

Training course on Human Rights at International Borders

Session 6

Human rights-based return

Session 6 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

Session 6 learning objectives

After this session, learners will be able to:

- Describe human rights principles applicable to return
- Define possible circumstances in which individuals cannot be returned
- Identify the human rights of persons who are to be returned and corresponding obligations of border officials
- Appreciate the steps to ensure that human rights are respected and protected during the return process, including gender considerations

6.1

Return in the context of migration

6.1.1. What is 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 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.

6.1.2. Human rights particularly at risk in return

- (a) Principle of non-refoulement
- (b) Prohibition of collective expulsion
- (c) Right to freedom of movement
- (d) Right to life
- (e) Freedom from torture or other cruel, inhuman or degrading treatment or punishment
- (f) Right to due process
- (g) Right to liberty and security of person
- (h) Right to health, including sexual and reproductive health
- (i) Right to an adequate standard of living
- (j) Right to food and water

Questions?

6.2

Key human rights considerations relating to return

6.2.1. Exercise (true/false): Human rights considerations in return

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.



6.2.2. Principle of non-refoulement

- Prevents States from returning any person **under their jurisdiction or effective control**, including extraterritorially,
- when there are **substantial grounds** for believing
 - that the individual would be **at risk of being subjected to torture**, or other cruel, inhuman or 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).

Principle of non-refoulement (contd.)

- The principle of non-refoulement under international human rights law is **absolute** and protects anyone who is at risk unequivocally
- The deporting State **must determine** whether there are **“substantial grounds”** to believe that the individual would at a “foreseeable, personal, present and real” risk of torture or other cruel, inhuman or degrading treatment or punishment, persecution, or other serious human rights violations
- The deporting State must consider that threat or risk may apply **to the individual specifically** or because they are **a member of a group**

Principle of non-refoulement (contd.)

- States have the obligation to **prevent mistreatment by private actors or organs of a third State** operating within their jurisdiction
- *Diplomatic assurances* should not be used as a loophole to undermine the principle of non-refoulement
- The prohibition of refoulement overrules national immigration laws and contradicting international obligations, such as *extradition treaties*

6.2.3. Prohibition of collective expulsion

- Prohibits States from removing migrants without a **reasonable and objective examination of the individual circumstances** of each person, including through a personal interview
- It is primarily a **due process right to ensure that an individual assessment** is carried out and includes the right to appeal against expulsion
- Absence of a reasonable and objective examination of each person's situation makes collective expulsion **arbitrary** and therefore **prohibited**.

Key considerations in interception and rescue

- The principle of non-refoulement
and
- The prohibition of collective expulsion

discussed in this session



are also critical human rights considerations in interception and rescue.

discussed in
session 3 (day 1)

6.2.4. Voluntary return

→ *Voluntary return* should be promoted in preference to forced return.

To be “**voluntary**”, the return should be based on **free and informed consent**:

- **Free of any coercion**, including any actual or implied threat of prolonged, indefinite or arbitrary detention, or detention in inadequate conditions
- **Informed**, that is, the individual must have received all necessary, relevant and up-to-date information as to their choices, prior to making their decision
- Backed by the availability of sufficient **valid alternatives**, such as temporary work/study/humanitarian permits or opportunities for regularization or citizenship

6.2.5. Sustainable return

- Must be considered *from the migrant's perspective*
- Ensure that the return is carried out in **safe conditions** and **with dignity**
 - **Mitigate any risks** that returnees may face in their country of origin/return
 - Prepare a plan for **sustainable reintegration** and continued evaluation of the return, especially when children are being returned.
 - Do not share sensitive personal information with authorities of countries of origin/return in order to protect the life, security and privacy of the migrant and their families.

Questions?

6.3

Practical steps to protect human rights in the return process

6.3.1. Exercise: steps to protect human rights in return

Read the case assigned to your group, briefly discuss it and write your responses to the following questions on the flip chart.

1. Focusing on human rights issues relating to return, what went wrong in this case?
2. What considerations should have been taken into account and what measures should have been taken to make sure the return decision and process was human rights compliant?
3. What gender-specific concerns can you identify?

CASE A

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

- Kai and Sammy have been given notice in writing that they will be returned to their country, but have not been told why, when they will be returned or how to appeal the decision. They have not seen the judge again to explain their story; the guards said they could be sent back anytime.
- Although they do not feel safe in detention, they are also scared to go back home. In addition to the gangs, Kai is afraid that people back home will think he is a criminal as “only criminals are deported”.

→ continued

- Kai's father wants to help, but it is expensive to hire a lawyer.
- A week after they received the written notice of return, an official told them to gather their belongings as they would be returned that afternoon.
- Kai protested on grounds that he was 17 years old with no family at home. They tried to say that it would be dangerous for Sammy to return.
- The official left in surprise, then returned with a child protection officer, who wanted to find out more about their case.

CASE B

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

- *Amodita* was back in the holding facility; an official came to tell her that they could drop the criminal charges against her if she agreed to return voluntarily to her country. All she had to do was sign the agreement and she would be returned together with others by bus.
- She told the official that she couldn't because she had nothing to return to – no land, no job, no proper health care, and that her family was relying on her for support. She felt that everyone would say she was a failure – she did not get a job, she lost her baby, and she would be returning without her husband.
- She did not know where Ichanga was or what had happened to him and she was very worried.

- *Ichanga* received a visited from a man claiming to be from the consulate, who told him that he could assist his return home. But *Ichanga* was worried that he will be imprisoned and tortured because he had been accused of supporting a terrorist group – others who faced similar accusations had been severely punished and sometimes never heard of again.
- *Ichanga* asked to speak to a judge, but the consular official said he could not arrange that. Later on, some men in military uniforms came and handcuffed him and took him to the airport for the return flight. He started screaming because he did not want to be returned, especially without his wife. Two officials pushed him to the ground and started punching him.

6.3.2. Procedural safeguards for returnees

(a) Individual assessment of possible risks for each person is critical

- Ensure that individuals are returned *only to places/countries that are safe* for them
- *Do not return* individuals to situations of destitution or inhospitable conditions
- *Allow the individual to choose* the State to which they want to be returned, to the extent possible
- Ensure returnees have the *appropriate identification/travel documents*

Procedural safeguards (contd.)

(b) Right to information

- Inform the migrant of the removal decision orally
- Provide the removal order in writing and in a language that the migrant understands, give the reasons for the decision, and provide adequate justification for the removal

(c) Right to an effective remedy

- Provide individuals reasonable time to challenge the decision
- Procedures should be individualized, gender-responsive, prompt and transparent with access to legal advice, legal aid, counselling, interpretation services, and all other essential procedural safeguards, including the suspensive effect of an appeal

6.3.3. Preparing for the return

- Ensure sufficient personnel with the competent authority to ensure the **individual is returned safely and with dignity**
- Inform the migrant *well in advance* of the date of return and all the relevant procedures
- Take into account the **gender, age, language, vulnerabilities** of the individual who is being returned
- Officials must be *identifiable* with name tags and/or personnel numbers

6.3.4. Implementing return procedures

Return should not be undertaken at all costs.

- Do not return an individual unless they are **medically fit – both physically and mentally** – to travel
- **Interrupt** the return process **at any point** if the rights or safety of the individual or the officials would be compromised or endangered

Implementing return procedures (contd.)

Force should be used only as a last resort, and its use must be lawful, strictly necessary and proportionate to achieving the purpose

- Never use 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
- Never use measures or treatment that are not medically justified (e.g., tranquilizers, sedatives, other medication).

6.3.5. Child returnees

- *A child should be returned only when it has been determined that it is in their best interest, taking into consideration family unity, the child's survival and development, among others.*

Prior to the return, ensure:

- An appropriate family or guardian has been identified in the country of return
- Appropriate reception and care arrangements for the child are clear
- A parent, legal guardian, or child protection officer will accompany the child throughout the return process

6.3.6. When return is not possible

Appropriate administrative and legislative mechanisms should be in place to ensure legal status of individuals who cannot be returned.

- Indefinite detention is not an option and alternative measures to detention should be explored
- Options include granting a temporary or fixed-term residence permit or other specific visa, integration in the country of destination/residence

Questions?