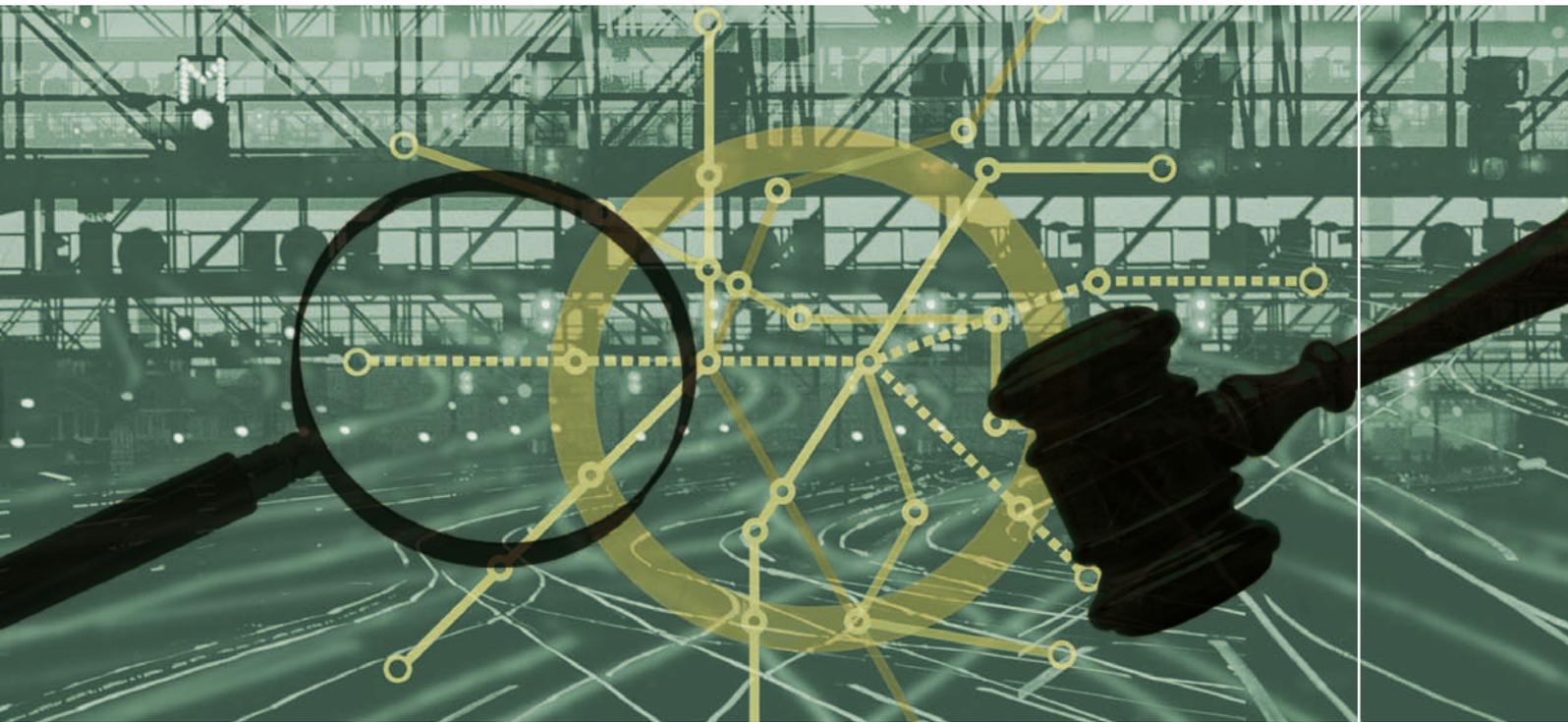




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United Nations Office on Drugs and Crime



Basic training manual on investigating and prosecuting the smuggling of migrants

Module 9
Human rights



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UNITED NATIONS OFFICE ON DRUGS AND CRIME
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Module 9. Human rights

A. Learning objectives

The present module examines selected human rights issues that should be considered when investigating and prosecuting the smuggling of migrants. At the end of this module, you should understand:

- Which human rights are relevant in investigations into the smuggling of migrants
- The human rights of smuggled migrants
- The human rights of suspected smugglers of migrants
- The principles relating to the protection of refugees
- The nature of your role is in protecting and promoting human rights
- How human rights can be legally limited temporarily

B. Human rights and law enforcement

Law enforcers constitute the first line of defence in protecting human rights. They uphold the law, including human rights law. However, they are sometimes in situations that require them to infringe on human rights and balance competing considerations. In its resolution 34/169, the General Assembly adopted a Code of Conduct for Law Enforcement Officials.¹

All investigations, including interviewing of witnesses, victims and suspects, personal searches, searches of vehicles and premises, interception of communications:

- Shall not be unlawful, arbitrary, unduly intrusive or biased
- Shall be competent, thorough, prompt and impartial and lawful
- Shall include careful processing of crime scenes
- Shall seek to collect and preserve evidence

Such principles are laid out in codes of conduct such as that below.

Code of Conduct for Law Enforcement Officials

Article 1

Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

¹ See General Assembly resolution 34/169 available from www.unhcr.org.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Non-discrimination

It is a fundamental principle of international human rights law that all persons have a right to be recognized as a person before the law, are to be treated as equal before the law and are entitled without any discrimination to equal protection of the law.

Law enforcers shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.

The fact that everybody is equal before the law does not mean, however, that everybody is identical. Hence, it is not considered to be discriminatory for a law enforcer to apply certain special

measures designed to address the special status and needs of women (including pregnant woman and nursing mothers), juveniles, the sick, the elderly, people with special needs and others requiring special treatment in accordance with international human rights standards.



Remember: human rights are always relevant throughout the process of investigating smuggling of migrants and any other crime.



Questions and exercises

- Mr. Officer must detain four smuggled migrants overnight at the border office before they are relocated the following day. Three of the smuggled migrants are men and one of them is a woman. There are two rooms at the border office. Mr. Officer puts the three men in one room and the woman in the other room. Is this discriminatory? Why or why not?
- Do you have a code of conduct or disciplinary code in your country? How does it compare with the United Nations Code of Conduct for Law Enforcement Officials?
- How could the above Code of Conduct be tailored to the needs of law enforcers specifically working in the area of smuggling of migrants?
- Do codes of conduct still need to be abided by when one is dealing with non-nationals?

C. Human rights of smuggled migrants

General principles

Regardless of their immigration status, smuggled migrants have the right to expect that their human rights and dignity will be upheld and prioritized at all stages by those who intercept and identify them, those who detain them, those who remove them from the country and, where relevant, those who grant them asylum.

While States can detain and remove irregular migrants in certain circumstances and on certain conditions (assuming they are not found to be refugees or are protected from removal by other human rights such as those derived from the prohibition of torture or cruel, inhuman or degrading treatment or punishment), they also have a responsibility to do so using measures that demonstrate respect for human rights and the safety and dignity of the migrants concerned.

Police also have a role to play in the prevention of migrant smuggling by protecting the human rights of nationals and thereby reducing the discontents at the root of the desire to leave.

Smuggling of Migrants Protocol, article 16 (Protection and assistance measures)

1. In implementing this Protocol, each State party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
2. Each State party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.
3. Each State party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.
4. In applying the provisions of this article, States parties shall take into account the special needs of women and children.
5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State party shall comply with its obligations under the Vienna Convention on Consular Relations,^a where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

^a United Nations, *Treaty Series*, vol. 596, No. 8638.



Remember, smuggled migrants may be victims of human rights abuse during the smuggling process.

Rights of smuggled migrants who are victims of crime

Law enforcers who are likely to encounter victims of crime should do the following:

- Respond promptly, especially to complaints of violence.
- Inform victims of the assistance (legal, material, medical, psychological and social) that is available to them.
- Investigate, report and follow up thoroughly and professionally.
- Keep a roster of contacts handy, with all the relevant information on services available to assist victims.

- Establish close cooperative procedures with medical, social, legal and other victim assistance providers.
- Endeavour to ensure that a female officer is present during all contact with female victims of crime, especially violence.
- Explain to victims their rights, their role in legal proceedings, and the nature of legal proceedings.
- Provide transportation to a safe place and to medical services or arrange for providers of medical services to travel to the victim.
- Keep records secure and carefully protect confidentiality of victims.
- Establish victim assistance guidelines to ensure prompt, proper and comprehensive attention to the legal, material, medical, psychological and social assistance needs of victims.

Rights of smuggled migrants who are refugees or asylum-seekers

Everyone has the right to seek and to enjoy, in another country, asylum from persecution.

Refugees and asylum-seekers sometimes use the services of smugglers of migrants.

The illegal entry of a person is not to affect negatively their claim to asylum and the Smuggling of Migrants Protocol is not to be read in such a way as to be discriminatory with respect to the smuggled migrants (article 19).

Article 1 of the 1951 Convention relating to the Status of Refugees,² defines a refugee as any person who, “owing to a 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

Simply put, a refugee is a person who, owing to a well-founded fear of persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion or political reasons, including conflict and war, is unable or unwilling to return to his or her country of origin (or, if stateless, to his or her country of habitual residence).

An asylum-seeker is a person seeking admission to a country as a refugee and awaiting a decision on his or her application for refugee status under relevant international and national instruments. In the case of a negative decision, he or she must leave the country or may be expelled, as may any alien in an irregular situation, unless permission to stay is granted on humanitarian or other related grounds.

Each country should have a dedicated entity for processing asylum claims and administering refugee issues.

² United Nations, *Treaty Series*, vol. 189, No. 2545.

Principle of non-refoulement

A key consideration to keep in mind when investigating or prosecuting a case of the smuggling of migrants is the principle of non-refoulement.

According to the principle of non-refoulement, a State cannot send a person back to a country where his or her life is in peril when there are substantial grounds for believing that he or she would be in danger of being subject to other elementary human rights violations (such as torture or cruel, inhuman or degrading treatment or punishment). In respect of this principle, States are also obligated to examine whether such a risk could be posed to the migrant through “chain deportation” (that is, his or her further deportation to State or States different from that to which they have been sent).

The principle of non-refoulement is laid down in the 1951 Convention and other human rights instruments. According to the 1951 Convention:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (article 33, para. 1).

However, the benefit of this principle cannot be “claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country” (article 33, para. 2).

Article 19 of the Smuggling of Migrants Protocol states that the Protocol shall not affect any other rights, obligations or responsibilities of States and individuals under international law, including humanitarian, human rights and refugee laws. This means that the illegal entry of a person is not to negatively affect his or her claim for asylum and the Protocol is not to be read in a way that is discriminatory to the smuggled migrant.

It must be remembered that, while some smuggled migrants make legitimate asylum claims and are correctly accorded the status of refugees, this does not make the actions of the smugglers of migrants any less criminal when they are smuggling the migrants for their own financial gain. In fact, their taking financial advantage of persons who are in vulnerable positions could be considered an aggravating circumstance.

More information about aggravating circumstances is contained in module 7.



Regardless of whether a person is a refugee or a migrant, a citizen or a non-citizen, whether he or she is fleeing persecution, armed conflict, threats to his or her life or abject poverty, that person is entitled to have his or her human rights upheld and to be assured that his or her treatment adheres to certain standards.

Repatriation considerations

Because of the principle of non-refoulement, a refugee cannot be repatriated.

If an asylum-seeker's claim for refugee status is unsuccessful, he or she may be expelled, as an alien is, unless he or she is granted permission to stay on humanitarian or other related grounds.

Countries seeking to repatriate a person to another country should also be mindful of other human rights considerations. For instance, repatriation of a migrant to a safe country, which may in turn repatriate the migrant to a non-safe country, could ultimately amount to a breach of the migrant's human rights. As mentioned above, this action, known as chain deportation, is prohibited by the principle of non-refoulement.

Smuggling of Migrants Protocol, article 18 (Return of smuggled migrants)

1. Each State party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.
2. Each State party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.
3. At the request of the receiving State party, a requested State party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.
4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
5. Each State party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.
6. States parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

Considerations where minors and other people with special needs are involved

Children are often the object of migrant smuggling activity and may be smuggled with adult migrants, who are less likely to be deported in cases where the children are claimed to be their own.

In the event that minors or other people with special needs are discovered, officers must act in accordance with the local laws and policies. At an absolute minimum, minors should:

- Be removed, immediately, from the source of any danger
- Not be allowed further contact with any suspects
- Be seen by a medical professional (for health issues but also for possible evidential issues)
- Be provided with additional clothing or nappy changes (if required), fed, given refreshments and if old enough, given at least a pencil and paper to provide them with something to do
- Be dealt with thereafter by trained officers

When there is some doubt about whether or not a person is a child and the person's age cannot be verified, the best practice is to assume that he or she is a child.



When children are involved in smuggling situations, law enforcers should be mindful of the obligations set out in the Convention on the Rights of the Child,³ available at <http://www2.ohchr.org/english/law/crc.htm>.

Similar actions should be taken with regard to any special needs. This could include the provision of interpreters, signers (those who speak in sign language) and medical assistance.



When people with special needs are involved in smuggling situations, law enforcers should be mindful of the obligations set out in the Convention on the Rights of Persons with Disabilities,⁴ available at: <http://www.un.org/disabilities/default.asp?id=150>.

³ Ibid., vol. 1577, No. 27531.

⁴ General Assembly resolution 61/106, annex 1.

Inasmuch as your local policies and/or laws may require these different categories of migrants to be dealt with differently, they should be identified as early as possible. However, it may often be the case that decisions cannot be taken at the very first encounter. Partners such as the Office of the United Nations High Commissioner for Refugees and the United Nations Children's Fund should also be engaged as soon as practicable.

Care must also be taken to identify trafficking victims among smugglers of migrants. Trafficking victims are victims of crime (see above for more information on the rights of smuggled migrants who are victims of crime).⁵



Questions and exercises

- How would you further tailor the list of rights mentioned above to situations involving the smuggling of migrants in your local context? What items would you add to the list?
- Respond to the following checklist with reference to your local context:
 - What assistance is available to smuggled migrants who are victims of crime?
 - Do you have a roster of contacts? Who is on this list?
 - What are victims' rights at the point when you first come into contact with them?
 - Do you have the facilities necessary to transport victims to service providers or arrange for service providers to come to victims?
 - What records do you keep of victims? How do you protect their confidentiality?
 - What procedures for cooperation with assistance providers are in place?
 - Are victim assistance guidelines in place? What are they?
 - How would you find the answer to those questions you could not respond to?
- Based on your responses to the above checklist, formulate 10 clear points that law enforcers could post on their wall as a quick reference when placed in situations where they encounter migrants.
- What is the difference between a refugee and an asylum-seeker?
- What does non-refoulement mean?
- What is the process in your country for determining whether the principle of non-refoulement applies to a particular person?
- In your country, what happens to a person who cannot be returned to his or her country of nationality or permanent residence for reasons of non-refoulement?
- In cases where the principle of non-refoulement does not apply, how is a person returned to his or her country of nationality or permanent residence?

⁵ For in-depth information about responding to situations of trafficking in persons, see the *UNODC Anti-Human Trafficking Manual for Criminal Justice Practitioners*, available at <http://www.unodc.org/unodc/en/human-trafficking/anti-human-trafficking-manual.html>

- Who are the people and what are the units, agencies and organizations in your country relevant to situations where a smuggled migrant claims asylum? How do you contact them?
- Who are the people and what are the units, agencies and organizations in your country relevant to situations where a person is to be returned from or to your country?

D. Human rights of (suspected) smugglers of migrants

Rights of suspected smugglers of migrants upon arrest

Every person who is arrested has certain rights that apply immediately upon arrest and after arrest. This places an obligation on police officers to respect and protect the basic rights of people who are arrested, namely:

- The right to liberty or freedom and security of persons and to freedom of movement.
Under the principle of legality, a person can be arrested only on legal grounds. Arrest without legal grounds amounts to arbitrary detention.
- The right to be treated with dignity and respect.
For instance, swearing or using abusive language during arrest may infringe on a person's dignity.
- The right to be informed of the reasons for arrest, at the time of arrest.
- The right to remain silent (related to the right to not incriminate oneself).
Arrested persons should not be compelled to confess or testify against themselves. This right does not include the provision that a person should not supply basic details about him- or herself (such as name and address).
- The right to be promptly informed of the charges against him- or herself.
- The right to be informed of one's rights.
- The right to be presumed innocent until proved guilty.
- The right to be brought to a place of custody.
- The right to have access to a lawyer.
- The right to be brought promptly before a judge or other officer authorized by law.
- The right not to be tortured or treated in a cruel, inhuman or degrading way.
- The right to a fair trial within a reasonable time.
- The right to notify family members and other appropriate persons about detention.
- The right to legal assistance and to communicate with legal representative.
- The right for women to be segregated from men and children from adults who are not their parents, when practicable.

Duties of law enforcers when carrying out arrest

- To inform the suspect of his or her rights.
- To keep a record of relevant data.
- To ensure that the arrest record shall be communicated to the detainee or his or her legal counsel.
- To ensure that, where necessary, an interpreter shall be provided during the interview.

Conditions of detention

- Persons should be detained only in officially recognized places of detention.
- Detainees should be kept in facilities that are as humane as possible and designed to accommodate human beings, and should be provided with adequate food, water, shelter, clothing, medical services, exercise and items of personal hygiene.
- Women must be separated from men, and children from adults.
- Detained persons should be allowed to inform their family of detention, and should be given reasonably satisfactory facilities for communicating with their legal representatives.
- Religious and moral beliefs of detainees shall be respected.
- Persons arrested or detained without charge shall be accorded the same protection and facilities as pretrial prisoners and those awaiting trial.



For more information about administering justice in situations where suspected smugglers of migrants are detained, please refer to the United Nations Standard Minimum Rules for the Treatment of Prisoners⁶ available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.

Vienna Convention on Consular Relations

In the case where foreign nationals are arrested or detained, article 36 of the Vienna Convention on Consular Relations, 1963,^a provides that, if requested, the authorities of the receiving State must notify the consulate of the sending State without delay that its national has been deprived of his or her liberty. Any communication shall be facilitated and consular access to the detainee shall be granted.

^a United Nations, *Treaty Series*, vol. 596, No. 8638.

⁶ *Human Rights: A Compilation of International Instruments*, Volume 1 (First Part): *Universal Instruments* (United Nations publication, Sales No. E.02.XIV.4) (vol. 1, Part 1), Sect. J, No. 34.



Questions and exercises

- Do you believe that the rights of smugglers of migrants and the duties of law enforcers listed above are appropriate? Would you modify any of those rights or duties? Would you include any others?
- Are the standards of arrest and detention mentioned above practicable in your local context?
- What data do you think should be recorded upon arrest? Design a questionnaire to be filled out by law enforcers upon the arrest of suspected smugglers of migrants.
- In your country, which authority can “prove guilt” of a suspected smuggler of migrants?
- Explanations and/or examples have been provided for some of the above-mentioned rights. Offer explanations and/or examples for the others.
- Are the standards for the conditions of detention listed above practicable in your local context?
- What is the difference between a detained person and a prisoner?
- In your local context, what are the challenges in meeting basic minimum standards of human rights for both smuggled migrants and smugglers of migrants?
- In addition to the rights of smuggled migrants and smugglers of migrants, the rights of which other persons are to be considered in investigations into the smuggling of migrants?

E. Limiting human rights

In the course of investigations and operations dealing with the smuggling of migrants, you may be in a situation where human rights need to be limited. Certain human rights can be limited only lawfully, that is, they can never be limited without legal justification.

Other human rights can never be derogated from under any circumstances, even in a state of emergency. For derogations to apply, the state of emergency must pose a threat to the life of the nation and the State must have officially declared the state of emergency. Measures that derogate from human rights standards must be officially notified to other States through the competent international organization. Furthermore, derogations are permissible only to the extent strictly required by the situation and only for as long as the state of emergency is in place. Even when these conditions are fulfilled, there are certain rights that can never be derogated from. Such rights are called non-derogable.

Examples of rights that can never be derogated from (non-derogable rights) include:

- Right not to be subject to torture, or cruel, inhuman or degrading treatment or punishment
- Right not to be held in slavery or servitude
- Right to equality before the law
- Right to be presumed innocent until proved guilty

Examples of rights that can be temporarily limited under certain conditions include:

- Right not to be deprived of liberty
- Freedom of movement
- Freedom of religion
- Freedom of expression
- Right of peaceful assembly
- Freedom of association



Examples: limitations

A police officer uses force against a smuggler of migrants who threatens him physically or resists arrest.

Another example of a limitation with respect to the smuggling of migrants may be the temporary administrative detention of smuggled migrants on certain grounds.

Human rights can be limited only to a certain extent. For example, using force to arrest an unarmed smuggler who does not resist arrest would be excessive, as would the detention of smuggled migrants in inhumane conditions or for too long. The excessive limitation of rights becomes a breach of human rights.

The following (P.L.A.N) principles can be regarded as a means of checking whether rights are limited lawfully:

- Proportionality:** Any limitation to rights should be proportionate to whatever objective is legally being sought.
- Legality:** Any action to limit rights should be justifiable by a valid law.
- Accountability:** Review systems and reporting procedures should be in place to account for any limitation of rights.
- Necessity:** Where other measures are inadequate, rights should be limited only to the extent necessary.



To the above principles should be added the following: all limitations of human rights must be non-discriminatory.



Questions and exercises

- Can you think of any cases where rights may need to be limited in investigations into the smuggling of migrants? Whose rights would they be?
- Have you had an experience where rights were limited in the course of an investigation into the smuggling of migrants?

In the situation you described, were the limitations:

- Proportionate?
- Legal?
- Accountable?
- Necessary?

Was there a process for reporting the temporary limitation of human rights?

- In your country, what consequences must a law enforcer face when he or she breaches the human rights of a migrant or smuggler?
- You are a border official who has just intercepted five smuggled migrants: three are men, one is a male child and one is a woman. You have arranged for transportation to a facility where they can be properly cared for and debriefed, but they must stay at the border post overnight. You have two rooms equipped for sleeping. One is the room you sleep in, with a sink with running water; the other room contains one bed. Both rooms can be locked from the outside.

How do you accommodate the five migrants? Give reasons for your answer.

F. Concluding remarks

Every person, regardless of his or her nationality, residence or other status, has human rights. Law enforcers are in a particularly important position with respect to human rights: they are charged with the responsibility of protecting the rights of others, yet sometimes, when there are competing interests involved, they may have to temporarily limit those rights.

This requires that law enforcers perform a careful balancing act, ensuring that human rights are limited only to the extent that such limitation is proportionate, legal, accountable and necessary.

Some rights, however, can never be limited under any circumstances and any attempt to limit them would constitute a breach of human rights.

Where human rights are breached, not only does this represent a human tragedy and crime against international and domestic law, but it may also potentially undermine investigations and prosecutions in relation to the smuggling of migrants.



Self-assessment questions

- What are human rights? Why are they important?
- What is the source of human rights?
- Name some human rights that are relevant to your work in investigating the smuggling of migrants.
- Why is the United Nations Code of Conduct for Law Enforcement Officials important for police officers?
- What is a refugee? What is an asylum-seeker?
- What is the principle of non-refoulement?
- Name some of the considerations to be taken into account when dealing with people with special needs.
- What are the rights of a person upon his or her arrest?
- Provide three examples of duties of law enforcers towards arrested persons.
- What does it mean to limit human rights?
- Under what circumstances can human rights be limited?
- To what extent can human rights be limited?
- Explain the P.L.A.N. principles and their use.



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