:</i> secondary screening by officials trained to identify trafficked persons and related exploitation; ensure she is interviewed separately from the man travelling with her</p>

<p>6. Alan</p> <ul style="list-style-type: none"> ▶ 25-year-old man from Arcadia ▶ Documents are in order ▶ Other information: Part of his name appears on a terrorist watch list ▶ Alan is a very common name in Arcadia 	<p>Note that the fact of being on a terrorist or “no-fly” list may not mean that the individual is a risk; there are many instances of individuals being wrongly put on such lists/ databases (see discussion in session 4.2.5)</p> <p><i>Referrals:</i> secondary interview to assess risk</p>
<p>7. Kim</p> <ul style="list-style-type: none"> ▶ Individual from Zuy, age 22 ▶ Other information: Departed from Zuy without Government’s permission; shows signs of severe abdominal pain 	<p>The need for explicit permission from Government to leave a country could indicate that irregular emigration is criminalized</p> <p>Prioritize need for medical attention over other investigation</p> <p>Note that there is no information on Kim’s gender and it is a name that is not gender-specific. What assumptions are made about Kim’s gender? Do those assumptions change the decisions made in this case?</p> <p><i>Referrals:</i> emergency health-care services; asylum or other human rights protection process</p>
<p>8. Zahra</p> <ul style="list-style-type: none"> ▶ 15-year-old girl from Ambrosia ▶ False papers ▶ Other information: Says she does not know where her parents are 	<p>Should be treated as a child first and foremost; even if screening officials have doubts about her age, she should be given the benefit of the doubt</p> <p><i>Referrals:</i> child protection services, with further referral to family tracing service</p>
<p>9. Ivan</p> <ul style="list-style-type: none"> ▶ 19-year-old man from Carombya ▶ Documentation seems to be in order ▶ Other information: Struggles to speak and appears to have a mental or intellectual disability; travelling with a cousin aged 32 years. 	<p>Note that identification of persons with disabilities often relies either on information provided by the individuals themselves, or on the presence of a “visible” disability. Where possible, officers should try to keep persons with disabilities together with their family or support group.</p> <p><i>Referrals:</i> mental health services</p>

4.4. Practical steps to ensure human rights-based and gender-sensitive interviews

4.4.1. Exercise (brainstorming/carousel): Stages of the interview



Duration: 25 minutes (including instructions and group work)

Aim of the exercise:

The purpose of this activity is to encourage learners to think through the steps needed at different stages of the interview in order to ensure a human rights-based approach. It builds on the work covered in the training course so far, and allows learners to draw on their own work experience. This brainstorming method enables review of acquired knowledge, as well as reflection on new issues. To debrief, link the outcome of the exercise to the discussion on different stages of the interview in the rest of the session.

How to carry out the exercise:

- ▶ Place four (4) flip charts around the room so that learners have enough space to circulate and write on the charts.
- ▶ Write one interview stage on each flip chart:
 - A. Preparing the interview
 - B. Beginning the interview
 - C. Conducting the interview
 - D. Concluding the interview.



It may be useful to prepare the flip charts in advance, as this exercise follows the screening role-play exercise.

- ▶ Briefly explain what each stage refers to, then show the instructions on the slide and explain the exercise. Leave the instructions on display during the exercise.
- ▶ Divide learners into four groups, corresponding to the number of flip charts.
- ▶ Assign each group one interview stage and ask each group to discuss their interview stage and note their ideas on the relevant flip chart. Explain that they will work on each stage in turn.

Allow the groups 7 minutes to brainstorm and make notes on their interview stage, before rotating to another stage/flip chart. As the groups move on, they will spend less time at each flip chart, as it will become difficult to add new information.

At each stage/flip chart, learners will familiarize themselves with the particular interview stage, and what the previous groups have noted, discuss with their group, and add new information, as necessary. Continue this process until each group has discussed each interview stage (4 rounds).



If time is short, this activity can also be carried out with groups assigned to only one interview stage, without rotating.



Debriefing (this will merge into the rest of the session)

- ▶ Invite a representative from each group to present the points on the respective flip charts.
- ▶ For each stage, ask if anyone has additional comments or questions about it, and ensure that the human rights rationale for the steps is clear.



Use the slides for this session for the debriefing.

If time is short, use the slides and discuss the contributions on each interview stage at the relevant part of the session.

4.4.2. Preparing for the interview

Systematic preparation, including devising a strategy and an interview structure in compliance with human rights standards and rules of procedure, will increase the likelihood of good quality and effective interviews.

(a) Selecting the interviewer and the venue

Generally, the interviewer should be the same gender as the interviewee, although the migrant should be offered an option, if possible. To that end, it is important to have women officials working at border stations where interviews take place, and a child protection officer or child

welfare worker should be present at interviews of child migrants or anyone claiming to be under 18 years old.

Officials should ensure that the area where they conduct the interview is private and suitable in order to assure confidentiality and allow for the disclosure of information that would be censured in the presence/hearing of others (e.g., members of the community, family, etc.).

The interview space should be a safe, culturally appropriate and gender-responsive environment (e.g., make childcare available during the interview so that the individual does not have to answer questions involving sensitive information in front of their children). The layout and design of the interview space should also be consistent with the non-criminal nature of migration, including irregular border crossing.

If children are to be interviewed, the room should be set up in a child-friendly way, including not positioning the border official directly opposite the child, as in an interrogation. The selected location should have adequate facilities to meet the basic needs of the migrant during the interview.

(b) Gathering information about available resources

Border officials should be familiar with the support and referral pathways available and be able to use referral mechanisms, including information about migration procedures such as asylum, child protection, health services, interpretation, legal aid, the individual's rights and responsibilities, and all relevant care and support services, and provide contact details. Officials should have access to a database of available support services appropriate for the national and local context.

Border officials should consider drawing up standard notification forms with up-to-date information on available remedies, prepared in the languages that are most frequently used or understood by migrants and other travellers to the State.

(c) Preparing questions for the interview

Border officials should prepare appropriate questions on all relevant issues. It is especially important to be prepared to ask all questions that may indicate possible immediate needs, including the necessity to be referred to medical and any other urgent assistance.

Prepare questions so as to gather information on the migrant's situation, bearing in mind that a particular situation may affect migrants of different genders, differently. If not properly and deliberately researched, the gender-specific context of the individual's experience, including in relation to human rights violations and specific human rights protection needs, is often not uncovered. It is important to develop questions that are sensitive to gender, age and other intersectional grounds of discrimination that compound a migrant's experience of human rights violations.

Guidelines 6.9 and 6.10: Develop and provide training on interview guidelines.

(d) Selecting and briefing an interpreter, if necessary

Border officials should ensure that relevant service providers, such as interpreters, are present or available, including for sign language, legal aid, health care, and guardians for separated children.



See more on working with interpreters in session 4.4.2(g) below.

Guidelines 7.1, 7.3 and 7.4: Establish referral mechanisms and ensure that specialized service providers are present.

(e) Being mindful of factors that may affect communication

Border officials should be mindful of factors that may affect their communication with the interviewee, in particular the risk of stereotypes and bias by both parties. That would be detrimental to the interview process and negatively affect its outcome.

► *Focus on the individual*

It is important to focus on the individual and their experience, rather than on their background, as doing so can minimize the impact of stereotyping and bias, including negative stereotypes and perceptions about migrants.

For example, ensure that women’s reports of human rights abuses are understood for their impact on the individual and in the context of the situation and the needs of women, and not viewed through the lens of male experiences.

Interviewers should use techniques and procedures that are sensitive to gender, age and other intersectional grounds of discrimination and disadvantages that compound the human rights violations that migrants may experience.

Guidelines 6.12 and 6.13: Avoid stereotypes and ensure sensitive communication.



See Glossary for a definition of “gender stereotype/stereotyping”.



See discussions on gender in sessions 1.2 and 4.2.4.

► *Consider the following aspects:*

Culture: Cross-cultural differences may lead to misunderstandings or misinterpretations. Active listening and checking understanding by summarizing what the interviewee has said can help to reduce or remedy misunderstanding.

Gender: Gender differences between the interviewing official, interviewee and/or interpreter may affect the dynamics between them.

Age: If a person claims to be under 18 years old – that is, a child under international law – officials should treat the person as a child, giving them the benefit of doubt.⁴⁹¹ If there is no conflict of interest or potential threat to the child, it is advisable that they be interviewed in the presence of a trusted adult, such as a parent or guardian. Otherwise, the child should be interviewed only in the presence of appropriately trained childcare workers or child protection officers.

Personal history and background: The interviewee’s past experience and background may influence the interview; a person who is a survivor of torture by State officials, for example, may have strong distrust towards uniformed officials, and therefore be reluctant to share much information.

(f) Deciding not to proceed with the interview

► *The interest of the interviewee should be the priority*

There may be situations in which the official may conclude that the interviewee is not fit to be interviewed or that the interview would cause significant further traumatization. In such circumstances, the interest of the interviewee should be prioritized to avoid any risk of violation of the person’s right to physical and mental integrity.⁴⁹²

⁴⁹¹ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 10, Guideline 4.

⁴⁹² Code of Conduct for Law Enforcement Officials, art. 6.

(g) Working with interpreters

Border officials should ensure that the interview is conducted in a language that the interviewee understands and that they are able to express themselves without difficulty.

When preparing an interpreter, ensure the following:

- ▶ Before the interview, the interviewing official should *ensure that the interpreter and the interviewee can understand each other*.
- ▶ The *interpreter must be unprejudiced and impartial*. The interviewing official should be mindful of any factor that might affect the communication between the interpreter and the interviewee, including gender, ethnicity/nationality, culture or religion.
- ▶ The *interpreter must be trustworthy*. It is critical that the interpreter interprets the words of the interviewee without adding their own personal interpretation or information. The interpreter must be able to interpret reports of human rights abuses that may be traumatic, or issues that they do not personally agree with, without any interference.
- ▶ The *interpreter's involvement must not endanger or harm the interviewee or compromise the interview process*.

This could be a concern, for example, when the interpreter is from, or has ties to, the interviewee's country of origin or diaspora and the migrant fears that this will undermine the confidentiality of the interview and information about their interview (or even the fact that they are in the country) will get back to their community or family, and that would be harmful to them.

There are numerous reasons why a migrant might have concerns about an interpreter from their country of origin and it would make them reluctant to speak openly in the interview. Such reasons include if they were not supposed to migrate because of State legislation, bans or family disapproval, or if they experienced rape or other form of sexual violence in transit (fear of stigma), or if they have been trafficked (fear of risk to their family or information getting back to traffickers in their country of origin).

Technological solutions may also be available, such as interpretation by telephone or Skype, and useful particularly for interviewing speakers of rarer languages or dialects.

Guideline 6.11: Use competent and impartial interpreters.

4.4.3. The interview

Beginning the interview

- ▶ Border officials should start an interview by *identifying themselves*, using safeguards where necessary, and their official function.
- ▶ They should then *explain the purpose of the interview* and the roles of any other staff – such as an interpreter or other officials – who may be present.
- ▶ It is *good practice to check with the interviewee* if they are happy with all present, and to give them the opportunity to request changes, such as the gender of the interviewer or the interpreter, or the language in which the interview will be conducted.
- ▶ It is necessary to *explain how the interview will be documented* and assure confidentiality. Informed consent must be obtained for any recording of the interview.

It is important that the interviewee understands how their information will be used. Confidentiality does not mean that only the interviewer will hear the interview or have access to the record of it. Other staff working on the case may need to access it; and information may be shared with service providers in the case of referrals, for example.

Video recordings can capture the interviewee's condition and show non-verbal signs of trauma, for example, but may raise concerns about confidentiality and the risk of identification.

- ▶ *Establishing rapport* is a crucial factor for effective non-coercive interviews. It can help to reduce the interviewee's anxiety, anger or distress, as well as increase the likelihood that the interviewee will offer more complete and reliable information. Creating a supportive interview environment enables disclosure of sensitive and personal information, which is especially important for survivors of trauma, torture and/or ill-treatment and sexual violence.
- ▶ *Providing information about the process* and about the steps that will follow can help put the migrant at ease. The interviewing official should inform the migrant about the identification and referral procedures, their rights and obligations during the process, including their right to legal advice and representation, any possible consequences if they do not comply with the interview or other aspects of the process, as well as any remedy available to them. All information should be provided in accessible formats and in a language that the interviewee is known to understand.



See points on providing information, including relevant principles and guidelines at international borders in session 4.2.3.

Conducting the interview

Border officials should adopt an open and non-threatening manner, and:

- ▶ Encourage *free narrative*: The border official conducting the interview should allow the migrant to give their account freely and uninterrupted in their own words. That could be encouraged by the use of non-specific prompts such as, "Did anything else happen"? "Can you tell me more about that"?
- ▶ Use a *mix of open-ended and closed questions*: Open-ended questions encourage the interviewee to provide a free and uninterrupted account and should be worded in such a way as to allow the interviewee to provide unrestricted information. Such questions encourage memory retrieval and are less likely to influence the interviewee's account; they also allow the interviewee to decide on the amount and flow of the information to provide.
- ▶ Where/when necessary, the interviewing official can *seek clarification of specific points* by asking closed questions, worded in such a way as that the interviewee has to respond in a limited manner, such as with yes or no, or give factual information such as the time of events.
- ▶ Use *active listening*: The interviewing official should engage in active listening, paying close attention to and repeating back the narrative given by the interviewee to confirm understanding.
- ▶ Identify any *situations of vulnerability*: The official should ensure that interviewees have adequate time to present their cases and seek remedies where appropriate.

Interviewees have the right not to be compelled to testify against themselves or to confess guilt of any offence.⁴⁹³ Under no circumstances should there be any use of torture or cruel, inhuman or degrading treatment or punishment against a migrant.

The interviewing official should never apply any physical or mental pressure on the interviewee in an effort to obtain information; nor should the interviewee be subjected to any attack on their honour or reputation.⁴⁹⁴

4.4.4. Concluding the interview

Border officials should end the interview by:

- ▶ Going over the interview content with the interviewee;
- ▶ Inviting the interviewee to provide any additional information/points;

⁴⁹³ International Covenant on Civil and Political Rights, art. 14(g).

⁴⁹⁴ *Ibid.*, art. 17.

- ▶ Explaining the next steps – what happens next, how long before a decision is made, and so on:
 - Offering information, if necessary, on available support and where it can be obtained, as well as going over the process for filing a complaint or exercising their right to remedy (this information should have been provided earlier);
 - Asking if the interviewee has any questions.

4.4.5. Gender-sensitive screening and interviewing

- ▶ Ensure that screening and interviewing of women and girls are conducted *by women officials*; and that trans or non-binary individuals are allowed to choose the gender of the officials conducting the screening or interviewing, and in particular searches.
- ▶ Communicate with women *separately from male family members*. Women must be respected and treated as autonomous, independent decision-makers, regardless of whether they are travelling in a family group.

When a family unit is at a border, it is important to communicate separately with all members of the family. In particular, border officials need to ensure that women and girls of the family are interviewed independently of the men, and by women officials. They should also be provided with relevant information about services and rights directly, rather than through or with the consent of male relatives. Those measures may help to identify possible protection needs.⁴⁹⁵ Border officials must take adequate measures to prevent women and girls, and LGBTI interviewees from any possible retaliation by their families or communities.

- ▶ Ensure measures (e.g., medical care, nursing spaces) are available for *pregnant or nursing* women or girls or other individuals who may not identify as women.
- ▶ Never employ gender stereotyping, homophobic, transphobic, gender-based (or any other) discrimination in screening and interviewing.⁴⁹⁶

For example, *do not assume* that a woman migrant is not making her own decisions about her migration; disclose or signal social, cultural or religious norms regarding gender or masculinity that may stigmatize and shame men or adolescent boys who are survivors of sexual and gender-based violence, which may prevent them from reporting or seeking certain services; ask inappropriate or intrusive questions to determine an individual's sexual orientation; or use the wrong name and/or pronoun where a trans migrant's papers do not correspond to their gender identity; and so on.

4.4.6. Avoiding stress, vicarious trauma, burnout

Guideline 3.5: Ensure access to appropriate medical and psychological care, support and counselling services for border officials.

Secondary trauma is quite common among those who work intensively with traumatized individuals. As well as the direct effect of hearing about or witnessing the effects of the trauma experienced by interviewees, the border official's limited mandate, resources and time available with interviewees may contribute to stress and ultimately burn out:

⁴⁹⁵ Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014) on the gender related dimensions of refugee status, asylum, nationality and statelessness of women, para. 16; OHCHR and Global Migration Group *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 11, Guideline 2.

⁴⁹⁶ For example, techniques that seek to evoke feelings of emasculation of men being interviewed.

- ▶ Symptoms may include fatigue, depression, loss of compassion, nightmares related to trauma material, feelings of helplessness, rage, physical symptoms such as headaches and abdominal discomfort.

It is important to put in place measures and practices that acknowledge secondary trauma without judgment and help the border officials deal with their symptoms:

- ▶ Such measures include regular mandatory time off, rotation through different types of work activities, professional support systems.

The work of border officials entails close contact with the public. The effectiveness of their work would be compromised if the effects of secondary trauma on their attitudes and conduct erode public trust. In particular, any deterioration in an official's respect for human rights could lead to violations against any individual or group at the international border.



Distribute the handout containing key steps for interviewing.

4.5. Exercise (role play): Interviewing at the border

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This is the second role-play exercise in this session. Learners will work in pairs – one taking on the role of a migrant, and the other, the role of a border official – in order to simulate an interview at a border.



Duration: 60 minutes
(role play: ±25 min.; debriefing: 30 min.)

Aim of the exercise:

To encourage learners to put the concepts discussed in the session into practice through a role-play activity simulating a real-life situation. It is also intended to encourage learners to understand that it does not matter who migrants are, where they are from, or why they are moving; they are all human beings and they all have rights, and must be treated with dignity.

The activity includes elements relating to language and communication barriers and migrants in vulnerable situations, which are aimed at encouraging learners to empathize with migrants' experiences in the interviewing process and challenges they may face at international borders.

How to carry out the exercise:

- ▶ Preparing for the interview



There should be at least two facilitators for this activity.
The instruction slide may need to be revised to take into account room size, set-up, number of learners, and interpretation needs.

- *Preparation of migrant roles:* A number of migrant profiles have been prepared for this activity, briefly explaining each migrant's situation and one key experience that the migrant should not mention during the interview. That is intended to replicate the migrant's (interviewee) reticence to provide certain information, as is sometimes the case in interviews.
- *Preparation of border official roles:* Have ready sufficient interview reports, on which the officials must summarize their observations, including on the migrant's health, human rights needs, and recommendations for referral. Also provide border officials with the brief containing miscellaneous information that would normally be in the border computer system or available in a real-life situation.
- *Preparation of the room:* Set up the room in such a way that each interviewing station has enough privacy from other stations.

- ▶ Instructions to learners
 - *Assign the roles of border officials and migrants:* Assign the roles of border officials (interviewing officers) and migrants. Ideally, those who played the role of officials in the screening exercise ([session 4.3](#)) should play the role of migrants in this exercise to ensure that everyone has a chance to conduct a screening/interview and to be a migrant.
 - *Brief learners on their roles:* Divide learners into their respective roles and take each group to different parts of the room. Brief each group on their role and how the exercise will be conducted.
 - *Migrants:* Distribute the migrant profiles containing descriptions of their situations. Ask learners to briefly reflect on how they can best communicate (verbally, body language) their situations. Explain to the migrants why they must not reveal the “prohibited” information in their profile. Migrants must have/know all the information about their migration story to be able to respond to the interview questions.
 - *Border officials:* Distribute the materials to the border officials (interviewers) and brief them about the materials provided: interview report to be completed based on their observations. The interviewer must identify some basic information about the migrant; assess their needs for immediate assistance; and provide appropriate referrals. The interviewer should seek and record information about the migrant’s health condition and human rights concerns, as well as any referral or other recommendation made to the migrant.
- ▶ Conducting the interview (10 min. each)

Once everybody is ready, the trainer signals for the interviews to begin and starts the timer. Allocate approximately 10 minutes for each interview.



Debriefing

- ▶ At the end of the exercise, ask learners to discuss with their interview partner(s) how the interview went for them, and to focus on the following:
 1. What challenges did they face?
 2. Did they feel comfortable?
 3. What did the official do/say to make them feel comfortable or uncomfortable?
 4. What did the migrant do/say to make them feel suspicious?
 5. What about gender or other considerations?
 6. What could have been done differently?
- ▶ In plenary, ask learners to reflect on why the migrants were instructed to withhold information about their situation/experience.

Encourage learners to reflect on the rationale behind the exercise, in particular the communication challenges faced by many migrants in vulnerable situations, including owing to trauma experienced, language barriers, fear or mistrust.

Encourage learners to reflect on the role of gender and the implicit expectations relating to gender:

1. Did the gender of the interviewer/interviewee matter?
2. Would you have addressed the situation differently if the person’s gender was different?

The table below contains a description of each migrant and can help the trainer to guide the debriefing discussion.

Migrant stories (interview)

Migrants	Discussion points and referrals
<p>1. Boy from Zembla</p> <ul style="list-style-type: none"> ▶ 15 years of age ▶ Does not know where his parents are ▶ Is terrified of firearms and military uniforms ▶ Carries a military identification card <p><i>Not allowed to say: age</i></p>	<p>Did interviewer identify him as a child? And specifically, as an unaccompanied child?</p> <p>Shows signs of trauma (associated with armed conflict) and possible recruitment (forced)</p> <p><i>Referral:</i> child protection services; psychosocial counselling for possible trauma; asylum or human rights protection (best interests of the child) process</p>
<p>2. Woman from Ambrosia</p> <ul style="list-style-type: none"> ▶ 79 years of age ▶ Has diabetes ▶ Has difficulty walking ▶ Has undertaken a long journey with multiple stops <p><i>Not allowed to say: she has diabetes</i></p>	<p>Did interviewer identify that she has diabetes? And prioritize providing her with food and water (particularly in light of her age and diabetes) before continuing the interview?</p> <p>Older person; seems to have serious health issues that may have worsened in transit, particularly if she has not been able to access adequate medical care for chronic conditions</p> <p><i>Referral:</i> health-care services, with specific expertise in older person care and provision of appropriate medicine</p>
<p>3. Girl from Carombya</p> <ul style="list-style-type: none"> ▶ 17 years of age ▶ Was raped during her journey and is in early stages of pregnancy ▶ Wants to join her older brother in Europe, but does not know his address <p><i>Not allowed to say: she was raped during journey and maybe pregnant</i></p>	<p>Did the interviewer identify her as an unaccompanied child?</p> <p>Did the interviewer identify her as being pregnant and/or rape survivor?</p> <p><i>Referral:</i> sexual and reproductive health services; psychosocial counselling; child protection services; family tracing services</p>
<p>4. Man from Zuy</p> <ul style="list-style-type: none"> ▶ 45 years of age ▶ Has multiple sclerosis ▶ Displays signs of trauma <p><i>Not allowed to say: his child drowned during the journey</i></p>	<p>How did the interviewer consider his situation – as trauma from travelling, health condition, grief or something else?</p> <p>Has a chronic health condition - degenerative disease</p> <p><i>Referral:</i> psychosocial counselling; health services</p>
<p>5. Boy from Costaguana</p> <ul style="list-style-type: none"> ▶ 7 years of age ▶ Travelling with guardian ▶ Asks repeatedly for food and appears malnourished <p><i>Not allowed to say: his guardian is not giving him any food</i></p>	<p>Did the interviewer identify him as a child? Did the interviewer discover that he was being abused by his guardian? And provided him with water and/or food? Did they seek to interview the guardian separately?</p> <p><i>Referral:</i> child protection services; medical services (malnutrition)</p>

Reminder – Situations of vulnerability

To wrap up the debriefing, summarize how *situations of vulnerability* can arise:

- ▶ In migrants' country of origin;

- ▶ During their journey – in countries of transit or the way in which they travel;
- ▶ On arrival or during their stay in the country of destination;
- ▶ Due to an individual circumstance or element of their identity.

Note that these situations may co-exist simultaneously, and they can change over time. Migrants often move in and out of various legal categories – and situations of vulnerability – during their journey.

Moreover, those vulnerabilities are often not visible, and migrants may be unable or reticent to discuss them in an initial interview with border authorities. Patience and empathy are therefore key, if border officials want to ensure an effective interview while respecting migrants' dignity.

4.6. Exercise (brainstorming): Considerations when screening or interviewing migrants in potentially vulnerable situations



Duration: 60 minutes
(brainstorming: 10-15 min.; debriefing: 45 min.)

Aim of the exercise:

To encourage learners to consolidate everything they have learned so far in the training course in relation to migrants in vulnerable situations. The exercise will also provide the trainer with an opportunity to evaluate learners' progress and to identify if certain concepts are still unclear.

How to carry out the exercise:

- ▶ Prepare flip charts or paper at different tables, with up to 9 examples of migrants who may be in vulnerable situations, such as: refugees, survivors of torture and trauma, survivors of sexual or gender-based violence or other violent crime, trafficked persons, smuggled migrants, persons with disabilities, children, older persons, women and LGBTI individuals, Indigenous peoples or persons with albinism. The trainer may adapt this list to fit the local context.
- ▶ Divide learners into groups and allocate one migrant example to each group.
- ▶ Ask each group to identify a rapporteur.
- ▶ Ask each group to discuss the considerations that should be taken into account when: (a) screening; and (b) interviewing an individual in the particular situation of vulnerability, and write notes on the flip chart/paper provided.



Learners should reflect on the previous two role-play exercises (screening (session 4.3) and interviewing (session 4.5)).

- ▶ Allow the groups 10 minutes (or longer, if necessary) to discuss and note.



Debriefing

For the purposes of this exercise, each example of migrants in situations of vulnerability is treated as a single issue.

However, the reality is often more complex: individuals may experience more than one situation of vulnerability simultaneously or consecutively during the course of their journey. For example, a woman migrant may be a lesbian who is subject to violence by military personnel while waiting

to cross the border; a person with a disability may be the survivor of trauma experienced while being smuggled from one country to another.



Use the handouts containing information on situations of vulnerability for the debriefing.

See also session 2 on situations of vulnerability.

Examples of migrants in vulnerable situations

(a) Refugees⁴⁹⁷



See note on refugee protection in session 2.1.

- ▶ May not immediately express their desire to apply for refugee protection. This should not adversely affect their credibility.
- ▶ At screening/interviewing, the border official should provide information on the right to seek asylum and how to access the asylum procedures.
- ▶ Asylum claims should be registered and assessed in a specific process and by specialized experts and the individual should be referred to the asylum process.
- ▶ If a claim for refugee status is made, the official should provide documentation certifying the status as applicant for refugee protection and provide referrals to the next steps in the asylum process.
- ▶ Persons who face a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder must not be returned to their country of origin or to a transit situation/country in which they will face such risk.
- ▶ Border officials should not seek to contact the refugee's national authorities (e.g., to check their story) as that could, among other things, endanger them or their friends and family in the country of origin.

(b) Survivors of torture and/or trauma

- ▶ It is important that the interviewing officer recognizes that torture dehumanizes the person, which, together with lasting trauma, can make it difficult for them to engage, especially with authority figures who they may associate with their torturers.
- ▶ In all interviews, but especially when the migrant has or may have already experienced some form of trauma, it is vital that the interviewing officer avoids generating unnecessary distress and re-traumatization.
- ▶ Provide referrals to qualified professionals who can provide the necessary care, including medical and psychosocial services.
- ▶ Survivors of torture and those who may be at risk of torture or other serious human rights violations must not be returned to their country or to a transit situation/country in which they will face such risk.



See session 6.2.2 for discussion on non-refoulement.

⁴⁹⁷ For more information on refugees, see UNHCR, Self-Study Module 2: Refugee Status Determination – Identifying Who is a Refugee, 1 September 2005. Available at www.refworld.org/docid/43141f5d4.html; UNHCR, Interviewing Applicants for Refugee Status, 1995, RLD4. Available at www.refworld.org/docid/3ccea3304.html.

Guideline 7.8: Identify and refer survivors of torture, violence and trauma to appropriate services.

(c) Survivors of sexual and gender-based violence or other violent crime

- ▶ Rape and other forms of sexual and gender-based violence are more frequently documented against women, girls and trans individuals, but men and boys may also experience such violence.
- ▶ Shame and associated trauma can make disclosure of such an experience very difficult. It is vital that border official establish trust and assure confidentiality and a supportive interview environment so that the migrant can relate their story freely, including disclosure of sensitive and personal information.⁴⁹⁸
- ▶ The selection of the interviewer is important so as not to limit the ability of the migrant to relate their experience. Migrants should have the option of being interviewed by an official of the same gender or of their choosing.
- ▶ It should be noted that, although they are being considered separately in this exercise, sexual and gender-based violence or any other violence or crime could constitute torture.



Given the recommendation that migrants be interviewed by officials of the same gender as part of providing a safe and supportive environment to enable disclosure of sexual violence, it is important to consider what that might mean for the officials conducting those interviews.

For example, such human rights violations are often associated with women migrants, does this particularly impact women officers? Do they have the necessary training and support? Are male officers trained to interview men and boys who are victims of sexual violence? If men and boys prefer to speak to a women interviewer, are there trained women interviewers present? Is the role of interviewing in cases of sexual violence always allocated to women officials, and how does this affect women particularly, for example, gender stereotyping all women in caregiving roles?



It might be useful to go back to session 1.5 and reflect on the human rights of border officials, and to the discussion on secondary trauma in session 4.4.6.

(d) Trafficked persons⁴⁹⁹



See Glossary for a definition of “trafficking in persons”.



See session 2.1.3 on distinguishing trafficking in persons from smuggling of migrants.

- ▶ Although human trafficking is often associated with women and girls, trafficked persons could be any age and any gender.

⁴⁹⁸ OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 32.

⁴⁹⁹ For more information, see OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002 (E/2002/68/Add.1); OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36, 2014. Available at www.ohchr.org/Documents/Publications/FS36_en.pdf.

- ▶ Trafficked persons are people who have been recruited and coerced or deceived into exploitation. They could be in any labour sector as well as other areas of exploitation such as organ trafficking.
- ▶ Migrants may be arriving at the border with their traffickers. This is another reason for an individualized response. It is good practice to screen/interview all migrants separately so as to create an opportunity for the individual to be able to disclose if they are being threatened or are otherwise under duress.
- ▶ The trafficker may not be with the migrant at the border; however, the migrant may still fear that their family would be at risk in their home country if they disclose any information about their situation to the interviewer.
- ▶ It may not be possible to confirm that the individual is in a trafficking situation. The definition of trafficking includes exploitation as the purpose of the act, and that may not yet be known or evident at the border. Do not overlook other possible crimes or human rights concerns just because trafficking cannot be identified.
- ▶ The safety of the trafficked person must be the priority. Avoid generating unnecessary distress, further traumatization or further danger from traffickers and associated persons.
- ▶ Counter-terrorism measures can link the fight against terrorism to the fight against human trafficking, and potentially deprioritize a human rights approach to trafficking. Such a linkage would cause trafficked persons to be seen as a potential threat to security, resulting in reduced services for trafficked victims. Screening and interviewing should always take a human rights approach to all persons at borders, and prioritize their protection and safety.

(e) Migrants with disabilities

- ▶ Remember that not all disabilities are visible. In addition to physical impairments or serious mental health problems, migrants may have psychosocial disabilities such as post-traumatic stress disorder or bipolar disorder, which are harder to identify, but which require reasonable accommodation.
- ▶ Ensure facilities are accessible: States are required to ensure accessibility so that migrants with disabilities can access and navigate facilities for screening and interviewing on an equal basis with others.⁵⁰⁰
- ▶ The interviewing official should focus on the individual's needs. Such needs may include sign-language interpreters, materials in Braille, and rooms accessible to wheelchair users and so on.

Guideline 6.15: Ensure reasonable accommodation and access for screening and interviewing persons with disabilities.

(f) Children

- ▶ May be child migrants or children of migrant parents, travelling with family members or a guardian, separated from them or unaccompanied.
- ▶ *The best interests of the child should be the primary consideration.*⁵⁰¹

⁵⁰⁰ The obligation to implement accessibility is unconditional, that is, the entity responsible for providing accessibility may not justify failure to do so by referring to the added burden of providing access for persons with disabilities. See Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 25.

⁵⁰¹ Convention on the Rights of the Child, art. 3.

Younger children should be interviewed only in exceptional circumstances, for example, if the information is critical and cannot be obtained through other means or sources, and after a careful assessment of the child's best interest.

- ▶ Whenever there is any doubt about the age of an individual who may be a child, whether or not they are claiming to be a child, officials should treat them as a child.

Age verification is a complex issue, and there is considerable controversy surrounding some methodologies for such assessments, including many that claim a basis in science. Different ethnicities have different processes for determining age: for example children of different ethnicities to that of the country of arrival/destination may be judged to be older than they are. That is particularly true with regard to boys who develop facial hair younger. Best practice related to age verification indicates that the process should always be undertaken by experts, including child protection specialists, and carried out in a child-friendly, gender-sensitive and culturally appropriate manner.

- ▶ Border officials should limit interviews with children to only gathering basic information about the child's identity. Particular care should be taken to protect the rights of children during screening and interviewing as they are less likely to know about existing procedural safeguards or about their human rights, and there is a risk that leading questions could plant false memories.

Children should be interviewed only in the presence of appropriately trained childcare workers or child protection officers.

- ▶ Border officials must obtain the informed consent of the parent(s) or legal guardian to talk to the child, since they are legally responsible and best placed to support and protect the child, as well as the child's consent, if their age allows.
- ▶ Unaccompanied or separated children should be referred to child protection agencies as soon they are identified as being unaccompanied or separated and assigned a guardian as soon as possible.

Guidelines

6.17: Interviewing children.

7.7: Ensure prompt identification and referral of children.

(g) Older persons

- ▶ May be in a vulnerable situation, depending on the length or difficulty of the journey, their mental and physical condition, or their dependence on the family they are travelling with. On the other hand, they may have had to take over care responsibilities for grandchildren and other relatives.
- ▶ Focus on the individual's physical and mental well-being, their capacity to independently perform day-to-day tasks, and any specific health-care needs they may demonstrate. Be aware that older migrants may only be able to speak the language that is prevalent in their community/country.

(h) Women

Guideline 6.14: Do not presume women to be vulnerable or to lack agency, but give adequate attention to gender-specific needs.



See discussion on gender, migration and human rights in session 1.2.

- ▶ Women are not inherently vulnerable and in need of (male) protection. Not all women migrants will be in vulnerable situations; and even if they are, it is vital to avoid paternalist approaches that may limit women's rights. Women do face disproportionate risks of human rights abuses due to gender-based discrimination and discriminatory social norms and practices, but it is also important not to overlook that any migrant, including men and boys, may also be at risk of specific gendered human rights violations.
- ▶ Women are active, equal and autonomous rights holders – even if they are in vulnerable situations. They play multiple roles in any given context, and are not only victims, passive beneficiaries of aid or protection.
- ▶ Being vulnerable is not inherent to being a woman; external factors put women at particular risk. Moreover, men are also vulnerable to specific gendered human rights violations.
- ▶ Women constitute half the world's population and about half the world's migrants. They are not a single or a homogenous group.
- ▶ Respect women as independent decision-makers, including when they are travelling with male family members. Some women may be reluctant to talk, and may defer to their husband or other male relative. It is important to build rapport with women migrants, and stress that any information provided will not be shared with family and community members.
- ▶ Do not categorize women together with children. That carries the risk of infantilizing women or reinforcing a historical tendency to make concern for women's human rights derivative of the gender norm that prescribes their roles as mothers. It masks the fact that certain substantive human rights guarantees apply to women and some also apply to girls, boys and children.

Guideline 7.6: Refer pregnant or nursing women, girls and other individuals who may not identify as women to the appropriate services.

(i) LGBTI migrants

Guideline 6.16: Ensure gender-sensitive screening and interviewing of LGBTI persons.

- ▶ May be reluctant to openly identify their sexual orientation or gender identity for fear of legal, economic, social, familial or community repercussions. That is especially true if they have travelled from, through or are arriving in, a country that criminalizes same-sex relations and diverse gender identities or expression.
- ▶ Differences in legal recognition of diverse gender identities in identity documentation may cause discrepancy between self-identity and the identity in their documentation. That may unfairly penalize trans persons, especially in the context of counter-terrorism measures that involve increased travel document security.
- ▶ For trans and non-binary migrants, approaches should involve recognition and respect for diverse gender identities, removal of abusive requirements for recognition, respect for gender expression, and ensuring that treatment is based on the person's self-identification.⁵⁰²
- ▶ It is important that border officials respect the individual's gender identity and do not express any judgment about the person's sexual orientation, gender identity or expression through comments or body language. That requires officials to use the name and pronoun that the individual prefers to use for themselves.



Distribute the handout on interviewing migrants in vulnerable situations.
Distribute session 4 summary.

⁵⁰² OHCHR, *Living Free and Equal*, p. 43.

Session 5: Avoiding detention and inadequate conditions of detention

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Introduce learners to the standards relating to the right to liberty in the context of migration ▶ Introduce learners to key considerations and steps to be taken to ensure protection of the human rights of all migrants in immigration detention
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Describe the right to liberty and the exceptional circumstances when it is permissible to detain someone ▶ Describe possible alternative measures to detention ▶ Identify the rights of persons who are in immigration detention and the corresponding obligations of border officials and other relevant personnel, including of private security companies ▶ Be aware of special considerations that might be required for certain persons in situations of vulnerability
Key learning points/ messages	<ul style="list-style-type: none"> ▶ Irregular migration is not a crime; at most, it may be considered an administrative offence. ▶ Immigration detention is to be avoided; it should be an exceptional measure of last resort. ▶ Regarding children, immigration detention is never in the best interests of the child and is therefore prohibited. ▶ There are many human rights-based, non-custodial alternatives to immigration detention. ▶ Detention can create, increase or exacerbate situations of vulnerability for migrants. ▶ Respect for the dignity of detained migrants must be guaranteed.
Preparation	<ul style="list-style-type: none"> ▶ Print handouts ▶ Ensure sufficient copies of the detention scenarios to divide evenly among the working groups for the session 5.3.1 exercise ▶ Prepare sufficient copies of the two cases for the session 5.4.1 exercise to evenly divide among the working groups
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts and pens
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ Detention scenarios ▶ Detention standards and conditions ▶ Cases: Vulnerability in detention ▶ Session 5 summary

Session overview/rationale

This session examines elements of the right to liberty at international borders. It is entitled “avoiding detention and inadequate conditions of detention” to convey from the outset that immigration detention is not inevitable. However, detention should be an exceptional measure of last resort. This session will look at key human rights considerations to be taken into account to avoid detaining migrants. Recognizing that, in many national contexts, avoiding immigration detention entirely is not realistic, the session will also discuss how to protect human rights in immigration detention, paying particular attention to migrants in vulnerable situations.

Session content

- 5.1: Immigration detention
- 5.2: Key human rights considerations regarding immigration detention
- 5.3: Protecting human rights in the event of immigration detention
- 5.4: Situations of vulnerability and immigration detention

5.1. Immigration detention

Ask learners who among them work, or have worked, in immigration detention or in similar situations, so as to get a sense of the experience and expertise in the room.

5.1.1. What is immigration detention?

Immigration detention is any deprivation of liberty for the purposes of border governance and immigration enforcement. Deprivation of liberty is 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 – either by virtue of an order given by a public authority, or with its consent or acquiescence.



See Glossary.

This definition of immigration detention focuses on the right that is at risk – i.e., deprivation of liberty – and is based on the provisions in articles 4 (1) and (2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Regardless of the definition or term used in national law or whether it is categorized as criminal or administrative detention, the decisive question for its qualification as “deprivation of liberty” is whether or not migrants are free to leave, not merely in theory, as a possible option at some point in the future, but as a practicable option available at any time.⁵⁰³

Detention of migrants could occur in various places, including at land and sea borders, in “international zones” at airports, on islands (or other “offshore” facility), on boats, in prisons or police lock-ups, in quarantine situations, as well as in closed camps or shelters.

Holding migrants at any such location while refusing their entry into or departure from a country amounts to deprivation of liberty for such time as they are being held. All affected migrants are entitled to the full protection afforded to persons deprived of their liberty under international law.

Detention of irregular migrants is increasing around the world, including in transit countries and at international borders. Far from being used as a last resort – as befits a measure with such

⁵⁰³ Special Rapporteur on torture, A/HRC/37/50, para. 17.

a drastic effect on individuals — administrative detention is often routine and, in some cases, mandatory. In many cases, procedural safeguards for administrative detention are fewer than for criminal detention, including a lack of measures to determine the arbitrariness of arrest and continued detention.

Migrants in detention are often denied access to legal aid or interpretation services and thus may not understand why they are detained or how to challenge the legality of their detention. The enhanced use of detention and other forms of strict enforcement increases the likelihood that migrants in transit will seek to avoid the authorities entirely. That, among other things, renders them at more risk of abuse and exploitation, and increases the likelihood that they will accept greater risks to continue their journey.

The conditions of immigration detention can be inhuman and degrading, including chronic overcrowding, unsanitary conditions, lack of access to adequate nutrition and health goods and services, including sexual and reproductive health services, and high levels of violence, with little to no recourse to effective remedies. Long-term administrative detention is linked to mental health issues, often exacerbated by a lack of access to mental health care and services in detention.

5.1.2. Discussion: Human rights particularly at risk in immigration detention



The discussion in this session builds on the discussions of human rights particularly at risk at international borders in sessions 1.3.3, 3.1.2 (interception, rescue and immediate assistance) and 4.1.3 (screening and interviewing). The right to education will be discussed for the first time in session 5.1.2(e), and the rights to liberty and security of person, health, food, sanitation and adequate shelter, in the context of detention will be discussed in more detail.

This is not an exhaustive list. Indeed, other human rights could be violated in detention, including the rights to be free from torture and other forms of cruel, inhuman or degrading treatment, to life and to privacy. The right to an effective remedy (session 1.3.3(m)) applies to any violation of migrants' human rights in detention. Human rights at risk in the context of return will be discussed in session 6.



The slide for this discussion is interactive so that the trainer can display the question only, encourage learners to do a quick brainstorming, then reveal the examples.

(a) Right to liberty and security of person, including the right not to be arbitrarily detained

These rights are central when a migrant is detained. They will be explored in more detail during this session. Assessment of the distinction between restrictions on freedom of movement and deprivation of liberty takes into account the degree and intensity of the restriction, the type, duration, effects and manner of implementation of the measure in question and the context. Relevant factors include the possibility of leaving the restricted area, the degree of supervision and control over the individual's movements, and the extent of the person's isolation. However, the length of the restriction is not a factor: when the facts indicate that a person has been deprived of liberty, a relatively short duration does not affect this conclusion.⁵⁰⁴

⁵⁰⁴ Human Rights Committee, general comment No. 35 (2014), paras. 5 and 6. Note that deprivation of liberty is distinguished from restrictions on liberty or restrictions on the right to freedom of movement in international human rights law; the permissible restrictions on the right to freedom of movement are set out in the International Covenant on Civil and Political Rights, art. 12.

The prohibition of arbitrary detention is absolute; arbitrary detention can never be justified.



See also session 5.2.2.

The detention of any child because of their or their parents' migration status constitutes a violation of the child's rights and contravenes the principle of the best interests of the child.⁵⁰⁵



See session 5.2.3 for further discussion on children and immigration detention.

(b) Right to due process and a fair trial

It is critical to ensure the right to due process and the oversight of a judicial authority, and that detention is, and remains, necessary, proportionate, lawful and non-arbitrary.



See discussion on due process in sessions 1.1.8 and 1.3.3(i), and on procedural guarantees in session 5.3.3 below.

(c) Right to health

The right to health applies equally in detention (see discussion in [session 5.3.4](#) below).

(d) Rights to food, water and sanitation

The rights to food, water and sanitation apply equally in detention (see discussion in [session 5.3.4](#) below).

(e) Right to education

Education is both a human right in itself and an empowerment right, that is, a means of realizing other human rights, including contributing towards eradicating poverty and enabling individuals to participate fully in their communities. Everyone has the right to education. All children, regardless of migration status or stage of migration, have the right to free primary education and to secondary education, which should be accessible on the basis of equality of treatment with nationals of the State concerned, if provided for free. Furthermore, migrants should also be able to access higher education, vocational and language training, and benefit from lifelong learning opportunities, on equal terms with nationals.⁵⁰⁶

In the context of detention: States should make provision for the further education, including religious education, and vocational training of all adult detainees who are interested and capable of continuing their education.⁵⁰⁷ Although, in principle, children should not be held in immigration detention, many children who are detained are denied their right to quality education, play and leisure facilities. During any period in detention, children, including unaccompanied and separated children, have the right to education, which, ideally, ought to take place outside the detention premises in order to facilitate the continuance of their education upon release.⁵⁰⁸ Such opportunities should be provided without discrimination, including on gender grounds.⁵⁰⁹

Detained migrants may be held in mixed facilities that were not originally designed for such purposes. Authorities are required to keep women and men separate in such premises, with

⁵⁰⁵ Joint general comment No. 4 (2017) of the Committee on Migrant Workers / No. 23 (2017) of the Committee on the Rights of the Child.

⁵⁰⁶ International Covenant on Economic, Social and Cultural Rights, art. 13; Convention on the Rights of the Child, arts. 28, 29.

⁵⁰⁷ Nelson Mandela Rules, rules 4(2), 104(1).

⁵⁰⁸ Committee on the Rights of the Child, general comment No. 6 (2005), para. 63. This point applies to education opportunities for all detainees: see the Nelson Mandela Rules, rule 104(2).

⁵⁰⁹ Bangkok Rules, 2011, rule 37.

the consequence that women and girls held in such improvised facilities are not always given access to common areas where educational and other activities, such as exercise and other recreation, take place.⁵¹⁰ This is discriminatory and can have repercussions on their physical and mental health.⁵¹¹ Furthermore, girls' education is often not prioritized in such contexts, either by parents or by the authorities, or is highly gendered in nature and content (e.g., segregated with stereotyped courses and options). In addition, pregnant and nursing girls, as well as girls who are menstruating may be denied access to education.⁵¹²

(f) Right to adequate shelter

The right to adequate shelter applies equally in detention (see discussion in [session 5.3.4](#) below).

(g) Right to freedom of religion or belief

The religious beliefs of detainees must be respected.⁵¹³ Access to a qualified representative of their religion shall not be refused to any detainee; but no detainee should be compelled to receive a visit by any religious representative. As far as practicable, every detainee shall be allowed to satisfy the needs of their religious life by attending the services provided, and by possessing the books of religious observance and instruction of their denomination.⁵¹⁴

Border officials should recognize that migrant women detainees from different religious and cultural backgrounds have distinctive needs and may face multiple forms of discrimination in their access to gender- and culture-relevant programmes and services. For example, given that there are typically fewer facilities for women detainees or that they are housed within an area of facilities designed for men, there may not be a sufficient number of women detainees for the authorities to provide a qualified representative to provide services or space to meet the religious/spiritual needs of migrant women, as well as members of racial and ethnic minorities and indigenous peoples. Accordingly, authorities should provide comprehensive programmes and services that address their needs, in consultation with women migrants themselves.⁵¹⁵

(h) Right to family unity

The preservation of family unity is an important element of child protection. However, maintaining family unity does not justify the detention of children whose parents/guardians are detained; alternatives to detention should instead be applied to the entire family.⁵¹⁶ When children are held with their parents, they should not be treated as prisoners and should instead be provided with the maximum possible opportunities to spend time together as a family.

Measures to ensure family unity in detention should recognize that various forms of family exist. Detained migrants should be able to maintain contact with family members in the country. Prohibition of family contact should never be used as a disciplinary sanction or restrictive measure. Where conjugal visits are allowed, this right should be applied without discrimination, and women who are detained shall be able to exercise this right on an equal basis with men. Immigration detention officials must ensure that there is no discrimination against individuals in same-sex relationships: documented examples of such discrimination include the prohibition of physical contact, denial of the right to intimate visits, segregation in religious and cultural activities, and imposition of solitary confinement.⁵¹⁷

⁵¹⁰ On separation of categories of detainees, see the Nelson Mandela Rules, rule 11.

⁵¹¹ Subcommittee on Prevention of Torture, Prevention of torture and ill-treatment of women deprived of their liberty, CAT/OP/27/1, paras. 30, 39, 40.

⁵¹² OHCHR, Realization of the equal enjoyment of the right to education by every girl, 2017, A/HRC/35/11, paras. 10–14, 28, 52. Available at www.ohchr.org/Documents/Issues/Women/WRGS/ReportGirlsEqualRightEducation.pdf.

⁵¹³ Nelson Mandela Rules, rule 2.

⁵¹⁴ *Ibid.*, rule 65.

⁵¹⁵ Based on the Bangkok Rules, rule 54.

⁵¹⁶ Convention on the Rights of the Child, art. 9(1); Global Compact for Safe, Orderly and Regular Migration, para. 29(h) (Objective 13).

⁵¹⁷ Nelson Mandela Rules, rules 43(3), 58; Bangkok Rules, rules 26–28; Subcommittee on Prevention of Torture, CAT/OP/27/1, paras. 37, 46.

5.2. Key human rights considerations regarding immigration detention

This session introduces five key human rights considerations regarding the detention of migrants at international borders.

It should be noted that, if a State outsources the operation of migration detention facilities to private companies or other entities, it remains responsible for the manner in which the contractors manage the facilities. The duty of care is owed by the State to those persons held in detention.



See also session 1.1.5 on States' responsibility for human rights abuses committed by private-sector actors.

5.2.1. Immigration detention should be a measure of last resort

Guidelines 8.2 and 8.3: Prevent arbitrary and unlawful detention in the context of migration.

- ▶ Everyone has the right to liberty, regardless of:
 - their migration status;
 - their reasons for migrating;
 - how they have moved.
- ▶ States should establish a *presumption against immigration detention* in law.

Any deprivation of liberty that takes place at international borders must be a measure of last resort.

Detention may be used only when it is determined in each individual case to be necessary and proportionate to a legitimate purpose defined by law. Migration, including irregular entry or stay or the use of smugglers, should not be considered a criminal offence.⁵¹⁹

Only once deprivation of liberty is deemed to be lawful and necessary should there be a review of alternatives to detention to ensure that detention is an exceptional measure of last resort.

Any decision to hold an individual in administrative detention or custody in the context of migration must be an exceptional measure of last resort, for the shortest possible period of time, and only if justified by a legitimate purpose, such as if there is a verified risk that the individual is seeking to leave the border area without proving that they have the right to enter the country. The circumstances of each individual must be considered on a case-by-case basis.

Detention may be used only when it is determined to be necessary and proportionate to a legitimate purpose defined by law at the moment of the detention decision and reviewed regularly over the period of detention. Migration detention policies and procedures must not be discriminatory.

- ▶ States need to clearly define and exhaustively list in *legislation*, as well as in supporting and enabling regulations and standard operating procedures, the reasons that justify

⁵¹⁸ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 46; Global Compact for Safe, Orderly and Regular Migration, para. 29(g) (Objective 13).

⁵¹⁹ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 10; Special Rapporteur on torture, A/HRC/37/50, para. 23.

detention. The reasons in law must not be overly broad, so that they do not apply to an entire category of migrants, such as all irregular migrants.

- ▶ Immigration detention must be absolutely indispensable for achieving the intended purpose, with no other less onerous measure available for the element of *necessity* to be met.
- ▶ States are required to strike a balance between the gravity of the measure taken and the situation concerned. That must include consideration of the effect of the detention on the physical and mental health of the individual, and of alternatives to detention for the requirement of *proportionality* to be satisfied.
- ▶ The *duration* of any immigration detention must be limited by law and be for the shortest period of time. Detention must not be punitive in nature and must be periodically reviewed as it extends in time.
- ▶ Immigration detention that targets any group of migrants, for example on the basis of actual or assumed religion, race, ethnicity or national origin, constitutes structural discrimination and is *prohibited*.



See 5.2.2 below for a discussion on arbitrary detention, including in terms of the duration of any detention.

Some migrants should not be detained as the risk of harm caused by the detention would be disproportionate to the aim to be achieved. Migrants with special protection needs, including but not limited to pregnant or nursing women and girls, older persons, migrants with a disability, survivors of torture or trauma, victims of sexual and gender-based violence, migrants with physical or mental health needs, trafficked persons and stateless persons, should therefore not be held in detention. Similarly, asylum seekers or trafficked persons should not be detained, imprisoned, or criminalized, including for irregular entry or for any offences they were compelled to commit as a consequence of being trafficked.⁵²⁰

In the Global Compact for Safe, Orderly and Regular Migration, States again made a commitment to work towards using immigration detention only as a measure of last resort, and instead, using alternatives to detention.⁵²¹ States also affirmed their commitment to ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or in the return process, and regardless of the type of place where the detention occurs.⁵²²

5.2.2. Immigration detention should not be mandatory or arbitrary

International human rights law prohibits unlawful or arbitrary deprivation of liberty.⁵²³

- ▶ *The prohibition of arbitrary detention is absolute.*

Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security, or because of the numbers of migrants seeking entry.

⁵²⁰ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 (see E/2002/68/Add.1), Principle 7, Guidelines 2(5), 4(5), 8(3); ILO, Protocol of 2014 to the Forced Labour Convention 1930 (No. 29), art. 4(2); Special Rapporteur on torture, A/HRC/31/57, para. 41; Convention relating to the Status of Refugees, art. 31(1).

⁵²¹ Global Compact for Safe, Orderly and Regular Migration, para. 29 (Objective 13).

⁵²² *Ibid.*, Annex, para. 27 (Objective 11).

⁵²³ International Covenant on Civil and Political Rights, art. 9(1); Convention on the Rights of the Child, art. 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 16 and 17; Universal Declaration of Human Rights, arts. 3 and 9.

It is a universally binding norm of customary international law that extends to the territorial jurisdiction, as well as all areas where the State exercises effective control.⁵²⁴

The notion of “arbitrariness” should not be understood as merely “against the law”, but rather should be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, and discrimination, as well as the elements of reasonableness, necessity and proportionality. The law itself and implementation of that framework must also comply with international law.⁵²⁵

Mandatory, or automatic, detention of migrants, including those in irregular status, is not in compliance with the requirement of proportionality as it does not allow for an individualized assessment, and is therefore arbitrary. For example, if all migrants who arrive at a border are detained in order to carry out identification or to resolve paperwork that would amount to a blanket rule in contravention of the right to liberty.

Furthermore, arbitrary detention increases the risk of, and can amount to, torture or ill-treatment. Detention based solely on migration status can amount to torture, most notably when it is intentionally imposed or perpetuated for purposes such as deterring, intimidating or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum or other human rights protection alternatives, agreeing to voluntary repatriation, providing information or fingerprints, or with a view to extorting money or sexual acts, or for reasons based on discrimination of any kind, including discrimination based on migration status.⁵²⁶ States should not use immigration detention with the aim of deterring others from migrating.⁵²⁷

Detention in the course of migration governance proceedings is not per se arbitrary, but the detention must be in line with the safeguards enumerated in the section above. Administrative detention is permissible only for the shortest possible period of time, and States must legislate a maximum detention period in the course of migration proceedings. The longer the duration of the detention, the more it is likely to become arbitrary, including in the context of detention before the removal/ deportation/return of the migrant. The detained individual must automatically be released at the expiry of the detention period set by law. Excessive detention or indefinite detention in the course of migration proceedings cannot be justified and is arbitrary.

If any processes related to the reasons for detaining a migrant are delayed – for example, if the consulate of the migrant’s country of origin is not cooperating with identification –, the detainee must be released to avoid the possibility of prolonged or indefinite detention, which would be arbitrary and therefore against international human rights law.

Guideline 8.5: Ensure a legally limited duration of detention.

The State must ensure that mechanisms exist to enable the detained individual to exercise the right to habeas corpus, to challenge the legality of detention by bringing proceedings before a court.⁵²⁸ Failure to do so constitutes a human rights violation and renders the detention arbitrary.

⁵²⁴ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 8.

⁵²⁵ Human Rights Committee, general comment No. 35 (2014), para. 12; United Nations, CTITF and OHCHR, *Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism*, 2014, para. 19.

⁵²⁶ Special Rapporteur on torture, A/HRC/37/50, para. 28.

⁵²⁷ Committee Against Torture, general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 14. States have recently recommitted to this in the Global Compact for Safe, Orderly and Regular Migration, para. 29(c) (Objective 13): “Review and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based on law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment to migrants, in accordance with international human rights law.”

⁵²⁸ Committee Against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 13.



See session 5.3.3 for a discussion of other procedural safeguards.

Immigration detention should not be used to extend the pretrial detention of suspects of any criminal offences, including terrorist offences, or to avoid the due process requirements provided by the criminal procedure. The use of administrative detention under public security legislation, migration laws or other related administrative law, resulting in a deprivation of liberty for an unlimited period of time or for very long periods without effective judicial oversight, as a means of detaining persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law.

5.2.3. Immigration detention of children is prohibited

Guidelines 8.6, 8.11 and 8.15 on children and immigration detention.

- ▶ Detention of children for migration-related purposes is never in the best interests of the child.

Such detention always constitutes a violation of the rights of the child.

States have an obligation always to act with the best interests of the child as their primary consideration and to prioritize that principle over migration management objectives.⁵²⁹ Children in immigration detention, whether unaccompanied, separated or travelling with their family, will often be traumatized and have difficulty understanding why they are being “punished” although they have not committed any crime.

Girls in particular are at particular risk of experiencing torture and ill-treatment and other human rights violations in detention, owing to their age and gender. Often girls will constitute the minority population in detention facilities and may, for example, risk being housed with unrelated adults or boys.⁵³⁰

Children should never be detained on the basis of their or their parents’ migration status. The detention of any child because of their or their parents’ migration status is arbitrary, constituting a violation of the rights of the child and is in contravention of the principle of the best interests of the child. States cannot justify detaining children on the basis that their parents need to be detained, and that it is the only way to keep the family together. Alternatives to detention must be applied to the entire family, instead of putting children in detention to reunite them with their family.

Any children born in detention should be referred to an appropriate authority to ensure that they are registered immediately and receive birth certificates; and that the birth certificates do not mention that they were born in detention.⁵³¹

Child migrants have the right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding deprivation of their liberty, and the procedures employed should be child appropriate.⁵³²

5.2.4. So-called “protective” detention is not appropriate

“Protective” detention or custody is a form of deprivation of liberty imposed on an individual who the authorities consider to be at risk if they are at liberty.

It is therefore often intended as a protective measure.

⁵²⁹ Convention on the Rights of the Child, art. 3.

⁵³⁰ Special Rapporteur on torture, A/HRC/31/57, paras. 29–30; Bangkok Rules, rules 36–39.

⁵³¹ Convention on the Rights of the Child, art. 7; Nelson Mandela Rules, rule 28.

⁵³² Convention on the Rights of the Child, art. 12.

Protective custody may take place in a shelter or centre run by the State, private corporations or NGOs. Individuals in protective custody are deprived of their liberty and at risk of custodial violence and other human rights violations. It is highly gendered in its reach, remit and application.

Where a migrant is in a vulnerable situation, detaining them ostensibly for their own protection is not a suitable response to their need for protection. Detention intensifies existing vulnerabilities faced by migrants, further victimizing them and putting them at risk of further abuse that in some cases may amount to torture or ill-treatment.

- ▶ *Refuges or open shelters would be the appropriate solution for migrants who are not permitted, or are unable, to move onwards from the border.*

Protective custody is often used to restrict the movement of girls and women or unaccompanied and separated children, or victims of trafficking, particularly when they are women, ostensibly to protect them from the risk of violence or other abuse if they were to remain at liberty. It is also used to ensure that an individual who has been the victim of a human rights abuse will appear in court to testify against the alleged perpetrator.⁵³³

Similarly, LGBTI individuals who are at risk of violence in detention settings are sometimes held separately in isolated areas of detention centres. Although the intention may be to protect them from violence, it is important to be aware that such isolation is in breach of international human rights standards. Officials should ensure that solitary confinement is not used to manage or to protect persons at risk of discrimination, violence or other harm.⁵³⁴ If officials cannot guarantee the safety of LGBTI individuals or others in immigration detention, they should be referred to alternatives to detention or released without conditions.⁵³⁵

For the rationale of segregating detainees in situations of vulnerability for protective purposes to be legitimate, it should be instituted only in agreement with the detainee concerned, with a clear procedure, and must not lead to further stigmatization, nor limit access to services, facilities and education.⁵³⁶

The impact of such protective custody has been questioned by human rights experts, particularly because such apparent solutions do not address the cause of risk to the rights of those detained. Although often well intentioned, such efforts can stem from discriminatory notions of women's inherent vulnerability, as well as gendered notions of morality and honour. Such policies fail to recognize a woman's autonomy and instead act as a form of punishment for exercising her agency.⁵³⁷ Similarly, the agency and voice of children are often not taken into consideration when putting in place such detention plans. That is particularly true for girls given the risks they face in detention and the highly gendered reach and application of that form of deprivation of liberty.

In situations of protective custody there is typically no legal basis for the detention; procedural guarantees may not be observed and the detention constitutes discrimination if it is based on prohibited grounds. Human rights bodies have called for such practices of protective custody

⁵³³ Special Rapporteur on torture, A/HRC/31/57, paras. 24, 41, 71; Subcommittee on Prevention of Torture, CAT/OP/27/1, para. 26; Committee on the Rights of the Child, general comment No. 6 (2005), paras. 61, 62; Committee on the Rights of the Child, Report of the 2012 day of general discussion on the rights of all children in the context of international migration, para. 78; Joint general comment No. 4 (2017) of the Committee on Migrant Workers/No. 23 (2017) of the Committee on the Rights of the Child, para. 5; see also Report of the Secretary-General on the status of the Convention on the Rights of the Child, A/71/413, paras. 39–40, 61, 62.

⁵³⁴ Special Rapporteur on migrants, The impact of migration on migrant women and girls: a gender perspective, A/HRC/41/38, para. 71; OHCHR, *Living Free and Equal*, pp. 40, 45, 128–129.

⁵³⁵ Special Rapporteur on torture, A/HRC/31/57, paras. 13, 34–36, 70(s); Special Rapporteur on violence against women, Pathways to, conditions and consequences of incarceration for, women, A/68/340, paras. 40, 58–60, 63; OHCHR, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, para. 34; Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture, CAT/C/57/4, 2016, para. 64; OHCHR, *Living Free and Equal*, p. 41.

⁵³⁶ OHCHR, *Living Free and Equal*, p. 45.

⁵³⁷ Working Group on discrimination against women, Women deprived of liberty, A/HRC/41/33, 2019, paras. 45–46; For an in-depth study on all forms of violence against women, see Secretary-General, A/61/122/Add.1, 2006, para. 140; Special Rapporteur on violence against women, A/68/340, paras. 21–22.

to be eliminated. Alternative measures must ensure the protection of the rights of individuals in vulnerable situations without jeopardizing their liberty or other human rights.

5.2.5. Adequate detention conditions and dignity of the person

Guidelines 8.7 to 8.12: Ensure adequate conditions of detention.

Respect for human dignity

Detention conditions should respect the fundamental dignity of the person and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

- ▶ *All persons deprived of their liberty should be treated with humanity and respect for their inherent dignity.*⁵³⁸

That is considered “a fundamental and universally applicable rule”, forming a norm of customary international law applicable to all States.⁵³⁹ It applies without discrimination and cannot be dependent on the material resources available in the State. Terrorism and threats of terrorism cannot justify any derogation from this obligation.⁵⁴⁰

Administrative character of detention

- ▶ *Migrants deprived of their liberty must be held in adequate conditions.*

Detention conditions should provide for their needs, adhere to international standards and protect their human rights, including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁵⁴¹ States are required to take specific measures to prevent torture and ill-treatment by public officials, such as law enforcement agents or border officials, but also health-care professionals and others personnel, including private actors working in custody or detention.⁵⁴²

Facilities should be clearly designated by law for the purposes of immigration detention and the conditions must reflect their administrative purpose. Accordingly, detention, including its material, organizational, infrastructure and security structure should not be punitive in purpose or effect. All staff need to understand and respect the non-criminal status of migrants who are in such detention, and that their detention should not be punitive.

For example, a militarized approach, including wearing weapons in a visible manner, the presence of dogs, or a penitentiary-style organization and methodology of surveillance and control are highly intimidating and cannot be considered necessary in the context of immigration detention. Disciplinary measures should be different from those used within the context of a prison. The use of restraints and other means and measures of force must be strictly limited and used only in accordance with the principles of legality, precaution, proportionality, necessity, non-discrimination and accountability (see [session 3.2](#)).

⁵³⁸ International Covenant on Civil and Political Rights, art. 10(1); Convention on the Rights of the Child, art. 37(c).

⁵³⁹ Human Rights Committee, general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 4; United Nations, CTITF and OHCHR, *Detention in the Context of Countering Terrorism*, para. 33.

⁵⁴⁰ United Nations, CTITF and OHCHR, *Detention in the Context of Countering Terrorism*, para. 33, citing the International Convention for the Suppression of the Financing of Terrorism, art. 17: “Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.”

⁵⁴¹ Universal Declaration of Human Rights, art. 5; International Covenant on Civil and Political Rights, art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁴² Committee Against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 25, referring to articles 3 to 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Nelson Mandela Rules, rule 34.

The conditions of any form of detention, including immigration detention, must be humane, appropriate and respectful. In the immigration context, any interference with the individual's autonomy should be kept to a minimum, and restrictions imposed should be only to the extent necessary to maintain security and a well-ordered community life.

Individuals held for migration-related reasons should be detained separately from convicted persons or persons detained pending trial, as far as is practicable.⁵⁴³

Adequate material conditions

- ▶ *Material conditions in detention must meet at least the minimum international standards.*⁵⁴⁴

Adequate material conditions include equal safe access to food, water, hygiene and sanitation, provision of sanitary towels – free of charge and without stigma – for those who need them, accommodation, clothing and bedding, safety and security of person. Failure to provide those basic necessities can amount to degrading treatment.

States have a positive obligation and a heightened duty of care towards migrants who are in immigration detention: they must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.



Conditions of detention will be discussed in further detail in session 5.3.4 below.

Safety

- ▶ Ensuring safety in detention requires separate accommodation for men and women.

Detention systems and regimes, from architecture and security procedures to the facilities, have historically been designed to hold men. Consequently, detention facilities generally do not meet the specific needs of women, LGBTI or child detainees, with the result that such facilities can constitute a situation of vulnerability for them. For example, the lack of separate accommodation for women detainees means that they are often subjected to a level of security that is not justified by the risk they pose, as a gender-sensitive risk assessment undertaken on admission would demonstrate. Likewise, the lack of available medical or mental health services may also result in women being placed in more secure facilities than is necessary, when their actual or perceived impairment is used as the basis for higher levels of security.⁵⁴⁵

There is a high risk of sexual and gender-based violence against migrants of all genders in detention, whether committed by fellow detainees or by guards. The gender imbalance in staffing that is common in this work is the primary factor, as it is not unusual for male staff to be carrying out security duties because of a lack of women officials, for example. Invasive body searches (i.e., strip and body cavity searches) should be undertaken only if absolutely necessary; conducted in private and by trained staff of the same gender as the migrant, with trans or non-binary individuals being allowed to choose the gender of the official(s) carrying out the search. Body cavity searches must be carried out by qualified health-care professionals who are not directly responsible for their care in detention or by staff appropriately trained by

⁵⁴³ Nelson Mandela Rules, rule 11; Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 44.

⁵⁴⁴ The Nelson Mandela Rules are a benchmark for the implementation of the minimum international standards for the protection of the human rights of individuals deprived of their liberty; the Bangkok Rules supplement the Nelson Mandela Rules to provide gender-sensitive policy for the protection of the rights of detained women; while the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) address child-specific issues.

⁵⁴⁵ Special Rapporteur on health, A/HRC/38/36, 2018, para. 79; Bangkok Rules, rules 40, 41; UNODC, *Handbook on Women and Imprisonment*, 2nd edition, with reference to the Bangkok Rules, Criminal Justice Handbook Series, 2014, pp. 33–35.

such professionals.⁵⁴⁶ Such searches may constitute torture or ill-treatment, particularly for trans detainees. Women and men detainees should be housed separately, unless they belong to the same family and both wish to be housed together. Alternatives to detention, including release with or without conditions, should be considered in each individual case and especially when separate facilities for women and/or families are not available.

LGBTI migrants face a particularly high risk of violence in detention, especially sexual assault and rape, by fellow detainees and, at times, by guards. It is important to remember that LGBTI migrants constitute a gender-diverse group, and housing them together is often not an adequate solution. Alternatives to detention should be prioritized if effective protection cannot be provided and release is not approved. In exceptional cases when detention is not avoidable, the gender identity and accommodation preference of trans detainees should be taken into account, and they should be able to appeal the placement decision (see also, discussion on protective custody in [session 5.2.4](#)).

Authorities should consider specific measures to prevent all forms of exploitation, violence and abuse of persons with disabilities in detention, including the gender-based aspects. Violence against women with disabilities in institutions includes involuntary undressing by male staff against the will of the woman concerned, forced psychiatric medication and overmedication, which can hinder the ability to describe and/or remember sexual violence. The authorities must ensure effective remedies for any such instances that may occur.⁵⁴⁷ When the physical and mental security of the individual cannot be guaranteed in detention, alternatives to detention should be provided.

Many child migrants witness or suffer harsh physical abuse and inhumane conditions in detention. The risk posed to a child's healthy development and best interests outweighs the State's interest in halting irregular immigration. Although, in principle, children should never be detained for immigration purposes, there may be exceptional cases when such detention occurs. In such cases children should be housed separately from adults who are not their family members, unless it is in the child's best interests not to do so. Special arrangements must be made for unaccompanied children to be housed in separate living quarters suitable for children, and with an underlying approach of care, not detention.

Given the fear of reprisal, all migrants in detention need to know that there are independent, safe, effective, accessible, confidential, gender-, disability- and child-sensitive complaint and reporting mechanisms available so that they can report abuse without fear of escalating the violence.

5.3. Protecting human rights in the event of immigration detention

5.3.1. Exercise: What constitutes detention?



Duration: 20 minutes
(group work: 5 min.; debriefing: 15 min.)

Aim of the exercise:

To enable learners to examine different scenarios of immigration detention, based on real life examples, including de facto detention situations, and to encourage learners to reflect on the definition of immigration detention from a human-rights perspective.

⁵⁴⁶ Nelson Mandela Rules, rules 51 and 52; Bangkok Rules, rules 19–21; Special Rapporteur on torture, A/HRC/31/57, para. 36.

⁵⁴⁷ Convention on the Rights of Persons with Disabilities, art. 16; Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), paras. 26, 53.

How to carry out the exercise:

- ▶ Divide learners into three groups.



Distribute the handouts of the three detention scenarios.



Trainers may amend or draft their own detention examples to reflect local contexts.

- ▶ Ask learners to review the scenarios and briefly discuss the following questions in their groups:
 1. Does the scenario constitute detention?
 2. Why/why not?



If short on time, this exercise can be carried out in plenary like a true/false exercise.

The scenarios are also on the slides accompanying this guide so that, in the debriefing, trainers can focus on issues rather than storytelling.



Debriefing

Reminder: What is immigration detention?

- ▶ *Immigration detention* is 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 – either by virtue of an order given by a public authority, or with its consent or acquiescence, for the purposes of border governance and immigration enforcement.



See Glossary.



If learners do not mention child-friendly and gender-responsive solutions or measures in the debriefing, the trainer might want to prompt them for suggestions.

SCENARIO A	
<p>Arcadia</p> <p>In Arcadia recently, many people have been crossing the border irregularly. Immigration authorities have decided that, in order to register the migrants and decide what happens next, they will accommodate the migrants in a large reception centre. The centre is an old warehouse, and beds have been placed in the large hall for people to sleep. During the day, people can move around the centre, but they cannot leave. Because people have tried to leave the centre in the past, the authorities have</p>	<p><i>Analysis of scenario A</i></p> <ul style="list-style-type: none">▶ Migrants are not permitted to leave the centre at will – which is part of the definition of immigration detention – and that is exacerbated by the recent installation of high barbed wire fences.▶ It does not matter that the warehouse is called a reception centre and is not specifically defined as a detention centre. A common concern relating to centres used for de facto detention is that migrants are often deprived of their liberty without a specific basis in law, without an individualized consideration of the necessity and proportionality of the detention, and without the ability to challenge the detention.

<p>installed high fences topped with barbed wire around the warehouse. NGOs and the human rights ombudsperson report that they are unable to make contact with the migrants inside the centre.</p>	<ul style="list-style-type: none"> ▶ The fact that people are allowed to move around the centre is not an indicator of whether a measure constitutes detention or not. In the context of immigration detention, such a provision would be welcome as it would better reflect the administrative nature of detention. ▶ Mandatory detention of arriving migrants in order to verify their identity is likely to be arbitrary and therefore is not permitted under international law. It has not been determined individually that such deprivation of liberty is necessary. ▶ The inability of NGOs and other oversight bodies to make contact with the migrants is a worrying sign. Further information is needed on the possibility of judicial review or the length of detention. ▶ There is no information about the material conditions of detention. However, it appears that there may be concerns about privacy and separation of individuals on the basis of age or gender, as well as specific considerations for children and families. For example, facilities and materials to meet women’s specific hygiene needs, or safe spaces/play areas for young children.
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<p>SCENARIO B</p> <p>Elbonia</p>	<p><i>Analysis of scenario B</i></p>
<p>In Elbonia, crossing the border or staying in the country irregularly is considered a criminal offence in national law. Migrants who are apprehended without the correct documentation are taken to prison, where they are held in closed cells that they sometimes have to share with criminal detainees. As a special consideration, they are allowed to spend up to two hours a day in the courtyard.</p>	<ul style="list-style-type: none"> ▶ In this scenario, irregular migration is criminalized, which is contrary to international human rights guidance. ▶ Migrants with irregular status are imprisoned and held in criminal, not administrative, detention. Individuals detained on the basis of their migration status should never be held in facilities designed for those within the realm of the criminal justice system. In addition to imprisonment being inappropriate for an administrative offence, it would result in migrants being placed in the criminal justice system – alongside criminal offenders/prisoners – which should not occur. ▶ There is no information about judicial proceedings; it is possible that this example is a form of arbitrary detention, due to the automatic/mandatory nature of the measure that is devoid of any procedural safeguards before taking the migrants to the prison facility. ▶ Note that the information provided about the time allocated for outdoor recreation does not address the suitability of the facilities for such activities, nor whether migrants of different genders are kept separate in those facilities. There is no information about how migrants of different genders are treated and housed in this detention

	<p>system, their access to legal assistance and other due process guarantees, as well as their access to age-, gender- and culture-relevant programmes and services, including any required medical treatment. There is also no acknowledgement of the fact that immigration detention should generally not be punitive in nature.</p>
<p>SCENARIO C</p> <p>Zuy</p>	<p><i>Analysis of scenario C</i></p>
<p>In Zuy, the law on unaccompanied children requires the State to take measures to protect such children, including identifying a legal guardian. Children are housed in designated shelters while waiting for a foster family to be identified. However, the shelters are surrounded by a closed perimeter fence, and the children cannot leave, even to attend school. When the shelters are too full, some children are taken to police cells.</p>	<ul style="list-style-type: none"> ▶ Immigration detention is never in the best interests of the child; it is a violation of the child's rights that may also constitute cruel, inhuman or degrading treatment. ▶ Reminder: Immigration detention refers to any setting in which a child is deprived of their liberty for reasons relating to their own or their parents' migration status, or on the basis of the child being unaccompanied or separated, regardless of the name of the facility or location where the child is deprived of liberty. In other words, calling it a shelter does not mean it is not immigration detention. In any detention situation, standards for conditions of detention apply, for example in respect of gender-separate accommodation and facilities. Placement of a child in institutional care amounts to deprivation of liberty within the meaning of international human rights law. <p>Furthermore, the use of police cells to detain children when the shelters are full can be particularly damaging for the children's well-being and development. Both examples of deprivation of liberty in this scenario (shelter and police cell) amount to a violation of the rights of the child.</p> <ul style="list-style-type: none"> ▶ Unaccompanied or separated children are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children.⁵⁴⁸ Such children should be placed in the national/local alternative care system, preferably in family-type care with their own (extended) family when available, or in community care when no family is available. ▶ Depriving children of their liberty while waiting for the appointment of a foster carer privileges administrative convenience over the best interests of the child. A guardian who has the capacity and expertise necessary to secure representation of the child's best interests should immediately be appointed for an unaccompanied child.

⁵⁴⁸ Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, Annex.

- ▶ Zuy is also violating the child's right to education by not facilitating school attendance. Education should be provided for children of all genders without discrimination.

5.3.2. Alternatives to detention

As noted above, the lawfulness and necessity of deprivation of liberty must be considered, first of all; then alternatives to detention should be reviewed.

Guideline 8.1: Immigration detention should be a last resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes.

- ▶ *Alternatives to detention must always be made available and sought in order to ensure that detention is an exceptional measure of last resort.*

To ensure that any decision to detain is compliant with the requirements of reasonableness, necessity, proportionality and non-discrimination, States are obliged to consider other ways to achieve their objectives, such as considering alternatives to detention. Under the right to liberty and security of person, alternatives to detention are thus a requirement, not an optional extra, to ensure that detention is a last resort. States must consider less intrusive alternatives to detention of migrants that can achieve the same purpose.⁵⁴⁹ States have committed to prioritize non-custodial alternatives to detention that are in line with international law as part of their human rights-based approach to any detention of migrants.⁵⁵⁰ Even then, States should not rush to implement alternative measures to detention, as they too should be used only when there are adequate and individually justified reasons why the migrant cannot be allowed to leave the border area unconditionally.

Authorities should start from a presumption of liberty, and only if that is rejected on the basis of a clear, articulated reason, should they consider human rights-based alternatives to detention – one by one – including the obligation to provide adequate reasons why each option is not applicable in the particular case.⁵⁵¹ In particular, unaccompanied children, and families with children should always benefit from alternatives to detention.⁵⁵² Migrants in vulnerable situations should also benefit from particular scrutiny of the decision to detain them and alternatives should be made available.

Alternatives to detention must not be provided when there is no justification for detention in the first place. In such cases, migrants should be released.

Alternative measures should be non-custodial, community based, not dependent on the ability of the individual to pay and reviewed by a judicial authority. Release on proportionate bail or other securities, accommodation in open centres or at a designated place in humane conditions are also alternatives.

The provision of alternatives to detention respects migrants as rights holders who can be supported and empowered to comply with immigration processes without the need for detention, while at the same time achieves migration management objectives. Non-custodial, community-based

⁵⁴⁹ Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 16; Special Rapporteur on migrants, A/HRC/20/24, 2012, para. 50.

⁵⁵⁰ Global Compact for Safe, Orderly and Regular Migration, para. 29 chapeau (Objective 13).

⁵⁵¹ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, 2018, Principle 8, Guideline 5.

⁵⁵² Although the human rights guidance on non-detention of migrant children is clear, it is also apparent that many States continue to detain children. In those circumstances, children and their families should always be prioritized when alternatives to detention are available.

alternatives to detention should fully respect the human rights of migrants and be based on an ethic of care rather than enforcement.⁵⁵³ The least intrusive and restrictive measure possible in each individual case should be applied. The conditions of those alternatives should not be discriminatory, including on the basis of nationality or migration status. Due process safeguards must apply. Alternatives to detention should be subject to judicial review and independent monitoring and evaluation.

Alternatives to detention should be realistic and must not be dependent on the ability of the individual to pay for them. Alternatives to detention may take various forms, including reporting to the authorities at reasonable intervals in person or by phone; community-based solutions or accommodation in open centres or at a designated place; release on proportionate bail or other securities – although fixed amounts of bail may be discriminatory on the basis of socioeconomic status, given that some migrants may not have the financial means to raise bail. The conditions in any open centre and other facilities must be humane and respectful of the inherent dignity of all persons. Measures such as electronic monitoring using an ankle or wrist bracelet is intrusive and stigmatizing and should, in general, be avoided. Gender-specific options for such alternatives should take into account the specific experiences of migrant women, such as disproportionate caretaking responsibilities.

Research shows a high compliance rate with alternative measures to detention. Such measures also greatly increase the likelihood of compliance with return decisions: for instance, in Australia, the application of alternatives to detention resulted in a compliance rate of 93 per cent over a three-year period and a 60 per cent rate of independent departure among refused applicants, that is, those not granted a visa to remain in the country. Another study in the United States of America showed that migrants in a community supervision programme appeared at scheduled court hearings 99 per cent of the time, and at removal hearings 95 per cent of the time.⁵⁵⁴ Research also shows that alternative measures are more affordable than detention, sometimes as much as 80 per cent cheaper.⁵⁵⁵

5.3.3. Procedural safeguards

Guideline 8.4: Establish/strengthen procedural safeguards on detention.

- ▶ *There is a range of procedural safeguards to ensure an individual's rights to due process and a fair trial in the context of immigration detention.*

Judicial control of detention ensures that a detained individual has the opportunity to challenge the lawfulness of their detention, with a timely initial check on the detention, and regular subsequent reviews for as long as the detention continues.

The right to bring proceedings before a court applies in principle from the moment of apprehension, and no substantial waiting period before a detainee can first challenge their detention is permissible. The right applies to all persons deprived of their liberty, including individuals detained for immigration purposes or in connection with terrorism-related activity. Failure to ensure the right to bring proceedings before a court to challenge unlawful or arbitrary detention constitutes a human rights violation and renders the detention arbitrary.⁵⁵⁶ Incommunicado detention, that is, detaining an individual and keeping them totally isolated from

⁵⁵³ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 8, Guideline 2.

⁵⁵⁴ Sampson, R., V. Chew, G. Mitchell and L. Bowring. *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Revised), (Melbourne: International Detention Coalition, 2015), p. 10.

⁵⁵⁵ *Ibid.*, p. 76.

⁵⁵⁶ Human Rights Committee, general comment No. 29 (2001), para. 16.

the outside world, including from their family and legal counsel, inherently violates international human rights law as it prevents prompt presentation of the individual before a judge.⁵⁵⁷

Proceedings before a court

- ▶ *Prompt initial review:* Any detained person should be brought promptly – after apprehension or initial detention – before a judicial or other independent authority to have the lawfulness of their detention reviewed.

The requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it. A human rights-based approach would be to ensure a review within 48 hours of taking an individual into custody, unless the State has established a shorter time limit in law. For child migrants, an especially strict standard of promptness should apply and, with appropriate safeguards, they should be brought before a judge or other officer authorized to exercise judicial power within 24 hours.⁵⁵⁸ States must justify the circumstances for any delay longer than 48 hours, and such a delay must be absolutely exceptional. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. In the case of migrants in an irregular situation, the scope of the judicial review should not be confined to a formal assessment of the migrant's current migration status, but also include the possibility of release if detention is determined to be unnecessary, disproportionate, unlawful or arbitrary.

- ▶ *Regular periodic reviews:* After the initial review of the lawfulness of detention, a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary should regularly and periodically review the necessity for the continuation of detention to ensure it does not exceed the period for which the State can provide appropriate justification.

The decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention. Any non-custodial measures must also be subject to periodic review.

- ▶ *Challenge the lawfulness of detention – habeas corpus:* This is a judicial remedy designed to protect the right to liberty and security of person, as well as safeguard against the risk of torture and ill-treatment in detention. It entails the right of anyone who is deprived of liberty by arrest or detention to take proceedings before a court, at any time during their detention, in order that the court may decide without delay on the lawfulness of the detention, and order release if the detention is not lawful.⁵⁵⁹

Other procedural safeguards

Guideline 8.14: Provide access to legal aid and interpretation services.

- ▶ *Information:* Any individual being detained should receive a notification of the detention, orally and in writing, providing the grounds for the detention, their human rights, including the right to seek asylum, and the procedures to be followed to challenge and have reviewed the legality and arbitrariness of the decision before a judicial authority. That information should be provided in a language they understand; also, information leaflets in the appropriate language, including in Braille, will assist the detainee in understanding and retaining the information.

⁵⁵⁷ See International Covenant on Civil and Political Rights, art. 9(3); incommunicado detention may also violate other human rights, including arts. 6, 7, 10 and 14 of the Covenant; Human Rights Committee, general comment No. 35 (2014), paras. 35, 56, 63.

⁵⁵⁸ Human Rights Committee, general comment No. 35 (2014), para. 33; Committee on the Rights of the Child, general comment No. 10 (2007), para. 83.

⁵⁵⁹ International Covenant on Civil and Political Rights, art. 9(4).

- ▶ **Legal aid:** All detained persons have the right to the assistance of legal counsel at any time during their detention, including immediately after apprehension, at no cost for the detainee who does not have means, or the individual bringing proceedings before a court on the detainee's behalf, including through access to free and effective legal aid. They should also be informed of their right to and how to avail themselves of such assistance and should in principle be able to choose their lawyer.⁵⁶⁰
- ▶ **Legal counsel and guardians appointed for** unaccompanied children who are detained should be adequately trained to work with such children – particularly taking into account their extreme vulnerability and need for care – and be able to communicate in a language they understand.
- ▶ **Effective remedy, including compensation:** Any person whose rights have been violated, including the right to be free from arbitrary detention, has a right to an effective remedy.⁵⁶¹ That includes ordering their release if the detention is not lawful.



For more information on the legal basis of the right to adequate remedy, see session 1.3.3 (m).

- ▶ **Consular assistance:** Officials should ensure the right of detainees to communicate with the authorities of their home country, if they so desire, by informing the consular or diplomatic authorities of the country of origin without delay. If the migrant wishes to exercise that right, it is the duty of the authorities holding the migrant to facilitate such contact.⁵⁶² Such measures include access to information on consular assistance, contact information of the consular office, and access to telephones and other communications means for the purpose of making such contact.

Guideline 8.16: Ensure the right to consular assistance in detention.

However, contacting the officials of migrants' home countries carries possible risks to asylum seekers and refugees, as well as other groups such as irregular migrants and LGBTI individuals. Therefore, consular offices should be contacted only if expressly requested by, or with the free, informed consent of, the person concerned.

- ▶ **Outside communication:** All detained migrants must be able to communicate with the outside world and relatives, including by telephone or email, within a few days. If a child is detained, the authorities should undertake without delay to notify their parents or guardians.



See session 5.3.4(e) below on facilitating contact with civil society, including human rights and humanitarian groups, and independent monitoring of detention facilities and treatment of detainees.

- ▶ **Keeping a register:** Border officials should keep an up-to-date register to ensure that State authorities know at all times who is held in their custody or detention facilities, including prisons and any other place of deprivation of liberty. Data should be disaggregated by sex and age of the detainees, and should include the identity of the authority that ordered and is supervising the deprivation of liberty, the grounds for the detention, times and dates of any transfers, and relevant information on the detainee's state of health, including mental health. The register should be made promptly available, upon

⁵⁶⁰ Ibid., art. 14(3)(d); Human Rights Committee, general comment No. 35 (2014), para. 34; Working Group on Arbitrary Detention, A/HRC/30/37, Annex, Guideline 8, para. 67; Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, General Assembly resolution 43/173, Annex, Principle 17; Nelson Mandela Rules, rule 61.

⁵⁶¹ International Covenant on Civil and Political Rights, arts. 2(3), 9(5).

⁵⁶² Vienna Convention on Consular Relations, art. 36(1)(b).

request, to any judicial or other competent authority or institution authorized for that purpose by law, albeit in strict compliance with the migrant's right to privacy when personal information is being divulged.

5.3.4. Conditions of detention

(a) Safe environment

Detaining migrants puts them at risk of custodial violence. Detainees of all genders may be subject to violence, including sexual violence and abuse, and may also be at risk of self-directed violence, including suicide attempts, self-mutilation, hunger strikes, rioting and arson.

Guideline 8.12: Ensure physical and mental security in detention.

It is important that migrants who are at risk of or subject to violence in detention can access safe reporting mechanisms and have their claims taken seriously. For example, prejudices and stereotyping by officials can have harmful effects for migrant women with disabilities – such as calling into question their ability to make judgments, harbouring perceptions of disabled women as being asexual or hypersexual, and holding erroneous harmful beliefs or superstitions about certain types of disabilities – and contribute to a heightened risk of violence in detention for women with disabilities and increased barriers to justice.⁵⁶³

Authorities must ensure that migrants who are survivors of violence, including sexual and gender-based violence or other violent crime, are safe within the detention context, especially if the perpetrator is (or could be) in the same facility. Accessible, adequate, appropriate and confidential and accurate health advice and counselling, including sexual and reproductive health information and services should be provided. Furthermore, authorities need to provide survivors of violence with effective remedies and ensure reporting mechanisms that are safe and gender responsive, adequate referral systems and information for victims, including referral to shelters or other safe space. Alternatives to detention should also be provided if the migrant's physical and mental security cannot be guaranteed in detention; the best option is to avoid placing migrants in such situations in immigration detention whenever possible.⁵⁶⁴



See session 5.2.5 for a discussion of specific risks faced by women and LGBTI migrants in detention.

A safe environment is also linked to the length of detention. A long period of arbitrary detention and inadequate conditions, in which the detainees concerned are unable to influence their own situation, is likely to generate more intense mental and emotional suffering, and the prohibition of ill-treatment is more likely to be breached. Depending on the circumstances, that threshold can be reached very quickly, if not immediately, in the case of migrants in vulnerable situations, such as children, older persons, persons with disabilities, persons with medical conditions, survivors of torture and trauma, survivors of sexual and gender-based violence, pregnant and nursing women and girls, members of ethnic minorities, indigenous peoples and LGBTI persons.

In the context of pandemics, such as COVID-19, immigration detention centres and other places where migrants are deprived of their liberty are high-risk locations for the spread of communicable infections, particularly when they are overcrowded and lack adequate health care, food, water and sanitation and hygiene. Release of migrants from detention should therefore be prioritized

⁵⁶³ Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 30.

⁵⁶⁴ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, Principle 8, Guideline 3.

to protect the rights and health of migrants and staff in immigration detention facilities. Released migrants should have access to adequate housing, food and basic services.⁵⁶⁵

Men and women should as far as possible be detained in separate institutions/facilities. In a mixed-gender institution, the area of the premises allocated to women should be entirely separate, including the facilities for washing, eating and leisure, and access between those facilities and their residential areas. No male staff should enter the facilities set aside for women, unless accompanied by a woman staff member. Women detainees should be attended and supervised only by women staff, with a responsible woman staff member being in authority in the facilities allocated for women detainees. Premises allocated to men should similarly ensure the safety and dignity of both detainees and staff members, including in terms of access and facilities.



See also session 5.2.5 above on adequate detention conditions and dignity of the person.

See also the discussion on searches in session 3.1.4.

(b) Adequate standard of living

Authorities must provide adequate sanitation, food, water, bedding, clothing, health care, space, light, heating and ventilation, recreation and exercise, and facilitate the practice of migrants' religions.

The accommodations for individuals in immigration detention, in particular the sleeping accommodations, should meet all health requirements, including due regard for climatic conditions, volume of air, minimum floor space, lighting, heating and ventilation. Detainees should be provided with sufficient bedding in good condition, that is changed regularly to ensure cleanliness.⁵⁶⁶

In the context of detention, the right to adequate shelter requires decent conditions of detention, including guarantees of physical safety.

A human rights-based approach to detention recommends that one person be housed in a cell or room or that careful selection procedures be followed in deciding who to house together in facilities with dormitories.⁵⁶⁷ When clothing is provided, it should be clean and suitable for the climate and adequate to enable the migrant to maintain good health. Such clothing shall in no way be degrading or humiliating.

Inadequate conditions of detention – which are often so for women, LGBTI individuals and children – in terms of health-care services, overcrowding and lack of safety from abuse, can cause or exacerbate psychological distress. The trauma of detention and abuses experienced or witnessed during migration could cause individuals in immigration detention to experience mental health problems. Detainees with mental health-care needs should be housed in accommodations which are not restrictive and with the lowest possible level of security level; they should receive appropriate treatment and care, rather than be placed in a facility with a higher level of security solely due to their mental-health situation.

Detention facilities should be built or adequately modified to ensure that disabled migrants can access and navigate buildings on an equal basis with others. In addition, the authorities have a positive legal obligation to provide reasonable accommodation, that is, any modification or adjustment that is necessary and appropriate given the circumstances, when required in a particular case to ensure that the person with a disability can enjoy or exercise their rights.⁵⁶⁸

⁵⁶⁵ OHCHR, COVID-19 and the human rights of migrants: Guidance, 2020, available at www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf; OHCHR and WHO, IASC Interim Guidance on COVID-19: Focus on persons deprived of their liberty, 2020, p. 5.

⁵⁶⁶ Nelson Mandela Rules, rules 13, 21.

⁵⁶⁷ *Ibid.*, rule 12.

⁵⁶⁸ Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018) on equality and non-discrimination, paras. 24, 25, 27.

All detainees should have at least one hour of suitable exercise in the open air every day, weather permitting, especially if they are not employed in outdoor work.

The rights to safe and adequate food, water and sanitation may be violated in detention contexts where individuals are dependent on authorities to provide access. Poor conditions of immigration detention may constitute cruel, inhuman and degrading treatment. States should ensure that living conditions in detention centres are not contrary to the human rights and human dignity of migrants. In particular, facilities should not be overcrowded, unsanitary, or lack ventilation and open space, and at a minimum should provide adequate bedding, culturally acceptable food and safe water.⁵⁶⁹

Nutritious food suitable to age, health and cultural/religious background of the migrants should be provided in adequate quantity in detention. Special diets for pregnant or nursing women, girls and other pregnant/nursing individuals who may not identify as women should be available. Facilities in which the food is prepared and eaten must respect basic rules on sanitation and cleanliness. Those standards should be applicable to all detained migrants, irrespective of their migration status.⁵⁷⁰

The facilities for accommodation of women detainees must have the materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water for the personal care of children and women, in particular those involved in cooking, and those who are pregnant, nursing or menstruating.

(c) Adequate medical and health care

Guideline 8.13: Provide access to adequate medical and health care in immigration detention.

Individuals in detention should have unconditional access to adequate medical and health care; health facilities, goods, information and services, including those related to sexual and reproductive health care, should be accessible to all persons in detention. Overcrowding, violence and unsanitary conditions are detrimental to detainees' mental and physical health, and conducive to the spread of disease. Qualified staff whose primary role is to ensure the health of migrants in detention should provide adequate medical and health care that is age, gender, culturally and linguistically appropriate and that takes into account the effects of trauma. Medical staff in those facilities need to be available and have the authority to provide full treatment to the migrants, for example, in the event that hospitalization is necessary. Migrants with specific health needs, including pre- and postnatal care, and HIV treatment, should receive appropriate care; mental health care should include psychosocial counselling. While in detention, health care and treatment should be provided confidentially, with the informed consent of the person concerned, and free of charge.

Detention can cause migrants' physical and mental health to deteriorate, and can exacerbate pre-existing health conditions, including those resulting from trauma. An individual health and medical screening should be conducted at the point of interception or apprehension. When physical and mental health and security cannot be guaranteed in detention, authorities should provide alternatives to detention.

Gender-specific health rights, including access to reproductive and sexual health services, are often violated in detention, and in some situations, violations constitute ill-treatment or even torture: for example, lack of access to tests for and treatment of sexually transmitted infections, including voluntary testing, treatment and care for HIV/AIDS; pre-natal and postnatal care

⁵⁶⁹ Nelson Mandela Rules, rules 15, 18, 22(2); Global Compact for Safe, Orderly and Regular Migration, para. 29(f) (Objective 13).

⁵⁷⁰ Nelson Mandela Rules, rule 22; Bangkok Rules, rule 48.

and health-care services during delivery; screening for reproductive cancers; items to express gender or access to and continuation of gender affirming treatment and medical care.⁵⁷¹

Furthermore, women, girls, and trans, intersex, and non-binary migrants who would prefer to see a woman doctor may not have access to women health professionals, or access may be limited to periodic visits that are insufficient to provide adequate care and follow-up. As many women, girls and LGBTI people are not afforded equal access to health rights, they are more likely to experience other violations of their right to health, such as disrespectful and poor treatment by staff, medical neglect and denial of medicine, lack of privacy and confidentiality for medical exams, discrimination regarding access to harm-reduction services, and over-medicalization, including through the use of psychopharmacological drugs to keep them subdued.⁵⁷² Health professionals are obligated to promote, protect and improve the physical and mental health of detainees, paying particular attention to those with special health-care needs. However, in States where homosexuality is criminalized, health professionals conduct non-consensual anal examinations of men suspected of same-sex conduct, on the pretext of obtaining physical evidence of homosexuality, a practice that is medically worthless and amounts to torture or ill-treatment. Lack of recognition of gender identity may also lead to torture and ill-treatment in medical and detention settings.⁵⁷³

Women detainees should be able to see a woman doctor or nurse, or at least have a woman staff member present during the examination if no woman doctor or nurse is available. Trans, intersex and non-binary migrants who are detained should be permitted to choose the gender of the doctor or nurse to examine them, or at least the gender of the staff member to be present during the examination, if that is not possible.

Migrants who have been tortured in or prior to detention or who are suffering from other trauma need to have initial and periodic assessments of their physical and mental state by qualified medical personnel. Detention can aggravate or cause mental health issues, trauma, depression, anxiety, aggression and have other physical, psychological and emotional consequences. Detention of victims of torture may in itself amount to inhuman and degrading treatment and thus should be avoided.⁵⁷⁴

Many detention facilities fail to provide reasonable accommodation for migrants with disabilities, which has significant consequences on their enjoyment of the right to health and, in some cases, may violate prohibitions against torture and ill-treatment.

States need to provide regular medical attention and adequate specialized care, including mental health services, for all migrants in detention who require it. Detainees who acquire serious health conditions in detention should be released.

(d) Complaint mechanism

When an individual is deprived of their liberty, there must be accessible and independent mechanisms in place and established by law for them to make complaints about their treatment in detention to the authorities responsible for the administration of the detention and to higher authorities, as an essential safeguard for the prevention of torture and other human rights

⁵⁷¹ Nelson Mandela Rules, rule 28; Bangkok Rules, rules 10 and 11 on gender-specific health care, rule 39 on pregnant girls in detention, rules 48–49; Special Rapporteur on torture, A/56/156, para.2; Special Rapporteur on migrants, A/HRC/20/24, paras. 25, 37; Special Rapporteur on torture, A/HRC/31/57, para. 26; the Special Rapporteur on violence against women, A/68/340, paras. 54, 57, 65, 69, 70; Subcommittee on Prevention of Torture, CAT/OP/27/1, para. 28. For more on sexual and reproductive health and rights see www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx.

⁵⁷² Special Rapporteur on violence against women, A/68/340, para.2; Special Rapporteur on torture, A/HRC/22/53, para. 76, and A/HRC/31/57, para. 32; Special Rapporteur on health, A/HRC/38/36, para. 80; Subcommittee on Prevention of Torture, Eighth annual report of the Subcommittee, CAT/C/54/2, paras. 28, 67, 71; Subcommittee on Prevention of Torture, CAT/OP/27/1, para. 30; Independent Expert on sexual orientation and gender identity, A/73/152, 12 July 2018, para.18.

⁵⁷³ Special Rapporteur on torture, A/HRC/31/57, para. 36.

⁵⁷⁴ Special Rapporteur on migrants, A/HRC/20/24, para. 44.

violations and impunity. That is one of the rights that should be explained to individuals when they arrive at the place of detention (see [session 5.3.4\(a\)](#) above).



For more information on the legal basis of the right to adequate remedy, see session 1.3.3 (m).

Any complaint should be dealt with promptly and confidentially if requested by the detainee lodging the complaint. The individual making the complaint must be protected against retribution, including counter-charges, as a result of making the complaint. In addition, authorities should institute a prompt, independent, thorough and impartial investigation into any information alleging ill-treatment of a detainee. The complaints mechanisms provided by States must comply with the right to an effective remedy and establish measures to ensure non-recurrence.



See session 1.5 regarding the obligation of staff to report any abuse they witness, including by colleagues.

(e) Independent monitoring

Guidelines 8.18, 8.19 and 8.20: Facilitate monitoring and promote accountability.

There should be regular independent human rights monitoring of places of detention that permits detainees to communicate freely and in full confidentiality with the monitors. In order to monitor the conditions of detention and treatment of women detainees, monitoring teams and/or supervisory bodies should include women members. More broadly, the inclusion of women, as well as LGBTI persons, persons with disabilities and other minority representation, at all levels of inspection bodies would help facilitate the reporting of gender-based violence and discrimination. Following the death of a detainee, an inquiry should be carried out by a judicial or other authority into the cause of death. All relevant national and international human rights bodies, national preventive mechanisms and international and national NGOs must be allowed free access to the places of detention where persons detained in the course of migration proceedings are held, and all detainees should be able to exercise their right to contact such organizations. Authorities should facilitate independent monitoring and evaluation of detention at places of immigration detention by such actors and by international organizations or parliamentarians. Individuals in detention should be informed of their right to contact such organizations. Alternatives to detention should also be subject to independent monitoring and evaluation.

Protocols to most of the international human rights treaties establish a complaints mechanism through which complaints can be brought to the independent expert bodies that monitor the implementation of, and provide authoritative guidance on, the relevant treaty, usually when domestic remedies have been exhausted. Some regional international human rights treaties have also established similar mechanisms.

In addition, the special procedures of the Human Rights Council – independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective – are able to act on individual cases by sending communications (and follow-ups) to Governments and other authorities, to bring alleged violations or abuses to their attention.



See the handout containing international and regional human rights instruments distributed in session 1.1.6.



Distribute the handout on detention standards and conditions.

5.4. Situations of vulnerability and immigration detention

5.4.1. Exercise (case studies): Situations of vulnerability in detention



Duration: 50 minutes
(group work: 25 min.; debriefing: 25 min. (approx. 10 min. per case))

Aim of the exercise:

To introduce learners to experiences that can place migrants in situations of vulnerability, particularly in immigration detention, and to encourage learners to identify and reflect on human rights and gender-specific concerns that can lead to such situations in detention.



These cases are a continuation of the stories of Kai and Sammy (case A), and Amodita and Ichangea (case B) in session 1.3.2.

Learners should keep the handouts of the cases as they will be continued in session 6 (return).

Building on the case study exercise in session 1, this activity will also encourage learners to reflect on ways to mitigate similar risks in their own work.

How to carry out the exercise:

- ▶ Divide learners into the same groups as for the case studies in session 1.



Distribute the cases, making sure that the groups get the same case that they worked on in session 1.3.2.

- ▶ Ask learners to read through and discuss their case.
- ▶ Invite the groups to nominate a rapporteur who should write their responses to the following questions on the flip charts and represent them in plenary:
 1. What human rights issues are experienced by the person in detention?
List at least four.
 2. What should/could have been done differently to take the situations of vulnerability into account?
 3. What gender-specific concerns can you identify in the case?
 4. What steps could officials take to mitigate the issues?



Debriefing

- ▶ Briefly summarize each case.
- ▶ First, discuss case A: ask one of the groups that worked on case A to give an example of one human rights issue and/or one gender-specific concern they identified. Then, ask the other groups that worked on case A to add examples, until all the groups have contributed (see table below as a guide).
- ▶ Then, ask the groups that worked on case A to give examples of what should/could have been done differently for the migrants taking into account their vulnerable situations, and what steps the officials could have taken to mitigate the issues. The trainer may ask if there are any rights/concerns not yet mentioned and discuss them.
- ▶ Next, repeat the debriefing for case B.



If there are two trainers and enough space in the room for the groups to work concurrently, the debriefing for each case could be run in parallel. However, as the cases raise different human rights issues, it would be good for learners to participate in the debriefing for both cases.

CASE A (Detention)

Kai, 17 years old, and Sammy, 22 years old

Analysis of case A

Story summary

Kai: A few days ago, the smuggler took us to the border area and told us to run across a dry stream until we reached the other side in Syldavia.

There was another person waiting for us and he was paid to drive us onwards.

However, on the way, a group of immigration officials stopped us and immediately brought us to an immigration detention centre.

We are held with so many people in the same cell.

It is very dirty and hot; many people have diseases.

Most of the people seem much older than us and they often harass us.

I'm worried about Sammy. After his last experience in detention, he cannot sleep at night and has lost a lot of weight.

Sammy is gay and we do not feel safe.

Issues/concerns

- ▶ *Automatic detention, no individual assessment of the legality, necessity and proportionality of their detention* → They were taken immediately to a detention centre: they were not screened and interviewed to identify any vulnerable situation and human rights protection needs.
- ▶ *Right to information* → No mention whether Kai and Sammy were informed of their rights or the possibility of contacting their consular office, requesting legal aid or other.
- ▶ *Detention of a child* → Kai is a child under international law: Kai should not have been detained.
- ▶ *Smuggled* → Note that the use of services of a smuggler is not criminalized in international law.
- ▶ *Conditions of detention* → The cell was overcrowded, dirty and hot, and other detainees were ill: detention centre does not meet international standards.
- ▶ *Separation of child from unrelated adult detainees* → Kai is a child under international law and should not be detained with adults.
- ▶ *Signs of trauma, possible violence during migration?* → Sammy may be showing signs of trauma from his previous detention; there should have been initial and periodic assessments of their physical and mental state by qualified medical personnel.
- ▶ *Safe accommodation* → Sammy is gay: LGBTI persons face gender-based violence and are at particular risk of torture and ill-treatment when deprived of their liberty: officials should ensure protection from violence, ill-treatment, and physical, mental or sexual abuse.

We saw a judge some days ago, but the only question he asked was how we managed to cross the border.

He did not ask our age or why we were trying to reach Syldavia.

I want to speak to someone to get advice on what to do, but I have no idea how or who I should contact.

Some men tried to assault my cousin and I'm not sure how long we can stand up against them.

We tried to get help from the guards, but they did not do anything but laugh.

- ▶ *Inadequate judicial review, lack of procedural safeguards* → It is not known if this initial presentation before a judge was done within 48 hours, as recommended in a human rights-based approach; the judge assessed only Kai and Sammy's migration status; there was no assessment as to whether the detention was unnecessary, disproportionate, unlawful or arbitrary, which would have required Kai and Sammy's release.
- ▶ *Best interests of the child* → If the judge had checked Kai or Sammy's ages, he would have learned that Kai is a child under international law; in any decision, including a judicial decision, concerning a child, the best interests of the child must be taken as the primary consideration.
- ▶ *Right to information, lack of procedural safeguards* → Kai wants to get advice but does not know who to contact or how: that information should have been provided to them when they arrived at the detention centre; they should have had access to consular officials, if they wanted it (although, since Sammy is gay there may be reason for caution); and access to legal counsel.
- ▶ *Unsafe environment* → Some men tried to assault Sammy: the State has a legal obligation to provide a safe environment in detention, the risk assessment should have identified that both Sammy and Kai are in a vulnerable situation (for different reasons); and that knowledge should have informed a different decision for them; if physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.
- ▶ *Lack of protection; discrimination on grounds of sexual orientation, gender* → The guards just laughed at their appeals for help: the authorities (guards) are obligated to treat detainees with dignity and protect their rights, including protecting them from violence.
- ▶ *Accountability, complaints mechanism* → Kai and/or Sammy should be able to lodge a complaint about their treatment in detention (assault by men and disregard of their appeals by guards), without fear of reprisal; if other guards witnessed the disregard of their appeals for help, they should report their colleagues' behaviour to the authorities.

CASE B (Detention)

Amodita, 20 years old, and Ichange, 23 years old

Analysis of case B

Story summary

Ichange: The immigration officials took me off the bus and brought me to a small room where they started questioning me about a terrorist cell LIBERTA that opposes the Liberto ruling party.

They seemed unsatisfied with my answers that I did not know anything.

They started shouting at me to tell the truth.

Then they brought me to another room where two people who appeared to be military staff resumed the interrogation.

They were very intimidating, and threatened to lock me up for life if I did not admit my connections to LIBERTA.

After what seemed like many hours of threats and shouting, they locked me in the room and left.

I have been in this room for a few days now.

There is no bed; I lie on a thin mattress on the floor. They give me a little food and water once a day, but I have not been able to call anyone.

I am worried about Amodita and whether she is okay.

Amodita: The official explained to me that attempting to enter Elbonia irregularly was a criminal offence in Elbonian law, therefore I would be arrested and prosecuted.

He called one of the private security guards to transfer me to the nearest holding facility.

I felt very weak and the pain was not easing; I told them that I was pregnant and needed to see a doctor, but they said I could not.

Issues/concerns

- ▶ *Lack of due process, interrogation practices in breach of human rights* → Officials started questioning Ichange immediately, using intimidation and threats, including shouting and threat of indefinite detention, presence of military personnel/unidentified officials: the military-looking officials did not identify themselves; no access to legal counsel: border authorities should facilitate access to legal counsel for free/with legal aid, as necessary; never take undue advantage of the situation of a detained person to force a confession; never subject a detainee to violence or threats during interrogation.
- ▶ *Arbitrary detention, solitary confinement* → Ichange was left in a room for a few days: the detention is arbitrary because there was no due process, nor fair trial guarantees, including the possibility of challenging the lawfulness of the detention; the prohibition of arbitrary detention is absolute and cannot be circumvented by anti-terrorism laws (see session 5.2.2); also placing a detainee in solitary confinement needs to be authorized/regulated by the authorities; indefinite or prolonged solitary confinement (22 hours or more a day) amounts to torture or other cruel, inhuman or degrading treatment or punishment, and is prohibited.
- ▶ *Conditions of detention* → Thin mattress on the floor, a little food and water once a day: detainees should be provided with a bed and sufficient clean bedding; as well as adequate nutritious food, and water and sanitation facilities.
- ▶ *Lack of procedural safeguards* → The authorities did not allow/facilitate communication with anyone, including a lawyer and family member: Ichange has the right to legal counsel, and to contact Amodita.
- ▶ *Irregular migration is criminalized* → human rights guidance calls for decriminalizing irregular migration, although this would be outside the remit of border officials.
- ▶ *Due diligence concerns; transfer constitutes detention* → Use of private security guards: the State is responsible for ensuring that the private security company respects and protects the human rights of detained migrants.
- ▶ *Lack of medical screening, emergency health care, immediate assistance at the border* → Amodita is pregnant; she was not allowed to see a doctor even when she asked for one: an initial medical screening should have been carried out on arrival, which should have checked her pregnancy and

The male security guard proceeded to do a security check, despite my asking for a female guard.

They said borders are not places for women.

The security guard then shackled me at the hands, legs and around my belly, placed me in the car and drove off.

I was sweating profusely, but did not receive any water.

Finally, we arrived at a large facility where the guards immediately brought me to a cell that was overcrowded with many other women and girls.

I learned later that some were convicted of criminal activities.

I was still not able to see a doctor, but they showed me a mattress on the floor where I could lie down.

That night I started bleeding heavily, so they finally let me see the facility's doctor.

He said the bleeding was normal and dismissed me.

The guards refused to give me enough sanitary towels, telling me I could buy more myself; but I did not have any money.

After three days of heavy bleeding, I fainted.

provided emergency health care, including all necessary prenatal care and treatment; she should have been given food and water as a priority; Amodita is pregnant and therefore in a vulnerable situation: border officials should have ensured adequate referrals and care.

- ▶ *Lack of gender sensitivity, physical integrity, gender stereotyping at the border* → Amodita asked to be searched by a female guard; she was told that borders are not places for women: the human rights-based approach calls for women detainees to be searched by women officials; there should be gender balance in the recruitment and deployment of border officials; border officials should be sensitized to harmful stereotypes.
- ▶ *Inappropriate use of restraints/use of force* → Although the use of restraints during transfer may be permitted for the shortest period of time necessary, such restraint of a pregnant woman must meet the tests of necessity and proportionality; shackling a woman at the waist can endanger the pregnancy and can never be considered necessary or proportionate; given that Amodita was already feeling weak, did not resist apprehension and the risks involved with shackling, the guard's actions constitute excessive use of force.
- ▶ *Right to food and water, and immediate assistance during transfer* → Amodita is obviously pregnant and has said that she is in pain: given her condition, she should have been provided with food and water as a priority; she should have been provided with medical care immediately.
- ▶ *Automatic detention; lack of due process* → Amodita is transferred and detained in a holding facility without due process = arbitrary detention.
- ▶ *Poor conditions of detention, non-separation of administrative and criminal detainees* → Amodita is placed in an overcrowded cell with a mixed profile of detainees: detention facilities should not be overcrowded or unsanitary; individuals detained solely on immigration charges should not be held with persons charged with criminal offences; each person in immigration detention should be provided with a bed and clean bedding.
- ▶ *Inadequate access to and lack of quality health care, including reproductive health services; cruel, inhuman and degrading treatment* → Delay in allowing Amodita to see a doctor even though pregnant and bleeding heavily constitutes inhuman treatment; also, the State has a duty to ensure the availability of adequate prenatal health care for pregnant women, girls and other individuals who may not identify as women, including in detention; Amodita should not have been detained, but should have been taken to a doctor or placed in special accommodation in order to receive the necessary prenatal care and treatment; the doctor

They brought me to a clinic of some sort where the doctor informed me that I had had a miscarriage.

as an employee of the State did not fulfil his duty of care and did not respect Amodita's right to good quality health care.

- ▶ *No gender-sensitive approach* → The doctor was a man: if Amodita had wanted to see a woman doctor and none was available, a woman staff member should have been present during the examination.
- ▶ *Lack of due process and procedural safeguards* → The fact that Amodita bled for three days without receiving help also indicates that she was not brought before a judge for the initial assessment of detention within the 48-hour period recommended in a human rights-based approach: States should adopt specific measures to ensure meaningful access to the right to bring proceedings before a court to challenge the lawfulness of detention, and to receive without delay and appropriate and accessible remedies, including release/alternative to detention.
- ▶ *Material conditions in detention* → Guards refused to provide sufficient sanitary towels: sanitary towels should be provided free and in sufficient quantity.
- ▶ *Accountability, complaint mechanism* → Amodita should be able to file a complaint about her treatment from the time she entered the country and in detention, without fear of reprisal.

Additional notes on migrants in vulnerable situations

In addition to the situational vulnerabilities experienced by the four migrants in the case studies, there are two types of embodied situations of vulnerability:

- ▶ *Pre-existing factors* (e.g., age, health status, gender, poverty); and
- ▶ *Situational/contextual factors* (e.g., isolation, irregular migration status, religion).

Regarding the four migrants:

- ▶ *Kai* is a child and should not be held in immigration detention; the negative effects of immigration detention on his physical and mental well-being are exacerbated by inadequate detention conditions, being held with adults, and experiencing harassment and lack of care appropriate for a child.
- ▶ *Sammy* is showing signs of (re-)traumatization, most likely because of violence suffered in previous detention (see case study in session 1.3.2); in addition, his sexual orientation puts him in a vulnerable situation as it may make him a target for further sexual violence, regardless of whether same sex relations are criminalized.
- ▶ *Amodita* is in a vulnerable situation on several counts: in particular, she is pregnant and weakened by travel and does not have access to health services (physical/health condition); she is in an irregular migration situation in a country that criminalizes irregular migration (migration status); her already vulnerable situation is further exacerbated by her detention in poor conditions; her experiences during the journey further compound her vulnerability, for example, separation from and lack of knowledge about Ichange; having to face border authorities alone, lack of gender-sensitive support and treatment (search by male guard, examination by male doctor).
- ▶ *Ichange* is in a vulnerable situation because he has been wrongfully profiled as a terrorist – he was singled out, taken off the bus, interrogated with intimidation and threats; no due process guarantees have been made available to him; he has been arbitrarily deprived of his liberty.

5.4.2. Situations of vulnerability in immigration detention

Immigration detention can render individuals, who would not usually be considered at risk, vulnerable to violations of their human rights.

For example, individuals may become vulnerable in detention owing to degradation of physical and mental health, particularly in prolonged or indefinite detention, lack of due process guarantees, inadequate material conditions, lack of access to health care, re-traumatization, mistreatment, abuse, and sexual and gender-based violence.

Individuals in immigration detention have not been convicted of any crime, therefore their detention should not be punishment. Often detainees are not told the reason for their detention, and do not know how long they will be held in detention, which can cause anxiety.

- ▶ *It is important to recognize that vulnerability will often be contextual.*

Border authorities should therefore:

- Avoid detention as a general rule;
- Reconsider decisions to detain migrants and *consider alternatives to detention*.



See session 2 for more on migrants in vulnerable situations.

Refer also to OHCHR and Global Migration Group, *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations*, 2018.



Distribute session 5 summary.

Session 6: Human rights-based return

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Introduce learners to the key human rights considerations to be taken into account in the context of return ▶ Describe the main steps and considerations to ensure the human rights of individuals in the return process
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Describe the human rights principles applicable to return ▶ Define possible circumstances in which individuals must not be returned ▶ Identify the human rights of persons to be returned and the corresponding obligations of border officials ▶ Appreciate the steps to ensure that human rights are respected and protected during the return process, including gender considerations
Key learning points/messages	<ul style="list-style-type: none"> ▶ Returns must always be based on an individual assessment of each case. ▶ No one shall be returned to a situation where they may be in danger of being subjected to torture, persecution or other serious human rights violations. ▶ States should ensure that returns are lawful and sustainable in order to avoid recurring cycles of insecure and irregular migration that carry human rights risks for the migrant. ▶ All returns must follow due process and procedural safeguards. ▶ Voluntary return, free from any coercion, should always be promoted in preference to forced return in order to enable migrants to return to their countries in dignity.
Preparation	<ul style="list-style-type: none"> ▶ Print handouts
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using; flip charts and pens
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ True/false cards ▶ Cases: Return ▶ Steps for a human rights-based return ▶ Session 6 summary

Session overview/rationale

This session addresses how to protect human rights during the return process so as to facilitate a lawful, safe and dignified return. It examines the key human rights principles, including the principle of non-refoulement and the prohibition of arbitrary and collective expulsions, that guide States in ensuring that returns are lawful. It further addresses the procedural and practical considerations to be taken into account in carrying out a return.

Session content

6.1: Return in the context of migration

6.2: Key human rights considerations relating to return

6.3: Practical steps to protect human rights in the return process

6.1. Return in the context of migration

Ask learners who among them work, or have worked, with migrants to be returned to their own or another country, or in similar situations, so as to get a sense of the experience and expertise in the room.

6.1.1. What is return?

Guideline 9.1: Ensure human rights-based return or removal.



Use this opportunity to open a discussion about return in the learners' contexts, before continuing with the session. Include terminology used in their national context(s), as well as issues that arise during the return process.



See Glossary for a definition of "return".

- ▶ *Return* is used as an umbrella term to refer to all the various forms, methods and processes by which individuals are returned to their country of origin or of habitual residence, or to a third country.

Return may thus include deportation, expulsion, removal, rejection at the border, extradition, repatriation, handover, transfer or other types of return, as defined in different national legal frameworks and practices.

In practice, return is often characterized as either "forced" or "voluntary"; however, the reality is often less clear-cut. In this training course, the term "return" is generic with no determination as to the degree of voluntariness or compulsion, or the lawfulness or arbitrariness of the return.⁵⁷⁵



For more on voluntary return, see session 6.2.4.

Migration policies and practices are increasingly focused on preventing entry to and on returning migrants as rapidly as possible, often at the cost of eroding important legal safeguards. Fast-track procedures, cooperation agreements and other practices are increasingly used to facilitate and speed up return. However, such measures risk violating migrants' human rights, in particular the fundamental principle of non-refoulement and the prohibition of arbitrary and collective expulsions.

6.1.2. Discussion: Human rights particularly at risk in return



The discussion on human rights particularly at risk in this session builds on the discussions of human rights particularly at risk at different points of migrants' experience at international borders, in sessions 1.3.3 (at the border), 3.1.2 (interception, rescue and immediate assistance), 4.1.3 (screening and interviewing) and 5.1.2 (avoiding detention). Trainers should refer back to those discussions.



The slide containing this list of rights is interactive so that the trainer can display one right at a time to allow for brainstorming and discussion.

⁵⁷⁵ OHCHR and Global Migration Group, *Principles and Guidelines on the human rights protection of migrants in vulnerable situations*, pp. 16–17.

(a) Principle of non-refoulement

This right will be discussed in detail in [session 6.2.2](#) below.



See Glossary for a definition of “non-refoulement”.

(b) Prohibition of collective expulsion

This right will be discussed in detail in [session 6.2.3](#) below.

(c) Right to freedom of movement

All return processes should be undertaken with full respect for the right to freedom of movement, which encompasses the right to leave any country, including one’s own. Individuals should also be allowed to choose the State to which they are going to be returned, subject to the agreement of that particular State.

Guideline 9.9: Respect the right to freedom of movement.



See the discussion on the right to freedom of movement in [session 4.1.3\(c\)](#).

(d) Right to life

If a migrant’s life is deemed to be at risk, either during the return or upon return to their home country, the return should not proceed.

(e) Freedom from torture or other cruel, inhuman or degrading treatment or punishment

This is a primary concern in return, both during the process of return itself as well as in the country to which the migrant is returned. It is the core focus of the principle of non-refoulement.

(f) Right to due process

This right encompasses guarantees of individualized examination, the ability to challenge the removal order, and a judicial and effective remedy, which are essential to protect the rights of migrants who are being returned.

(g) Right to liberty and security of person

Migrants to be returned are often placed in immigration detention prior to removal.

When taking any decision to detain a migrant prior to carrying out a return, the tests of legality, necessity and proportionality should be applied, which include assessment of viable alternatives to detention. Border officials must follow due process in any detention decision. Children should never be detained on the basis of their or their parents/guardians’ migration status, and alternatives to detention should be found for children and families with children.



See [session 5](#) on how to avoid placing migrants in detention and inadequate conditions of detention.

Guideline 9.8: Ensure that pre-removal detention is necessary and legitimate.

Individuals have a right to security of person during the removal process. The process can be extremely stressful for a migrant, engendering or exacerbating any psychological health issues

or trauma. Furthermore, migrants have been injured and even killed during return owing to the use of force.

Return threatens and can violate the right to non-discrimination and the right to security of person and protection from violence or bodily harm. States must ensure that return does not discriminate, in purpose or effect, against different groups of non-citizens on the basis of prohibited grounds, including gender, age, race, colour, religion, nationality, or national or ethnic origin.⁵⁷⁶

(h) Right to health, including sexual and reproductive health

Fear of return, and government crackdown on irregular migration (in the form of increased returns and pre-return detention), may cause migrants to avoid seeking necessary health care for fear that health-care providers will report them to immigration authorities, or that they will be stopped/arrested by immigration enforcement agents at or on the way to the health-care facilities. That can endanger the health of the migrant, as well as pose a risk to public health. Policies of returning pregnant migrant workers may lead to women getting unsafe abortions where no access to safe and legal abortions is available or if they are afraid to access those services.

Migrants should not be detained or returned on the basis of their health status; States should ensure the provision of health care and treatment to such migrants at the first instance, including access to HIV prevention, treatment, care and support.⁵⁷⁷ Migrants should not be returned to States where the necessary treatment is not available and accessible. When returning migrants with health issues, States must protect the requirement of confidentiality inherent to the right to health.

Trans migrants who are being returned should be provided with the items they use to express their gender (e.g., breast binding or padding, genital tucking or penile prosthesis, padding for hips or buttocks) as well as any medication required to ensure the continuation of gender-affirming treatment.

(i) Right to an adequate standard of living

Migrants should have a reasonable opportunity to be able to secure any owed wages or other social security entitlements after return, if necessary, regardless of the outcome of any appeal of a return order.⁵⁷⁸ That is especially important if the return is to be sustainable for the migrant. Financial means can be a challenge for returned migrants who were working in the informal economy, which is often outside the protection of labour laws. Migrant women, in particular, are likely to work in low-paid, precarious jobs in the informal economy, such as domestic work.⁵⁷⁹

(j) Rights to food and water

Return journeys can be lengthy; returned migrants must have access to sufficient safe food and water during the journey.

⁵⁷⁶ See, for example, Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005), para. 4(b); Special Rapporteur on racism, A/HRC/38/52, 25 April 2018, para. 20.

⁵⁷⁷ States frequently use the public health rationale to detain and deport migrants with specific health statuses, such as HIV, Hepatitis C or Hepatitis B. To qualify as a public health exception, restrictions must be provided by law, strictly necessary, for the least possible duration, based on scientific evidence and the least restrictive alternative available.

⁵⁷⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, arts. 22(6) and (9); Global Compact for Safe, Orderly and Regular Migration, para. 38 (Objective 22). With regard to women migrants, see in particular para. 38(c).

⁵⁷⁹ Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008), para. 14; Committee on Economic, Social and Cultural Right, general comment No. 23 (2016); Special Rapporteur on migrants, The impact of migration on migrant women and girls: a gender perspective, A/HRC/41/38, 15 April 2019, para. 74; Secretary-General, Women's economic empowerment in the changing world of work, E/CN.6/2017/3, 30 December 2016, see paras. 26, 29, 33 and generally.

Individual risk assessments must determine and ensure that the economic, social and cultural rights of returned migrants, such as access to an adequate standard of living, food, water, health and education, as well as their civil and political rights, such as access to justice, will be respected, protected and fulfilled in the country to which they are returned, be it their country of origin or a third country.

6.2. Key human rights considerations relating to return

6.2.1. Exercise (true/false): Human rights considerations in return



Duration: 10 minutes

Aim of the exercise:

To engage learners on the topic of return, and to get a sense of their attitudes and prior knowledge.

How to carry out the exercise:

- ▶ Ask learners to answer YES/TRUE or NO/FALSE to the following statements, using the true/false cards in their course folders.
 1. The principle of non-refoulement prohibits the State from returning a person to a country where they could be subjected to torture or other serious human rights violations.
 2. The return of a family as a group to their country of origin can be decided without an individual examination of each family member.
 3. A forced return can be carried out without any judicial review or other safeguards.



If energy in the room is low, ask learners to stand if TRUE, and to remain seated if FALSE.



Debriefing

Answer to question 1: [YES/TRUE]

- Non-refoulement is addressed in detail in [session 6.2.2](#).

Answer to question 2: [NO/FALSE]

- The right to family unity and the imperative against family separation, in particular for children, requires that the family be kept together and examination of the situation of each family member be taken into account in determining the lawfulness of return.
- However, if there is a risk that an unaccompanied child's rights will be violated on return, family reunification in the country of origin should not be pursued, as it is not in the best interests of the child. See more on return of children in [session 6.3.5](#).

Answer to question 3: [NO/FALSE]

- Authorities must follow due process and ensure procedural safeguards throughout the return process (see [session 6.3.2](#) for details).

6.2.2. Principle of non-refoulement

The principle of non-refoulement constitutes an essential protection under international refugee and human rights law.

- ▶ The *principle of non-refoulement* prevents States from returning any person under their jurisdiction or effective control, when there are substantial grounds for believing that the person would be at risk of being subjected to torture or cruel, inhuman and degrading treatment or punishment, persecution or other serious human rights violations, either in the country to which they are to be transferred or removed (direct refoulement), or in a third country of further transfer (indirect or chain refoulement).

This definition is based on the provisions prohibiting non-refoulement in both international human rights law and international refugee law (see table below).⁵⁸⁰

In this training course, discussions will focus on the protections particular to non-refoulement under international human rights law.⁵⁸¹

Overview of the principle of non-refoulement in international refugee law and in international human rights law

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	Non-refoulement in international refugee law	Non-refoulement in international human rights law
Legal basis	1951 Convention Relating to the Status of Refugees, Article 33.1	<p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3</p> <p>International Convention for the protection of All Persons from Enforced Disappearance, Article 16</p> <p>International Covenant on Civil and Political Rights, Article 7</p> <p>International human rights bodies, regional human rights courts, as well as national courts consider the principle of non-refoulement to be an implicit guarantee stemming from the obligations under human rights law and enshrined also in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and other core international human rights treaties.</p> <p>At the regional level:</p> <p>Inter-American Convention on the Prevention of Torture, Article 13</p> <p>American Convention on Human Rights, Article 22(8)</p>

⁵⁸⁰ Note that international criminal law (in relation to smuggling of migrants and trafficking in persons) covers the principle of non-refoulement in the saving clauses in two protocols: Smuggling of Migrants Protocol, art. 19(1), and Trafficking in Persons Protocol, art. 14(1), and it has most recently been affirmed in the Global Compact for Safe, Orderly and Regular Migration, para. 37 (Objective 21).

⁵⁸¹ OHCHR, The principle of *non-refoulement* under international human rights law. Available at www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

Non-derogable	Not subject to derogation	Not subject to derogation
Personal scope of application	Refugees: regardless of whether a formal determination of refugee status has been made by the destination country, whether they are still in the determination process or intending to apply for asylum. It applies to refugees present on the territory of the State and at the border, including in all situations of large-scale movements.	Everyone: applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, wherever a State exercises jurisdiction or effective control, and even when outside of that State's territory.
Material scope	Prohibits return in any manner whatsoever to any country or place where there is a threat to the life or freedom of the individual on account of race, religion, nationality, membership of a particular social group, or political opinion.	The principle of non-refoulement has been found by international courts and tribunals to apply to the risk of violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, of the right to life, flagrant denial of fair trial, and arbitrary detention. The prohibition of refoulement also applies to other serious human rights violations, including enforced disappearance; threats to liberty and security of person; risks to life, including the absence of necessary medical care; living conditions contrary to human dignity, where a person cannot meet basic needs; various forms of discrimination; risk of indirect/chain refoulement.
Exceptions	Article 33.2 sets out the exceptions for which the guarantee of non-refoulement (Art. 33.1) does not apply, namely, if there are serious reasons for considering that the refugee represents a danger to the security or to the community of the country in which they are in. That is limited only to potential future threats and not to past activities. Article 1F provides for exclusion from refugee protection.	The principle of non-refoulement under international human rights law is characterized by its absolute nature to which no exceptions are permitted.

Under international human rights law, the principle of non-refoulement is absolute and protects anyone who is at risk unequivocally, regardless of their status or whether they are considered a danger to the security of the country.⁵⁸² The principle of non-refoulement is recognized as a principle of customary international law. This means the prohibition of refoulement is applicable to all States and can never be justified, including for any reason related to war, national emergency or maintaining public security.

In practical terms, the principle requires that any migration and border governance measure, including those to address transnational organized crime or counter-terrorism, cannot result in the return of a person to a place where they risk being subjected to torture, persecution or other serious human rights violations.

⁵⁸² Working Group on Arbitrary Detention, A/HRC/39/45, Annex, para. 43.

The prohibition of return to a country where individuals are at risk of torture and other ill-treatment means that States have an obligation not to put a person in a situation where they will or may suffer inhuman or degrading treatment or punishment at the hands of another State or of non-State actors within that State, whether the violations are directly intended or are the indirect consequence of action or inaction.⁵⁸³

The principle of non-refoulement obligates the authorities of deporting States to be aware of and to take into consideration post-return risks. When assessing the risk of refoulement to an individual, the State must consider that the threat or risk may apply to the individual specifically or as a member of a group.⁵⁸⁴ States have reaffirmed that, in line with the principle of non-refoulement, individuals must not be returned at borders.⁵⁸⁵

A number of situations can trigger the protection against refoulement, including where there are substantial grounds to believe that the individual would be at risk of:

- ▶ Torture or cruel, inhuman or degrading treatment or punishment,⁵⁸⁶
 - including inhuman and degrading conditions of detention for migrants;⁵⁸⁷
- ▶ Actual or threat of enforced disappearance;⁵⁸⁸
- ▶ Violation of the right to life, including risk of extrajudicial execution;⁵⁸⁹
- ▶ Serious forms of discrimination, including those relating to gender-based persecution or gender-based violence,⁵⁹⁰
 - including criminalization, torture or other serious human rights violation on the basis of their sexual orientation, gender identity or expression, or other gender-related characteristic;⁵⁹¹
- ▶ Irreparable harm on account of torture, ill-treatment or other serious breaches of human rights obligations;⁵⁹²
- ▶ Serious threat to their liberty and security of person;⁵⁹³
- ▶ Under-age recruitment or participation, directly or indirectly, in hostilities;⁵⁹⁴

⁵⁸³ Special Rapporteur on summary executions, Unlawful death of refugees and migrants, A/72/335, para. 20, citing the European Court of Human Rights, *Soering v. The United Kingdom*, application No. 14038/88, Judgment of 7 July 1989, para. 82.

⁵⁸⁴ Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, paras. 11, 30.

⁵⁸⁵ New York Declaration for Refugees and Migrants, para. 24.

⁵⁸⁶ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 3(1) and (2). The Committee against Torture has provided a longer, though still non-exhaustive, list of examples of human rights situations which may constitute an indication of a risk of torture and which must be given consideration by States in their assessment of the risk of refoulement, see Committee against Torture, general comment No. 4 (2017), para. 29.

⁵⁸⁷ Committee on Migrant Workers, general comment No. 2 (2013), para. 50.

⁵⁸⁸ International Convention for the Protection of All Persons from Enforced Disappearance, art. 16.

⁵⁸⁹ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, art. 5.

⁵⁹⁰ Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014), paras. 23, 37 and paras. 17–23 on non-refoulement, more generally.

⁵⁹¹ Special Rapporteur on torture, A/HRC/31/57, para. 33.

⁵⁹² Human Rights Committee, general comment No. 31 (2004), para. 12; Committee on the Rights of the Child, general comment No. 6 (2005), para. 27.

⁵⁹³ The Human Rights Committee has held that return to a situation where there would be a violation of the right to fair trial is a breach of the principle of non-refoulement, see Human Rights Committee, *A.R.J. v. Australia*, communication No. 692/1996, Views of 11 August 1997, and *Alzery v. Sweden*, communication No. 1416/2005, Views of 10 November 2006.

⁵⁹⁴ Committee on the Rights of the Child, general comment No. 6 (2005), paras. 28, 58.

- ▶ Arbitrary interference with the right to family and private life;⁵⁹⁵
- ▶ Violation of the best interests of the child;⁵⁹⁶
- ▶ Not having access to necessary medical treatment;⁵⁹⁷
- ▶ Living conditions that are contrary to human dignity in which the person is unable to meet their basic needs;⁵⁹⁸
- ▶ Indirect or chain refoulement, where the person is returned to a country that in turn will transfer or remove them to another country where they will face the risk as described above.⁵⁹⁹

The principle of non-refoulement applies to all persons who are under the State's jurisdiction or effective control – including extraterritorially, such as on the high seas or in an immigration control area outside of the territory.

In the specific context of rescue and interception (see [session 3](#)) that take place in territorial waters or on the high seas, and in the disembarkation that follows, the principle of non-refoulement requires that migrants are taken only to places/locations where their safety and human rights are no longer threatened, and that disembarkation does not lead to further transfer to a place/location where they would be at risk of human rights violations.

Principle C.11: States shall ensure that all border governance measures taken at international borders including those aimed at addressing irregular migration and combating transnational organized crime are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions.

Guidelines

4.10: Uphold the principle of non-refoulement in the context of rescue and interception.

4.13: Ensure disembarkation in/to a place of safety.

The prohibition of refoulement also includes the well-established due diligence obligation of States to prevent mistreatment by private actors or by organs of third States operating within their jurisdiction.

Guideline 2.12: Ensure that private actors involved in border management do not undermine human rights, including the principle of non-refoulement.

Pushback and pullback measures



See Glossary for definitions of “pullback” and “pushback”.

- ▶ *Pushback* measures violate the prohibition of collective expulsion (see [session 6.2.3](#) below) and risk violating the principle of non-refoulement, as it is unlikely that any individual assessment has been carried out to ascertain the possible risks of return.

⁵⁹⁵ Committee on Migrant Workers, general comment No. 2 (2013), para. 50; Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005), para. 37 with para. 40.

⁵⁹⁶ Committee on the Rights of the Child, general comment No. 6 (2005), para. 82.

⁵⁹⁷ Committee on Migrant Workers, general comment No. 2 (2013), para. 50.

⁵⁹⁸ Committee on the Rights of the Child, general comment No. 6 (2005), para. 27, which affirms that, under the Convention on the Rights of the Child, which has near universal ratification, States must take into account the access to adequate food and health services that the child will have on return.

⁵⁹⁹ International Covenant on Civil and Political Rights, arts. 6 and 7; Committee on Migrant Workers, general comment No. 2 (2013), para. 50.

Pushback operations may also involve excessive use of force whenever dangerous interception methods are used.

- ▶ *Pullback* measures prevent migrants from exercising their right to leave any country or territory.

Such operations are also likely to breach the prohibition of arbitrary detention and the rights to seek and enjoy asylum, and to benefit from due process safeguards. Moreover, if destination States participate or provide material assistance to pullback operations in which migrants are returned or taken to places/locations where they are likely to face serious human rights violations, including torture, those States would be acting in contravention of the principle of non-refoulement.

Diplomatic assurances



See Glossary for a definition of “diplomatic assurances”.

- ▶ *Diplomatic assurances* should not be used as a loophole to undermine the principle of non-refoulement.⁶⁰⁰

Such bilateral assurances do not relieve States of their obligations to carry out an adequate risk assessment with regard to return. Diplomatic assurances that torture will not be used against a returnee are of questionable value, given that there is already an absolute prohibition on torture. Therefore, such an assurance should never be used. Experts have questioned the reliability of guarantees/assurances that are provided in that regard.

Guideline 10.5: Ensure that cooperation agreements do not violate human rights standards, including the principle of non-refoulement.



The principle of non-refoulement and the prohibition of collective expulsion are key considerations in interception and rescue (see session 3).



For more on State jurisdiction and effective control, see session 1.1.5.

6.2.3. Prohibition of collective expulsion

- ▶ *Collective expulsions* are prohibited as a principle of general international law.⁶⁰¹

Such expulsions do not concern solely the removal of a large number of people at the same time, but the return of migrants without reasonable and objective examination of the individual circumstances of each person prior to removal.

⁶⁰⁰ Committee against Torture, general comment No. 4 (2017), para. 20.

⁶⁰¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(1); Special Rapporteur on migrants, A/HRC/7/12, para. 49 (fn. 36); OHCHR, “Expulsion of aliens in international human rights law”, Discussion paper, September 2006; Report of the International Law Commission, Fifty-ninth session (7 May–5 June and 9 July–10 August 2007), A/62/10, para. 239; Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens, para. 26. See also OHCHR, Intervener brief in the case of *N.D. and N.T. v. Spain*, European Court of Human Rights, Application Nos. 8675/15 and 8697/15, 9 October 2015, para. 19.

In particular, States must consider the full range of circumstances that may preclude the expulsion of each individual, including the risk of refoulement. Relevant circumstances include, but are not limited to the following, nor are the circumstances mutually exclusive. An individual may:

- (a) Face the risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment, or other serious human rights violations;
- (b) Face a threat to his or her life or freedom on account of race, religion, nationality, ethnicity, gender, sexual orientation, political opinion, or other prohibited discriminatory grounds;
- (c) Be a child, in which case the best interests of the child shall be the primary consideration, taking precedence over any other consideration. Unaccompanied or separated children should benefit from specific gender-responsive protection that would preclude return;
- (d) Be a victim of trafficking and therefore subject to special protection under international and national law, and entitled to temporary stay or legal status;
- (e) Be a smuggled person and entitled to temporary stay or legal status;
- (f) Be fleeing armed conflict or endemic violence and may thus claim temporary stay or legal status;
- (g) Under the national law of the State considering the expulsion, have a direct, derived or contingent right or privilege of residence, or other regular status that would permit them to stay;
- (h) Under national or international law, enjoy protection against return on the basis of the right to family life;
- (i) Be a stateless person and entitled to temporary stay or legal status;
- (j) Be medically unfit to travel and have the right to urgent medical care, specific human rights assistance or protection owing to a particular risk that they face.

Guidelines

4.5: Discharge the duty to avoid dangerous interception methods.

9.14: Ensure individual assessments in accordance with the prohibition of collective expulsion.

While the principle of non-refoulement (see [session 6.2.2](#) above) protects individuals from the risk of specific human rights violations upon return, the prohibition of collective expulsion is primarily a due process right to ensure that an individual assessment is carried out with due diligence and in good faith, including to determine the risk of refoulement to all migrants.

- The focus must be on the *due process requirement of an individual assessment*, including any appeal, of each individual migrant.

The absence of a reasonable and objective examination of each person's individual situation is what makes the expulsion a collective activity and therefore arbitrary.⁶⁰²

The prohibition of arbitrary or collective expulsion should apply in any area over which the State exercises jurisdiction or effective control, including areas outside the territory of the expelling State, border areas and on the high seas.

⁶⁰² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(1).

Readmission agreements

Guideline 9.21: Ensure independent monitoring of return processes.

- ▶ *Readmission agreements* are bilateral agreements that allow States to return migrants to a country that the authorities deem to be safe – not necessarily the migrant’s country of origin –, which, in turn, is obliged to accept (readmit) the returnees.

Sometimes States establish readmission agreements that specify the obligation of States to readmit their own nationals, and may also include conditions to readmit citizens of third countries. Such agreements are put in place to overcome practical and procedural obstacles to returning migrants, particularly when the migrants do not have identification documents. Those agreements do not always incorporate the human rights of migrants and are often not publicly accessible.⁶⁰³ There is concern that those agreements may function as a fast-track system for return, without an adequate individual examination of each migrants’ situation, without giving them the opportunity to access a lawyer and without procedural safeguards. In the absence of an individual assessment for each migrant, returns carried out under such readmission agreements amount to collective expulsions that are incompatible with the procedural requirements of the prohibition of refoulement.

Bilateral or multilateral readmission agreements are of particular concern when they foresee the return of migrants who do not hold the nationality of the country of return, or who may never have entered that country. In such instances, the risks of indirect or chain refoulement are particularly high.

Furthermore, readmission agreements usually involve cooperation with consular staff for identifying and issuing papers to their nationals. That may pose particular risks to certain individuals, such as asylum seekers and refugees, as well as irregular migrants and LGBTI individuals.

If used, readmission or other any other form of bilateral or multilateral agreement should be negotiated only with countries of origin and should not obligate signatory countries to take third-country nationals. Such agreements should ensure full individual assessments are carried out, be public and integrate rigorous human rights and gender analysis, due diligence, monitoring, accountability and oversight mechanisms.

In the context of maritime movement, agreements between States must not amount to handover or other transfer of persons, including on the high seas. Dangerous interception measures that amount to arbitrary or collective expulsions must be avoided.

6.2.4. Voluntary return

From a human rights perspective, *voluntary return* should be promoted in preference to forced return.

Returns can be considered “voluntary” only if migrants are fully and meaningfully informed of their choices and their consent is given free of any coercion. Violence or ill-treatment, actual or implied threat of prolonged, indefinite or arbitrary detention, or detention in inadequate conditions are all forms of coercion.

⁶⁰³ In the Global Compact for Safe, Orderly and Regular Migration (para. 37(a) (Objective 21)), States committed to “develop and implement bilateral, regional and multilateral cooperation frameworks and agreements, including readmission agreements, ensuring that return and readmission of migrants to their own country is safe, dignified and in full compliance with international human rights law, including the rights of the child, by determining clear and mutually agreed procedures that uphold procedural safeguards, guarantee individual assessments and legal certainty, and by ensuring that they also include provisions that facilitate sustainable reintegration”..

Free and informed consent to return

Guidelines 9.2 and 9.3: Promote voluntary return with free and informed consent.

Care should be taken in the context of assisted voluntary return programmes to ensure that they fulfil the requirements of a fully informed decision, free of coercion, and backed by the availability of sufficient valid alternatives.⁶⁰⁴ Some migrants request assisted voluntary return out of despair, including to avoid forced return; to avoid re-entry bans; to end being held in detention, possibly indefinitely; to end slow and complicated family reunification and asylum procedures; to avoid family separation; to leave poor reception conditions; to avoid destitution or the withdrawal of social support. It is of concern that individuals opting for voluntary return under those circumstances forgo their right to an individual assessment.

In order for migrants to consent to voluntary return, they must be provided with all necessary and relevant information, and be fully and meaningfully informed about the choice that have to make. The information provided should be up to date, accurate and objective, and contain details concerning the country and circumstances to which the individual will be returning. The information should be provided in good time to allow the migrant to fully consider their options before informing the authorities about their decision. It is not enough that the information is on the form that migrants have to sign when they consent to be returned; that is not giving free and informed consent.

Gender dimensions should also be considered when enabling migrants to give their free and informed consent for voluntary return. For example, it is not always possible for women to make an autonomous, independent, voluntary decision to return when the men in their households or wider communities hold the decision-making power. In some situations, women may face pressure to decide on a voluntary return, as the authorities expect that they will take their children with them when they return.

Children may be at particular risk of coercion in the decision to return given that their views are often sidelined, in spite of an obligation to allow them to be heard in all decisions that affect them.⁶⁰⁵ Girls in particular may not be taken seriously owing to gender stereotypes and discrimination, or they may be inhibited from speaking up as they are typically socialized to cooperate and not to challenge adults. Where child migrants are granted only temporary status, that may end when they turn 18, and they may be pressured to consent to a return programme.

Ideally, a fully free and informed decision is backed by the availability of sufficient valid alternatives, such as temporary work, study or humanitarian permits, opportunities for regularization or citizenship.

Although many returns are characterized as voluntary, including through assisted voluntary return programmes,⁶⁰⁶ the common feature of many such returns is the lack of genuine, fully informed and valid consent, which indicate the lack of genuine voluntariness.⁶⁰⁷ Assisted voluntary return programmes to States that are not safe, and in which migrants may face violations of their fundamental human rights, may be in violation of the principle of non-refoulement.

⁶⁰⁴ Global Compact for Safe, Orderly and Regular Migration, para. 37(b) (Objective 21): “Promote gender-responsive and child-sensitive return and reintegration programmes that may include legal, social and financial support, guaranteeing that all returns in the context of such voluntary programmes effectively take place on the basis of the migrant’s free, prior and informed consent, and that returning migrants are assisted in their reintegration process through effective partnerships, including to avoid their becoming displaced in the country of origin upon return”.

⁶⁰⁵ Convention on the Rights of the Child, art. 12.

⁶⁰⁶ According to the International Organization for Migration (IOM) which administers many such programmes, “assisted voluntary return” is the “administrative, logistical, financial and reintegration support to rejected asylum seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin”, available at www.iom.int/key-migration-terms.

⁶⁰⁷ Special Rapporteur on migrants, A/HRC/38/41, 4 May 2018, para. 17.

6.2.5. Sustainable return

Guideline 9.12: Ensure return only to a safe place in the country of return, where the migrant's human rights can be realized.

The “rush to return” that is increasingly central to migration policies has led to returns that are often unsustainable for the migrants concerned. That, in turn, can lead not only to further abuse and exploitation, but also to more cycles of insecure and irregular migration, with human rights implications for the people on the move.

Border authorities should take measures, in cooperation with their counterparts in the country of return, to ensure the returns process is carried out in safe conditions and with dignity. Returns should further be implemented only to safe places in the country of return, including ensuring that the returning individuals and their families are protected from reprisals by and retaliation from criminal groups, communities, families and other actors, including the authorities of the country of return. Migrants should not be returned to places where they risk being re-trafficked.⁶⁰⁸

- ▶ The *sustainability of a return must be considered from the perspective of the migrant who is to be returned.*

States can increase the sustainability of a return by mitigating the risks that returned migrants face in the countries of origin/return through implementing all possible measures that could enable them to enjoy their human rights, including the right to be free from discrimination and the rights to health care, an adequate standard of living, decent work, education, justice and social protection, including by establishing mechanisms for the portability of social security entitlements and earned benefits.⁶⁰⁹ Migrants should not be returned to areas that are experiencing extreme environmental degradation or harmful slow-onset climate events.

In the Global Compact for Migration, States have committed to “create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable.”⁶¹⁰ The Global Compact aims to ensure migration policies are human rights based and gender responsive, which would require reintegration programmes that safeguard against indirect as well as direct discrimination: for example, avoiding microcredit initiatives or financial incentives for heads of households, or work opportunities that, in practice, benefit only men returnees or offer only gendered labour options.

It is important to prepare a plan for sustainable reintegration and continued evaluation, especially when children are being returned. Long-term, independent and gender-responsive mechanisms need to be put in place to monitor the risk and occurrence of human right violations after migrants are returned.⁶¹¹

Authorities must take care to ensure that they do not share sensitive personal information with the authorities of countries of origin/return in order to protect the life, security and privacy of returned migrants and their families, for example, identity documentation of migrants in vulnerable situations or asylum seekers, criminal records, health details, or identification of sexual orientation.

⁶⁰⁸ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 (see E/2002/68/Add.1), Guideline 1.6.

⁶⁰⁹ Global Compact for Safe, Orderly and Regular Migration, para. 38 (Objective 22).

⁶¹⁰ *Ibid.*, para. 37 chapeau (Objective 21).

⁶¹¹ Special Rapporteur on the human rights of migrants, A/HRC/41/38, para. 76.

6.3. Practical steps to protect human rights in the return process

6.3.1. Exercise (case studies): Steps to protect human rights in return



Duration: 30 minutes
(group work: 10 min.; debriefing: 20 min. (10 min. per case))

Aim of the exercise:

To introduce learners to experiences that place migrants in situations of vulnerability, particularly in the context of return and to encourage learners to identify and reflect on human rights and gender-specific concerns that can lead to such situations in returns.



These cases are a continuation of the stories of Kai and Sammy (case A), and Amodita and Ichanga (case B) in sessions 1.3.2 (at the border) and 5.4.1 (detention).

Building on the case study exercises in session 1 and 5, this activity will also encourage learners to reflect on ways to mitigate similar risks in their own work.

How to carry out the exercise:

- ▶ Divide learners into the same groups as for the case studies in sessions 1 and 5.



Distribute the cases making sure that the groups get the same case that they worked on in the previous sessions.

- ▶ Ask learners to read through and briefly discuss their cases.
- ▶ Invite the groups to nominate a rapporteur to write their responses to the following questions on the flip charts and to represent them in plenary:
 1. Focusing on human rights issues relating to return, discuss what went wrong in each case.
 2. What considerations should have been taken into account and what measures should have been taken to ensure the return decision and process was human-rights compliant.
 3. What gender-specific concerns can you identify in the case?



Debriefing

- ▶ Briefly summarize each case.
- ▶ First, discuss case A: ask one of the groups that worked on case A to give an example of one human rights issue and/or one gender-specific concern they identified. Then, ask the other groups that worked on case A to add examples, until all the groups have contributed (see table below as a guide).
- ▶ Then, ask the groups that worked on case A to give examples of considerations that should have been taken into account, and measures that should have been taken to ensure the return decision and process was human-rights compliant. The trainer may ask if there are any concerns not yet mentioned and discuss them.
- ▶ Next, repeat the debriefing for case B.



If there are two trainers and enough space in the room for the groups to work concurrently, the debriefing for each case could be run in parallel. However, as the cases raise different human rights issues, it would be preferable for learners to participate in the debriefing for both cases.

CASE A (Return)

Kai, 17 years old, and Sammy, 22 years old

Analysis of case A

Story summary

Kai: One week ago, Sammy and I got given a piece of paper that said we will be sent back to our country.

It had no further information about the reasons why we could not stay; when we would be sent back; or if there was a way to prevent our return.

We were very surprised because we never saw the judge again, so we never had the chance to explain our story.

Even if the treatment and conditions here in detention have been awful, and we do not feel safe, I am more terrified about what might happen to us once we are back home.

In addition to the gangs, I'm also afraid that the people back home will think I committed a crime – often, people who get deported are criminals.

My father is desperate; he said he would try to get some help through a lawyer.

But a lawyer is expensive and we may be running out of time as the guards said we could be sent back anytime.

This morning, an official told us we should gather our belongings, as we would be returned in the afternoon.

I insisted that I could not return; that I was 17 years old, and I had no family at home.

Issues/concerns

- ▶ *Lack of due process, collective expulsion, risk of refoulement* → Kai and Sammy were given a removal order in writing and in a language they understand, but it does not contain the reasons for their expulsion: they have not been interviewed; they were not brought before a judge, nor informed how they could challenge the return decision. These are failings of the due process guarantees owed to them under the prohibition of collective expulsion and the right to an effective remedy. In addition, they have concerns about their safety if they are returned, which may constitute a risk of refoulement; each of them should have had an individual assessment to determine if they needed protection and were at risk of violations.
- ▶ *Gender stereotype, stigma* → Kai is concerned people will think they are criminals because they have been deported: returned migrants are often subjected to stigma, usually based on stereotyped assumptions, which can make it difficult for them to reintegrate into their home community/society, including difficulties in finding jobs, housing and so on. That would render the return unsustainable.
- ▶ *Lack of due process, right to information on procedural safeguards, access to legal aid/counsel* → A lawyer is expensive; no effective access to legal aid or counsel; no information on how to challenge the return decision.
- ▶ *Right to information about the return process* → They are told they will be returned that day: no prior notice, no time to find out options or to prepare; lack of reliable information can be psychologically traumatizing, especially as both Kai and Sammy have reasons to fear for their safety and well-being upon return.
- ▶ *Return of a child, child's best interests* → Family reunification should take place only when the authorities are satisfied that the child will be returned safely to their family or appropriate care-givers; various procedural safeguards must be followed to ensure the child's rights are protected in the return process, starting with formal determination of the child's best interests,

<p>We also tried to explain that it was <u>dangerous for Sammy to return</u>, but as there were so many people in the cell, we did not feel safe to explain why.</p> <p>The official looked surprised. He then left, but came back shortly after with a woman who said she was a <u>child protection officer</u> and that she wanted to learn more about our case.</p>	<p>and assurances regarding other rights. (see 6.3.5 below on child returnees).</p> <ul style="list-style-type: none"> ▶ <i>Return of a gay man, risk of refolement</i> → No information about the situation for gay men in Sammy’s country of origin, but he and Kai clearly fear that he will not be safe due to his sexual orientation, if returned; if there is a risk of serious human rights violations or persecution, returning Sammy would be a breach of the principle of non-refoulement. ▶ <i>Child protection officer involvement</i> → Correct action by officer and positive development, although the child protection officer should have been involved from the moment of apprehension.
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<p>CASE B (Return)</p> <p>Amodita, 20 years old, and Ichanga, 23 years old</p> <p><i>Analysis of case B</i></p>	
<p>Story summary</p> <p><i>Amodita:</i> I am back in the holding facility, and yesterday, an official came to tell me that they <u>could drop the criminal charges against me if I agreed to return voluntarily to my country.</u></p> <p>The official explained that I could <u>sign the agreement and be returned together with others by bus.</u></p> <p>I told the official that was impossible, because <u>I had nothing to return to</u>, no land, no job, no proper health care, and my family relies on me for support, especially since my father is so ill.</p> <p>I was thinking that <u>everyone will see me as a failure</u> – I did not get a job, I lost my baby, and they will say I am a woman with loose morals, as I will be returning without my husband.</p> <p>I don’t even know where Ichanga is, and what has happened to him.</p> <p>No one has had any news from him, and I am very worried.</p> <p>I cannot go back!</p>	<p>Issues/concerns</p> <ul style="list-style-type: none"> ▶ <i>Coercion, lack of genuine voluntariness</i> → Amodita is given the option of being exempted from (questionable) prosecution if she agrees to voluntary return. ▶ <i>Possible lack of individual assessment, lack of due process</i> → Amodita can sign an agreement and be returned: there is no information if an individual assessment of her situation was carried out; however, she was not told how to appeal the decision; has not been given information on how to pursue a remedy for treatment in detention. ▶ <i>Gender sensitivity, right to health</i> → Amodita just miscarried; has had no time to recover; officer proposing return by bus. ▶ <i>Unsustainable return</i> → Amodita feels she has nothing to return to: doubtful that return will be sustainable given all that she has been through and that there is no improvement in the situation that caused her and her husband to migrate from their country of origin (i.e., food insecurity with decreasing harvests, global warming - drought; no opportunities for work to support family). ▶ <i>Gender stereotype, stigma</i> → Amodita fears the judgment of her family and community if returned: common for migrants returned without earnings, particularly affects women who risk being judged for stepping outside gendered norms; they may think her husband left her and she is a loose woman; blame her for her miscarriage: sustainability of return further undermined.
<p><i>Ichanga:</i> Yesterday, a man claiming to work for the embassy of my country came to see me.</p>	<ul style="list-style-type: none"> ▶ <i>Right to privacy</i> → Ichanga was visited by a consular official: no information whether he was asked if he wanted the embassy to be informed or to be visited by consular staff. If arranged

He told me that he could help me go back to my country.

I was worried, however, that if I returned, I would be put in prison and tortured.

I have heard of cases where people accused of supporting LIBERTA or other terrorist groups have been severely punished, and sometimes their families never heard from them again.

I told the man I wanted to speak to a judge, but he said that was not his job.

This afternoon some men in military uniforms came to my cell, handcuffed me and brought me to the airport, where I was to be put on the next flight back to my country.

When I heard this, I started screaming because I did not want to be returned, especially without my wife.

Two officials then pushed me to the ground and started punching me.

without his informed consent, it would constitute a violation of his privacy, could also amount to coercion to return.

- ▶ *Risk of refoulement; fear of torture, incommunicado detention, enforced disappearance* → Ichangea fears that if returned he will be imprisoned, tortured, disappeared: State has a duty to assess risk of refoulement. The principle of non-refoulement under international human rights law applies without exception, even if an individual is suspected or found to have committed terrorist acts. There have been documented reports of migrants who have disappeared after being arrested, deprived of their liberty and summarily returned under unofficial arrangements or without due process.⁶¹²
- ▶ *No access to a judicial hearing, lack of due process* → Request to see a judge was not facilitated; was removed a day later without prior notice: not given written notice of removal or time to appeal the removal order; consular official should have ensured that the detaining authorities followed due process.
- ▶ *Return process not human rights-based, nor safe and dignified, use of disproportionate force* → While it may be acceptable in exceptional cases to use restraints such as handcuffs during transportation, they should be used as a last resort, limited to the least extent necessary, and removed at the earliest opportunity. Ichangea protested verbally but did not resist removal; he was pushed to the ground and punched: it is neither necessary nor proportionate to push a handcuffed man who cannot defend himself to ground and punch him because he does not want to do something; such action carries serious risk of harm/injury to the individual in restraints, including the risk of death.

6.3.2. Procedural safeguards for returnees

(a) Individual assessment

An assessment of possible risks in each individual case is the critical safeguard in returns. It is required as part of the prohibition of arbitrary or collective expulsion and serves to protect against the risk of refoulement and to facilitate voluntary and sustainable returns. The State from which the migrant is being returned should undertake a thorough assessment of all available information.⁶¹³

The assessment should be conducted in an intersectional manner, giving serious consideration to the different lived realities of potential returnees, including ensuring attention to age- and

⁶¹² Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, A/HRC/36/39/Add.2, paras. 25, 31.

⁶¹³ International Covenant on Civil and Political Rights, art. 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(1).

gender-specific concerns. It is not an assessment of generalized risk, but of risks specific to that individual migrant, including with respect to any situational and/or embodied vulnerabilities. In order for the assessment to be effective, it must take into account situations of vulnerability, in particular pre-existing psychological trauma that may affect a person's ability to effectively engage with standard procedures, as well as the specific views, experiences, challenges and needs of the potential returnee.

Late disclosure during a return procedure by the migrant of serious human rights violations should not lead to an adverse judgment on their credibility, and officials should ensure they are not returned before a reassessment of their case. Officials need to recognize the factors that make it difficult for migrants to be forthcoming with information, including fear, stigma and shame of experiences such as of sexual and gender-based violence – especially in the context of the added trauma of the return process – and take that into account.

- ▶ *Ensure that individuals are returned only to places/countries that are safe for them.*

Returning States need to assess any discriminatory practices, laws and policies in the country of origin or return before determining whether a migrant can be returned. For example, for women and girls, that would include assessment of the risk of gender-based violence, including sexual violence and exploitation; harmful practices such as child and forced marriage, female genital mutilation; so-called honour killings; denial of safe abortion that may amount to cruel, inhuman and degrading treatment; assumption of having been a victim of sexual and gender-based violence during their initial migration, which could lead to stigmatization, ostracism, attack by family or community; and so on.

- ▶ *Allow the individual to choose the State to which they want to be returned, to the extent possible.*
- ▶ *Do not return individuals to situations of destitution or inhospitable conditions.*

The officials determining whether conditions are suitable for a human rights-based return need to understand that return can create or exacerbate a situation of vulnerability for some migrants, for example, if they are perceived as being a criminal for being returned, or failing to provide for the family because their migration is cut short by the return. That is especially the case where migrants contracted debt to cover the costs of the migration.

Returns can create stigma for the returnee, particularly when their migration is considered to have failed. Men and women migrants may face hostility from their family and community if they return home empty-handed, or may find themselves in even more in debt than when they left. Often, stigma is linked to gender norms and roles; for example, in some cultures women migrants who are returned are assumed to have transgressed local gender norms. Even or especially when women have been, or are assumed to have been, subjected to sexual and gender-based violence during their migration, they may face discrimination and social stigma upon return, which may result in re-victimization in the form of psychological harm, or ostracism by community and family. Men may fear stigma on return, for example, when their migration was to fulfil the gendered social role of being the main income provider for the family through remittances. LGBTI migrants who are returned may face severe stigma and discrimination from the community or family, if their sexual orientation or gender identity is revealed through the return process. Thus, it is important that, in assessing whether it is safe to return an individual, the States involved in carrying out the return prioritize the protection of migrant's rights, and confidentiality of all information in their cooperation with the authorities of the country of return.

Migrants may be returned to a country that is not their country of origin. They may be sent back to the last country through which they transited or even to a country that they have never entered, but which is proximate to or in the same region as their country of origin. Such returns to so-called "third countries" can be undertaken for political expediency (e.g., the returning country has a readmission agreement with the third country) or for administrative convenience (e.g., when all migrants from a particular region, but from different countries, are returned together on one flight) and often take place without adequate procedural safeguards, including individual assessments and reviews of possible refoulement risks. It cannot be assumed that countries are a priori safe for everyone and States must maintain their obligations of non-refoulement. A

human rights-based return process would allow migrants to choose the country to which they are returned, subject to the agreement of the authorities of that particular country.

Guidelines 9.10 and 9.11: Issue appropriate identification documents and protect the confidentiality of information.

Travel documents that are incomplete or not recognized can have negative consequences for migrants who have been returned. Emergency travel documents issued by the deporting State do not provide guarantees for migrants' access to national identification documents, a situation that entails the risk of statelessness.⁶¹⁴

Trans migrants should be issued with documents that affirm their self-determined gender identity, with full respect for the right to privacy and protection of personal data.

(b) Right to information

Guidelines 9.4 and 9.5: Provide appropriate removal orders and ensure information on how to challenge the order.

Border officials should only carry out a return pursuant to removal orders that are issued in writing and in accessible formats by the appropriate authority to ensure due process of the law and non-discriminatory access to justice. The removal order should list the reasons for the decision,⁶¹⁵ and provide adequate justification for the removal, in light of the law and international human rights standards, including the prohibition of arbitrary or collective expulsion and principles of non-refoulement.

(c) Right to an effective remedy

Guidelines 9.6 and 9.22: Ensure effective remedy.

States must inform the migrant concerned of the intended deportation in a timely manner and enable them to appear in person before a competent, impartial and independent judicial or administrative body in order to challenge the removal decision and to exercise their right to make submissions against the return. The proceedings should be individualized, gender-responsive, prompt and transparent with supporting legal advice, legal aid, counselling, interpretation services, if necessary, and all other essential procedural safeguards, including the suspensive effect of an appeal.⁶¹⁶ States have affirmed their commitment to "facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy."⁶¹⁷

The migrant should also have time, without prejudice to the implementation of the removal order, to seek entry into another State as an alternative to return to their country of origin or of habitual residence.⁶¹⁸

⁶¹⁴ Global Compact for Safe, Orderly and Regular Migration, paras. 37(c) and (d) (Objective 21).

⁶¹⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(3), which provides that "exceptional circumstances on account of national security" is the only possible reason not to explain the decision to return the migrant.

⁶¹⁶ International Covenant on Civil and Political Rights, art. 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(4).

⁶¹⁷ Global Compact for Safe, Orderly and Regular Migration, paras. 37 chapeau and (e) (Objective 21).

⁶¹⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(7).

Given the nature of the consequences of refoulement, an effective remedy in the implementation of the principle of non-refoulement would be suitable recourse to preclude, in practice and without obstacles of any nature, the deportation of the migrant/complainant whenever there is a plausible ground to believe that the individual would be subjected to torture and other serious human rights violations upon return.⁶¹⁹ If the migrant wins the appeal against being returned, they should have the right to seek compensation, and the earlier decision to return them should not be used to prevent them from re-entering the State concerned.⁶²⁰

When migrants are returned, they should have a reasonable opportunity before or after departure to be able to secure any owed wages or other entitlements, regardless of the outcome of the appeal of the return order.⁶²¹



See more on the legal basis of the right to an effective remedy in session 1.3.3(m).

6.3.3. Preparing for the return

Guidelines 9.8, 9.16 and 9.22: Ensure rights-based pre-removal detention, if any; and appropriate staff for return procedures.

Authorities need to ensure sufficient personnel with the competent authority to ensure the individual is returned safely and with dignity. Staff mandated to escort migrants during return proceedings must have been selected, assessed and training for the role, including in relation to the gender-specific needs and human rights of women and girls, and measures necessary when conducting returns of migrants in vulnerable situations. Staff should also be trained with regard to avoiding excessive use of force (see [session 3.2](#)). In order to ensure transparency and accountability, officials should be identifiable with name tags and/or personnel numbers.

Ensure the presence of at least one person of the same gender as the individual being returned throughout the journey. Child protection officers or an appointed guardian must accompany children throughout the return journey, if they are not travelling with a parent. At least one member of the team accompanying the migrant(s) through the return process must be able to speak a language that the migrant understands.

Authorities should inform migrants of the date on which the return will take place and of all applicable procedures well in advance. That is separate from the notice containing information required to enable the migrant to exercise their due process rights to challenge the removal order and pursue an effective remedy, and should be provided only once those processes are completed.

Any pre-removal detention must be in accordance with international human rights standards (see [session 5](#)).

Border authorities should cooperate with independent monitoring of pre-removal and return processes, including on-board monitoring of return flights and other transportation methods, and, when applicable, the reception of migrants in receiving States to ensure that they are carried out in accordance with international human rights law and standards, including with regard to the prevention of torture, ill-treatment and refoulement, and are child, gender and disability responsive.

⁶¹⁹ Committee against Torture, general comment No. 4 (2017), para. 3.

⁶²⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22(5).

⁶²¹ *Ibid.*, arts. 22(6) and (9).

6.3.4. Implementing return procedures

Guideline 9.15: Interrupt the return if the human rights of the migrant are compromised or their safety will be endangered.

Return procedures should not be undertaken at all costs; States have a legal obligation to pay special attention to migrants with particular human rights needs, such as persons with medical needs. All returnees should be provided with medical documentation and an adequate supply of medication in order to ensure that any ongoing treatment is not interrupted. Migrants should undergo an individual medical screening by a qualified professional before deportation. The return process, including any pre-removal detention, and the migrant's fears regarding the situation they may face upon return, can cause severe anxiety and mental health issues, including post-traumatic stress disorder and the risk of suicide and self-harm. The return should be carried out only if the migrant's physical or mental health can guarantee a safe and dignified return.

The return process should be interrupted at any point if the rights or safety of the individual or the official would be endangered if it is continued.

Guidelines 9.17, 9.18, 9.19 and 9.20: Ensure that migrants are medically fit to travel; that any use of force is in line with international human rights law; and that staff are adequately trained.

Force should be used only as a last resort, and its use must be lawful, strictly necessary and proportionate. Measures or treatment that are not medically justified (e.g., tranquilizers, sedatives, or other medication) should never be used, nor any means or coercion, restraint or force that is likely to:

- ▶ obstruct the individual's nose or mouth; or
- ▶ force the individual into positions that risk asphyxiating them.



See session 3.2 for further discussion of the human rights standards regarding the use of force.

Border officials should avoid using force as much as possible; when the use of force is deemed absolutely necessary, the minimum level of force should be applied and it should always be proportionate to the threat posed in relation to achieving the law enforcement objective. The level of the force should be gradually escalated only when necessary, and de-escalation should be chosen whenever possible.

Since returns may involve many hours of travel, migrants should have access to food and water and bathroom facilities, and their physical movements should not be unnecessarily constrained, for example, by the use of restraints. Long return processes may present challenges for trans migrants to maintain their gender presentation. Officials should ensure respect for the dignity and privacy of all migrants in their custody.

6.3.5. Child returnees

- ▶ *Children should be returned only when it has been determined that it is in the best interests of the child.*

Determination of the child's best interests should be an adequate and participatory process that take into consideration family unity, the child's survival and development, among other

factors. The principle of the child's best interests should always take precedence over migration management objectives or other administrative considerations.⁶²²

A formal best interests determination procedure should be conducted, for which the following safeguards should apply:

- ▶ A formal and multidisciplinary procedure by actors independent of the immigration authorities, including a meaningful participation of authorities responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, as well as the child;
- ▶ The right of the child to be heard and to have competent and independent legal representation;
- ▶ Fair and equal assessment of all solutions/options that are available to the individual child;
- ▶ A gender analysis of the experiences and situations of the individual child, and the human rights concerns upon return, including any harmful gender or other stereotypes, and taking into account specific situations and risks for LGBTI children:
 - Full consideration of factors affecting the child's development and survival, and whether the child will return to safe and adequate conditions, including the socioeconomic conditions in the child's country of origin;
 - Consideration of the family environment and whether the child will be provided with proper care and custody;
- ▶ It is particularly vital that return is used only as a protection measure and not as a punitive one, and that the child understands that;
- ▶ If the return of a child has been determined to be in their best interests, ensure that prior to the return:
 - An appropriate family or guardian has been identified in the country of return;
 - Reception and care arrangements for the child are clear: children should never be handed over to border authorities of receiving countries if it is unclear how they will be cared for;
 - A parent, legal guardian or child protection officer will accompany the child throughout the return process.

In all cases, the return of children must be conducted in a safe, child-appropriate and gender-sensitive manner.

Principle A.6: The best interests of the child shall be a primary consideration applicable to all children who come under the State's jurisdiction at international borders, regardless of their migration status or that of their parents. States shall ensure that children in the context of migration are treated first and foremost as children and ensure that the principle of the child's best interests takes precedence over migration management objectives or other administrative considerations.

Guidelines 9.7 and 9.13: Ensure clear reception and care arrangements; identification of an appropriate family or guardian; never separate families in the return process.

Families should not be separated in the return process, for example, one or both parents should not be returned without a child owing to violations of immigration laws. The administrative consideration of returning a parent without the child does not outweigh the right to family life

⁶²² Global Compact for Safe, Orderly and Regular Migration, para. 37(g) (Objective 21); Joint general comment No. 3 (2017) of the Committee on Migrant Workers / No. 22 (2017) of the Committee on the Rights of the Child, para. 33.

and the impact on the life and development of the child. Status regularization can be a solution for migrants in an irregular situation who are residing with their children, particularly when the children was born or has lived in the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interests.

Similarly, family reunification in the country of origin may not be in the best interests of the child in all circumstances, and should therefore not be pursued when there is a "reasonable" risk that return would lead to the violation of the fundamental human rights of the child. In such situations, States should apply best interests determination procedures in finalizing family reunification and/or regularize the parents' status on the basis of their children's best interests. The survival of the child is of paramount importance and a precondition for the enjoyment of all other rights.⁶²³

Some States prohibit the return of unaccompanied children, requiring non-custodial alternatives to be arranged to facilitate the integration of the child in countries of residence – either temporarily or permanently.

In order to contribute to a sustainable return, States should put in place adequate measures to recognize the child's education by acknowledging school certificates and/or issuing new certification based on the child's capacities and capabilities, so as to minimize disruption of their education and avoid creating stigmatization or penalization. That is equally applicable to countries of origin or third countries in the case of return.

6.3.6. When return is not possible

There should be appropriate administrative and legislative mechanisms to ensure legal status to individuals who cannot return, such as granting a temporary or fixed-term residence permit or other specific visa. This may be relevant in cases where the return of an individual is not practically possible, including for health or any other reasons. In situations in which the return cannot be effected owing to the risk posed to the individual or, in some cases, on compassionate grounds,⁶²⁴ States can issue a continuous residence permit, or may also grant a work permit.⁶²⁵ In all cases, migrants should not be left without secure legal status, even if that status is temporary, and care should be taken to ensure that the permission to remain upholds their human rights, such as the right to basic social security if they would otherwise be destitute.

► *Indefinite detention is not an option, and alternative measures should be explored.*

Irregular migrants, including rejected asylum seekers, who cannot be returned to their countries of origin for a range of possible reasons, risk being held in detention for protracted periods or even indefinitely. In cases in which a removal order cannot be implemented for reasons beyond the detained migrant's control, they should be released in order to avoid potentially prolonged or indefinite detention, which is arbitrary and therefore prohibited.

Sustainable solutions for unaccompanied and separated children, and children with their families include integration in the country of destination/residence – either temporarily or permanently – according to each child's individual circumstances, or resettlement in a third country, for example, based on family reunification grounds, or other solution that could be identified on a case-by-case basis, by referring to existing cooperation mechanisms.⁶²⁶ Human rights guidance in the matter includes the recommendation that States provide avenues for status regularization

⁶²³ Committee on the Rights of the Child, general comment No. 6 (2005), para. 82; Joint general comment No. 4 (2017) of the Committee on Migrant Workers / No. 23 of the Committee on the Rights of the Child, para. 35.

⁶²⁴ For example, the circumstances that the individual would face in their country of origin or the vulnerable situation of the individual.

⁶²⁵ DLA Piper and OHCHR, "Admission and stay based on human rights and humanitarian grounds: a mapping of national practice", December 2018. Available at www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf.

⁶²⁶ For example, the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; Joint general comment No. 3 (2017) of the Committee on Migrant Workers / No. 22 (2017) of the Committee on the Rights of the Child, para. 33.

for migrants in an irregular situation who reside with their children, particularly when a child was born or has lived in the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interests.



See session 5 on arbitrary detention.



Distribute the handout containing steps for a human rights-based return.

Distribute session 6 summary.

Session 7: Wrap-up of training course

Content	<p>This session will:</p> <ul style="list-style-type: none"> ▶ Recap the main learning points/messages of the training course
Learning objectives	<p>After this session, learners will be able to:</p> <ul style="list-style-type: none"> ▶ Describe the main points of a human rights-based approach to border security and management ▶ Gather ideas as to how they may be able to implement what they have learned
Key learning points/messages	<ul style="list-style-type: none"> ▶ Human rights are central to effective border governance.
Preparation	<ul style="list-style-type: none"> ▶ Print handout of key learning points/messages ▶ Prepare course certificates
Equipment	<ul style="list-style-type: none"> ▶ Laptop, projector and relevant cables; microphones, if using
Handouts or additional resources (see course materials)	<ul style="list-style-type: none"> ▶ Session 7 summary

Session overview/rationale

This session provides a recap of the training course to reinforce the main learning points of a human rights-based approach to border security and management. Learners are invited to reflect on how they could apply their learning to their work as border officials. At the end of this session, learners will be presented with certificates and asked to fill out a questionnaire about the training course.

Session content

7.1: Key learning points/messages of the training course

7.2: Exercise (reflection): Putting learning into practice

7.1. Key learning points/messages of the training course

The wrap-up is the last session in the training course.

The trainer should go over the main learning points of the six sessions, which are presented below. They are also available on the slide presentation and in the course summary handout.



Distribute the course summary handout containing the key learning points/messages of the training course.

Human Rights at International Borders

Key learning points/messages

Session 1: Introduction to human rights

- ▶ Human rights are inherent and inalienable: all persons at international borders, including migrants, regardless of their status, are entitled to the same human rights.
- ▶ States (as duty bearers) have specific obligations towards individuals (the rights holders) under their jurisdiction.
- ▶ The right to due process applies in all border governance contexts to ensure that every individual is treated fairly and with respect for their human rights. The tests of lawfulness, necessity and proportionality are crucial in any consideration of limitation to the human rights of individuals at international borders.
- ▶ Human rights should be at the centre of all border governance measures: migrants must be protected against any form of discrimination and priority should be given to providing assistance and protection from harm. That means that human rights obligations take precedence over law enforcement and migration management objectives.
- ▶ A gender-responsive, rights-based approach to border governance is necessary to account for different experiences, views and needs of both migrants and border authorities, taking into account gender, age and other factors.
- ▶ International human rights law and the rule of law are complementary and both must be respected as they are essential to successful efforts to effectively prevent and combat terrorism.

Session 2: Migrants in vulnerable situations at international borders

- ▶ Some migrants need specific human rights protection because of the situations they left behind; the circumstances in which they travelled; the conditions they face on arrival; or because of personal characteristics such as age, gender identity, disability or health status.
- ▶ Although a migrant who is in or has experienced a vulnerable situation may fall outside the specific legal category of “refugee”, it is important to ensure that their specific human rights protection needs are met.
- ▶ An individual’s need for human rights protection can change in the course of their journey or over time.

Session 3: Ensuring human rights in interception, rescue and immediate assistance

- ▶ Border officials play an essential role in protecting the lives and safety of all migrants, including those in vulnerable situations, in interception, rescue and immediate assistance.
- ▶ Planning for interception, rescue and immediate assistance is vital.
- ▶ Dangerous interception methods must be avoided.
- ▶ Any use of force by law enforcement should be exceptional and must meet the requirements of legality, necessity, proportionality, non-discrimination, precaution and accountability.
- ▶ The risk of harm must never outweigh the advantage of using force.

Session 4: Ensuring human rights-based screening and interviewing at international borders

- ▶ Human rights-based screening and interviewing should always be based on an individualized approach and assessment.
- ▶ Avoiding stereotyping and discriminatory approaches is essential in a human rights-based approach and for effective border security and counter-terrorism investigations.
- ▶ One of the objectives of screening and interviewing is to identify individuals who may be in vulnerable situations and facilitate referrals to the appropriate support services.
- ▶ The right to privacy should be protected throughout screening and interviewing, including with regard to the collection and storage of migrants’ personal data.

Session 5: Avoiding detention and inadequate conditions of detention

- ▶ Irregular migration is not a crime; at most, it may be considered an administrative offence.
- ▶ Immigration detention should be avoided; it should be an exceptional measure of last resort.
- ▶ Regarding children, immigration detention is never in the best interests of the child and is therefore prohibited.
- ▶ There are many human rights-based, non-custodial alternatives to immigration detention.
- ▶ Detention can create, increase or exacerbate situations of vulnerability for migrants.
- ▶ Respect for the dignity of detained migrants must be guaranteed.

Session 6: Human rights-based return

- ▶ Returns must always be based on an individual assessment of each case.
- ▶ No one shall be returned to a situation where they may be in danger of being subjected to torture, persecution or other serious human rights violations.
- ▶ States should ensure that returns are lawful and sustainable in order to avoid recurring cycles of insecure and irregular migration that carry human rights risks for migrants.
- ▶ All returns must follow due process and procedural safeguards.
- ▶ Voluntary return, free from any coercion, should always be promoted in preference to forced return in order to enable migrants to return to their countries with dignity.

7.2. Exercise (reflection): Putting learning into practice



Duration: 10–20 minutes

Aim of the exercise:

To encourage learners to reflect on how they could apply the learning to their work as border officials and what steps would be needed to implement changes; and to identify possible avenues for follow-up and further engagement so as to ensure medium- and long-term impacts of the training and contribute to institutional change.

How to carry out the exercise:

- ▶ Invite learners to reflect on what they have learned during the training course (10 min.).

Learners may want to reflect more on their learning later on as a personal action plan. They should recognize that some changes to ways of working, standard operating procedures, among others, may be beyond their remit and require institutional change.



In preparing for this exercise, trainers may refer to elements from specific individual and institutional work plans in the particular national or regional context and provide ideas on how the human rights standards and good practices learned during the training course could be implemented. Those could include integrating human rights into standard operating procedures, policies and guidelines; developing new mandatory guidelines; integrating the human rights training material into regular training of border officials, among others.

Examples would also depend on the discussions that trainers may have had with border authorities when planning the training course.

- ▶ Encourage learners to think about:
 - New information, concepts, analyses, ideas they got in the training course;
 - New understandings they acquired during the training course;
 - How their learning and discussions over the past three days could inform their work in future.
1. What learning points/messages can they incorporate into their work?
 2. What areas of work will they approach differently after this course?
 3. What learning points they might like to discuss further with colleagues, including aspects for which they would need the support of colleagues and/or senior officials to change?
 4. What aspects they want to learn more about in order to make those changes and how might they do that?
 5. What changes can they make immediately? What changes they would like to effect by a certain time (e.g., in 30 days)? It is good practice to set deadlines/time frames for action.



Debriefing

If senior officials have indicated their openness to receiving recommendations, use this final session to identify concrete steps and recommendations put forward by the learners, including integrating human rights into standard operating procedures, policies and guidelines or integrating the human rights training material into the regular training of border officials, among others.

If time permits and learners are willing, the trainer could invite them to share their reflections with the group. In particular, it might be useful to share thoughts on issues on which learners may want more information, and on a plan for how to achieve change, or identify areas for follow-up and further engagement. Nonetheless, no one should be obligated to share their personal reflections, if they do not want to.

End of training course

Thank the learners for their participation, and thank the interpreters, guest speakers, technical staff and any others who contributed to the course.



Distribute the certificates.

Distribute the final evaluation forms and ask the learners to return the completed forms before they leave.

IV. Selected bibliography

In addition to United Nations sources contained in this bibliography, the training course is based on the work of the international human rights treaty bodies and the special procedures of the Human Rights Council, including, but not limited to, the work of the Special Rapporteur on the human rights of migrants.

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3. Migrants' rights

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4. Gender

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"Gender stereotyping as a human rights violation", report commissioned by OHCHR, October 2013, www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx.

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