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The Return of Persons not in Need of International Protection

Session 7 Manual

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Objectives

In the area of knowledge acquisition, after this session, participants will:

- Consolidate knowledge of what it means NOT to be in need of international protection (in the context of return).
- Understand the full implications of the concept of *voluntary* return.
- Acquire knowledge on the procedural and legal safeguards surrounding return operations of persons NOT in need of international protection in order for such operations to abide by international human rights law.
- Become familiar with the possible role of the different institutions and non-governmental organizations in the context of return operations, including UNHCR.
- Know key limitations applying to pre-removal detention, as well as the required conditions for such detention to be in accordance with international human rights standards.

In relation to skills and attitudes, participants will:

- Gain greater insight into the situation of those facing pre-removal and removal procedures, differentiating their possible specific needs (unaccompanied & separated children, families, etc)
- Be able to identify protection concerns in the context of a return operation and develop the required “mindset” to know when to take appropriate measures to address protection concerns in the context of their day-to-day border responsibilities.



Session Outline

Methodology	Material required	Duration: (Total: 3h 30mins)
7.1. Presentation: <i>“The return of persons who have been found not to be in need of international protection”</i>	- Key messages	30 minutes
7.2. “Market Place”: participating in a return operation	- Handouts on key aspects of return operations for border guards - Three flipcharts - Markers - Fake bank-notes	90 minutes
7.3. Debriefing & Participatory Presentation	- Key messages	90 minutes



7.1. Presentation: The return of persons who have been found not to be in need of international protection

This **presentation** is a very succinct introduction to the most recent legal and policy developments in the area of removal from EU Member States. The practical exercise that comes after the presentation allows for an in-depth analysis of the standards for return and the challenges involved for entry officials.

1. Return of persons not in need of international protection *vis-à-vis* refugee repatriation

Most refugees in exile want to return home when it is possible to do so in safety and dignity. Indeed the majority do so without any assistance or encouragement at all. Why? Because normally people WANT to be home. Home is where the roots are, the memories, family and friends.

This session aims to clarify the role of entry officials in return, not related to the repatriation of refugees but, rather, in the context of the return of persons NOT in need of international protection. It is about what to do with those persons who may have claimed asylum but are not, in fact, in need of international protection – some of whom could go home but because of their personal circumstances and the situation in their home country, they refuse to do so.

At the outset, it is essential to define who are "persons not in need of international protection". At its third meeting in May 1996, UNHCR's Standing Committee adopted the following definition:

"persons who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status on the basis of the criteria laid down in the 1951 Convention, nor to be in need of international protection on other grounds, and who are not authorised to stay in the country concerned for other compelling reasons".

2. UNHCR's engagement in the return of persons not in need of protection

It is important to distinguish between so-called repatriation (which concerns refugees and persons in need of international protection) and so-called "voluntary" returns (for persons who are not in need of international protection). There is much debate around the notion of 'voluntariness' and a number of definitions (including as articulated by IOM, ECRE, others). To UNHCR it is clear that a person only returns to their country of origin truly voluntarily when they have made an informed choice and have the option to stay, i.e. they have been recognised as in need of protection, have a legal status enabling them to stay in the host country, and elect to "voluntarily repatriate".

By definition, persons NOT in need of international protection fall outside UNHCR's mandate. It is therefore not normally UNHCR's role to be directly involved in the returns of persons not in need of international protection. Nonetheless, UNHCR has repeatedly been asked by States to engage in the issue of return of such persons, and the Office has done so on a good offices basis on a variety of occasions. It goes without saying that UNHCR's involvement must always be consistent with its humanitarian and protection mandate.

There is good reason for being engaged on this issue. As recalled inter alia in Conclusion No 96 adopted by UNHCR's Executive Committee in 2003, *"the efficient and expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons"*.

The same Conclusion goes on to "emphasize [that] *the credibility of individual asylum systems is seriously affected by the lack of prompt return of those who are found not to be in need of international protection*". To ensure the continued credibility and functioning of the asylum process, UNHCR therefore recognizes the importance of States, including in the European Union, having the possibility to return persons not in need of international protection.

As mentioned in other sessions, there are persons who are not covered by the application of the 1951 Convention but who are in need of international protection and fall under UNHCR's mandate. This is widely recognized and may be the case when persons cannot be returned due to armed conflict or general disturbance. Acknowledgement of their continued need for protection should include facilitation of their continued presence in the country of refuge, both

legally and politically. In the EU Member States, such persons are usually granted a subsidiary form of protection. [See session 3 on the refugee definition.]

EXCOM Conclusion 96 (2003) recommends that UNHCR complement the efforts of States in the return of persons found not to be in need of international protection by:

- Taking clear public positions on the acceptability of return
- Promoting the principle of responsibility of States to readmit their nationals
- Promoting the principles on reduction of statelessness
- Dialogue with States whose citizenship law allows renunciation of nationality in a way which could delay, hamper or stop return.

On various occasions in recent years, UNHCR has expressed its readiness “on good offices” basis to support States (upon their request) to return persons found not to be in need of international protection, provided UNHCR’s involvement is not inconsistent with its humanitarian mandate to provide international protection to refugees.

3. A comprehensive approach to the return of persons not in need of international protection

In recent years, a large number of States, both asylum countries and countries of origin, have joined UNHCR in the promotion of a comprehensive approach to the return of persons not in need of international protection. Such an approach is based on a dialogue between the countries concerned, and involving, where appropriate and useful, international organizations such as IOM.

A comprehensive approach to return is premised on the recognition that migration control and deterrence alone can have little lasting impact on curbing irregular movements, when the need or the desire to migrate prevails. Return-oriented measures must, therefore, be part of a broad range of migration management policies that go beyond short-term reactions to a perceived or real misuse of asylum systems.

Under EU law, Member States are required to give persons subject to removal orders a period of time to comply with the removal order, before they can forcibly be removed. This is known in the EU Returns Directive (see below) as “voluntary return”.

One important measure, adopted by some Member States, is the implementation of return programmes by host countries that offer counselling and assistance which can facilitate reintegration (commonly referred to as “assisted voluntary return” programmes). Experience shows that such programmes present fewer risks of individual hardship.

In addition, experience has shown the need to ensure the sustainability of returns. It is not only the responsibility of countries of origin to promote it, but also of host countries through the provision of concrete support to returnees before departure. There are a number of good practices in this context, including the signing of Tripartite Agreements, where the different parties commit themselves to the adoption of measures to promote the reintegration of returnees. Parties might comprise the host government, the government of the country of origin as well as UNHCR or IOM (or both). Such measures can be carried in the host countries, for instance by providing access to educational and vocational training activities that can be relevant upon return to the country of origin.

4. What is safe and dignified return?

The return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity. Should it be necessary, use of force should be proportional and undertaken in a manner consistent with human rights law; this is not only because of States’ duty to abide by their international human rights obligations, but also because a safe and dignified return process is core to reintegration in the home country.

According to UNHCR, **return in safety** is return which takes place under conditions of:

- legal safety (such as amnesties or official, public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return);

- physical security (including protection from harm); and
- material security (access to means of livelihood).

The concept of **return with dignity** is less self-evident than that of safety. The dictionary definition of "dignity" contains elements of "serious, composed, worthy of honour and respect." In practice, elements must include:

- that returnees are not handled physically in a demeaning or harmful way;
- that they are fully informed of conditions upon return and ideally, that they can do so at their own pace and have time to prepare;
- that they are not arbitrarily separated from family members; and
- that they are treated with respect and accepted by their national authorities, including the full restoration of their rights.

5. Concerns of potential returnees

A person whose asylum claim has been unsuccessful may subsequently not cooperate with procedures initiated by the authorities to effect their removal in a bid to avoid being returned. In many cases this may be due to feelings of extreme anxiety at such a prospect. The likely reasons for this are wide-ranging and include:

- A continuing belief in their need for asylum;
- Victims of civil war or persecution may be traumatised and not wish to live again in a country where they were persecuted;
- A person may not want to live in a place they do not know and with which they have no connection;
- Fear of penalties in their countries of origin;
- The fact that a high number of asylum-seekers whose applications are rejected originate from countries with serious human rights problems;
- The existence of severe gender discrimination to which women often do not want to go back;
- The fact that a number of asylum-seekers whose applications have been rejected have previously spent long periods living without legal status in countries of first asylum. This may have weakened any ties to their country of origin;
- Depression resulting from the failure of a migration attempt;
- Lack of legal advice or counselling, or lack of independent, trusted information about the situation to which they would be returning;
- Loss of family in their country of origin;
- Lack of education opportunities for young people to build themselves a better future;
- Lack of specialised medical facilities for persons with special medical needs/serious illnesses, and more generally lack of adequate access to medical care;
- Serious mental health problems, which can include suicidal feelings at the thought of return; and
- Desire to work in order to send back remittances to family remaining in the country of origin, which are sometimes the only means of survival.¹

¹ Taken from ECRE, *The Way Forward. The Return of Asylum Seekers whose Applications have been Rejected in Europe*, June 2005.

6. The return of unaccompanied and separated children

According to the principle set out in the UN Convention on the Rights of the Child (UNCRC), in all actions related to return of children, the best interests of the child must be the primary consideration. The child's best interests should be properly assessed in consultation with specialised social services, such as a child welfare authority whose function it is to protect children's rights, and the responsible legal guardian. At EU level, the principle of the best interests of the child has entered legislation through references in the Charter of Fundamental Rights and the Lisbon Treaty, as well as in some EU Directives. Article 5 of the EU Returns Directive obliges Member States to take due account of the best interest of the child, while Article 10 of the Directive grants unaccompanied and separated children the right to receive *'assistance by appropriate bodies other than the authorities enforcing return'*.

During their return journey, a separated child should be accompanied by a trained and familiar childcare professional in order to ensure that they arrive safely and to offer support to help them deal with any emotional matters associated with return. A child should never be handed over to the border authorities of a third country if it is unclear how the child will be cared for in the future. Member States should never return an unaccompanied or separated child without ensuring that proper care and custodial arrangements are in place. Children should return to the legal guardianship of a family member or a foster parent in the country of origin.

7. International standards on return

Apart from international human rights instruments, which are applicable to any human being and, therefore, also to returnees, in the last years, work has been undertaken at the policy and legal levels to specify the standards that should apply to the different situations of return, whether voluntary or enforced. A number of international and regional intergovernmental and non-governmental bodies, such as the EU, the Council of Europe, UNHCR, ECRE, the International Law Commission, national NGOs and others, have developed pieces of legislation and/or sets of guidelines that inform the different aspects of return procedures as well as situations of pre-return detention. These include:

- EU Directive on Returns
- European Convention on Human Rights (ECHR)
- Council of Europe Guidelines on Forced Return
- Recommendations of the Committee for the Prevention of Torture
- UNHCR's ExCom Conclusion 96 (LIV) on the Return of Persons not in Need of International Protection
- Tripartite agreements signed by UNHCR with EU Member States and countries of return, such as the one signed with the UK and Afghanistan respectively.

We will look at these specific standards in the practical exercise that will follow this presentation.

8. EU return policy

European countries are increasingly cooperating on an operational level e.g. to organise joint return flights or ensure the mutual recognition of expulsion decisions, and legislative instruments have been agreed to facilitate this. FRONTEX has also been given a mandate to facilitate operational cooperation on returns. The EU is providing an increasing amount of money to governments to support their efforts to remove people, including 676M Euros from 2008-2013 through the Return Fund. It also has a strong policy objective to sign and implement a number of Readmission Agreements with many countries of origin.

The main legal instrument setting rules on return procedures in the European Union is the "Directive on Common Standards and Procedures in Member States for Returning Illegally staying third-country Nationals" (December 2008). The Directive lays down common rules on a number of issues relevant to return proceedings. It applies to any third country national with no legal right to stay for any reason (e.g. lack of / expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status). The Directive **DOES NOT APPLY** to persons in an ongoing asylum process.

The Directive aims to set out common standards and procedures in the Member States for returning irregularly staying third-country nationals, *‘in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations’*. “Illegal stay” is defined as the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry, stay or residence in that Member State. The fact that the starting point for the applicability of the Directive is the notion of “illegal stay” means that it does not address the grounds or procedures for ending legal residence. The Directive asserts that *‘decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria implying that consideration should go beyond the mere fact of an illegal stay’*, and provides that the best interest of the child and respect for family life should be a primary consideration of Member States when applying the Directive. It also asserts that its implementation should be *‘without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees’*.

The Directive deals with the different aspects of a return process. It regulates the issuing of return decisions and entry bans. A number of procedural safeguards are granted to persons subject to return procedures, e.g. the right to appeal or seek review of decisions related to return, and to receive essential health care and, in the case of children, to access education while removal is pending. The Directive also sets out provisions on the detention of third country nationals pending removal, including the maximum length of time during which a person can be detained and the conditions of detention. It also establishes particular rules for the detention of children and families.

As with other EU legal instruments, return procedures must be implemented by States not only by observing the different provisions of this Directive, but rather, by **applying them in such a way that they are compatible with international human rights and refugee instruments**, as well as with the European Convention on Human Rights and other relevant instruments.

The following exercise will allow participants to identify those areas that are particularly relevant for entry officials involved in return of persons not in need of international protection and become familiar with the international standards that apply to such situations.



7.2. The “Market Place”: The role of entry officials in a safe and dignified return process

Preparation

The facilitator should divide the group of participants into three groups of about 7 or 8 participants each. Each group will go to a different corner of the room, where they will have flipchart paper, sellotape, markers and “fake” banknotes of 1,000, 100, 50 and 10 pence respectively.

Instructions to participants

- The facilitator should recall what was mentioned during the presentation to the effect that UNHCR has publicly expressed its readiness, on a good offices basis, to support States, upon their request, in their endeavours to return persons found not to be in need of international protection. In doing so, however, UNHCR has cautioned that its involvement needs to be consistent with its humanitarian mandate to provide international protection to refugees.
- The facilitator should continue presenting a fictitious situation, as follows:

CASE SCENARIO

- An EU Member State has invited UNHCR to take part in a return operation.
 - UNHCR is reportedly keen to support this process, yet the Assistant High Commissioner for Protection has stated:
 1. that it can only lend its support for a voluntary return process of persons NOT in need of international protection, and
 2. only as far as it fully complies with international human rights and refugee protection standards.
 3. while UNHCR understands that other “alternatives” to voluntary return must be sought for those unwilling to accept voluntary return programmes (i.e. forcible returns), these should also comply with international standards for forcible returns.
 - UNHCR’s concrete ways of engagement has not yet been determined.
-
- As stated above, participants will be divided into three groups of about seven or eight participants each. Each group will represent a “Border Control Unit” dealing with return enforcement, developing voluntary return plans and managing a detention centre for irregular migrants. The expression “Border Control Unit” is being used in this exercise to include entry officials, police and other personnel involved in the development and implementation of return operations.
 - Each “Border Control Unit” will be handed a list of aspects pertaining to a return process, which need to be taken into account to ensure alignment with international human rights and protection principles as well as regional law. Each group should identify concrete actions with respect to each of these issues to ensure that the different aspects and phases of the return process are up to international human rights and refugee protection standards. The suggested actions **should be as closely related to the work of border officials as possible** (this is to be clearly emphasized by the facilitator).

The list of issues given to participants is the [following](#):

Checklist for participant: aspects of a return process that may be relevant in the context of border officials responsibilities

1. VOLUNTARY RETURN

- 1.1 Prioritising voluntary over forced return
- 1.2 Ensuring the voluntariness of the return
- 1.3 Non-refoulement
- 1.4 Safe and dignified voluntary return
- 1.5 Family unity

2. DETENTION

- 2.1 Use of detention for pre-removal purposes
- 2.2 Pre-removal detention of children and families
- 2.3 Duration of detention for pre-removal purposes
- 2.4 Conditions of detention for pre-removal purposes
- 2.5 Legal aid and counselling during detention

3. FORCIBLE RETURNS

- 3.1 Procedural safeguards in forcible returns.
- 3.2 Safeguards in the forcible returns of unaccompanied & separated children
- 3.3 Confidentiality
- 3.4 Enforcement of forcible returns whilst ensuring safety and dignity
- 3.5 Use of coercive measures and means of restraint

- The groups will have **1 hour** to write the different suggestions on the flipcharts.
- The suggestions from the different participants in the group should be written on flipchart sheets and the latter should be hung on the wall using sellotape, in such a way that anybody can read them. The reason is that **each group will have to prepare a “market stand”** with their proposals. Each group of participants will have its own “market stand” in order to – during the second part of the exercise – “sell” their different suggestions to the other teams, who will go through the different market stands. The participants at the stand should convince their “potential customers” of the value of their suggestions with its humanitarian mandate and with international protection and human rights standards.
- After one hour, the facilitator will call the time and all groups must stop writing. Each group will divide itself into two: **half of the group will remain by its stand, to be able to “sell” its “products”** (the different suggestions to overcome protection and human rights concerns in current return procedures); and the **other half of the group will be responsible for the “shopping”** of interesting “products” elaborated by the other groups and exposed in their respective stands.
- In order to ensure an orderly “shopping” session, it should function as follows: since there is one “market stand” in each corner of the meeting room, those **participants** tasked by their group with **“shopping” should move clockwise from one stand to the next one every five minutes**. During those five minutes, the participants who stayed at their stand should “promote” their suggestions and “advocate” and “lobby” so that the other groups will “buy” them. They should explain the advantages of each suggestion. Every five minutes, the facilitator will call the time for the groups to rotate to the next “stand”
- **After 15 minutes**, when the three groups have finished their rotation through the other two “market stands”, they will start the actual **purchasing** of their favourite products. They will use the fake bank notes previously distributed to all groups and pay the highest prices for the initiatives they value most. They will stick their bank notes with scotch tape on top of each “purchased product” (i.e. the respective suggestions written on the flipcharts). They will have **three minutes to give away all their money and complete their purchases**.



7.3. Participatory debriefing on the market place

This debriefing (key messages below) should kick-start with an analysis by the facilitator of the most valued initiatives and a discussion with the participants on the reasons for their choosing to put their money on some “products” over others, etc. The facilitator should establish a dialogue with the different groups on their thinking behind the different proposals presented. Throughout the debriefing, the facilitator should keep focusing on those initiatives which are directly related to the functions of border or entry officials in general.

In discussing the different initiatives suggested, the facilitator should highlight which are the international standards (including law and policy) that apply to the different issues. The following answer key aims to assist the facilitator to that end.

Both the issues on the list, as well as the references to international standards, have been selected on the basis of their relevance to the work of entry officials, so they do not aim to cover the whole spectrum of rights and guarantees surrounding return procedures. **Yet, it is important that the facilitator invites the participants to come up with concrete examples on implementing these standards in their day-to-day activities, as it is essential to highlight the link to their own responsibilities.**

The standards collected below have been gathered from a variety of sources, which are succinctly indicated in the footnotes under the table below, and are listed under session 7 background reading.

For time management and learning purposes, facilitators should select those issues that are most likely to be faced by that specific group of participants, on the basis of their geographic and functional profile. As opposed to trying to cover all the issues, this will allow for more in-depth discussion about relevant issues and a higher absorption of key messages by participants.

Aspects of the return process		INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
VOLUNTARY RETURNS	Voluntary over forcible return	<ul style="list-style-type: none"> - Forcible voluntary return will in all cases be an option of last resort. Prior to that, all humanitarian aspects of the person's situation must be given fair consideration; adequate notification will be provided and every effort will be made to encourage him or her to opt for voluntary return.² - Authorities dealing with persons not in need of international protection should ensure the availability of complete information, in a language that most of the potential returnees can understand, about the existing programmes of voluntary return, in particular those organized by the State or in conjunction with the International Organization for Migration (IOM) and other similar organizations.³ - It is essential that the persons subject to a return measure be prepared for such an eventuality. Border officials should ensure access to sensitive counselling at all stages. Non-governmental organizations have an important contribution to make in this area, and should be involved as much as possible.⁴
	Ensuring the voluntariness of the return	<ul style="list-style-type: none"> - Only an informed decision can be a voluntary decision. It is therefore important to provide possibilities for returnees to gather information from sources they can trust.⁵ - Information should be provided as early as possible. This will allow individuals sufficient time to understand their situation, and to receive the necessary advice.⁶ - UNHCR, in consultation with the Government in the country of asylum / migration, may provide for the most appropriate means for the counselling and registration for those contemplating repatriation, with the assistance, as necessary, of non-governmental organizations.⁷ - A good practice is the counselling for voluntary return in Denmark by the Danish Refugee Council, which is carried out in teams consisting of a legal advisor with knowledge of the rules and procedure of asylum, and a counsellor with expertise on repatriation. If the Danish Refugee Council finds that the decision on asylum or humanitarian residence is not correct, they can assist in asking the relevant authorities to reopen the case. They have done so in a small number of cases. - Specialist counselling should be made available to persons who have undergone traumatic experiences in their country of origin and who may as a result suffer psychological problems. These persons are likely to find repatriation especially difficult. An assessment of the availability of suitable medical services in the country of origin should be undertaken prior to return.⁸
	Non-refoulement	<ul style="list-style-type: none"> - Member States shall not effect removal when it would violate the principle of <i>non-refoulement</i>.⁹ - As representatives of the State, border officials are obliged to avoid any situation which would entail a violation of the <i>non-refoulement</i> obligation. - As a basic measure, border officials in the host State should be updated on the situation in countries of origin, especially those undergoing conflict or widespread human rights violations. They should rely on a variety of available sources of information on the country of origin, including non-governmental sources, and they should consider any information provided by UNHCR.¹⁰

² UNHCR, Legal and practical aspects of the return of persons not in need of international protection, UNHCR 2001.

³ Adapted from Council of Europe's Twenty Guidelines on Forced Return. Guideline 1.

⁴ Adapted from UNHCR, Legal and practical aspects of the return of persons not in need of international protection, UNHCR 2001.

⁵ Adapted from UNHCR, Voluntary Repatriation Handbook, International Protection, 1996. See Chapter 4.2

⁶ ECRE, Position on Return, 2003.

⁷ Adapted from Tripartite Agreement for UK, Afghanistan and UNHCR.

⁸ ECRE Position on Return, 2003.

⁹ EU Return Directive Art. 9 in relation to Art. 33 of the 1951 Convention, Art. 3 ECHR and Art. 3 CAT.

¹⁰ Based on Council of Europe's Twenty Guidelines on Forced Return.

Aspects of the return process		INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
VOLUNTARY RETURNS	Safe & dignified return	<ul style="list-style-type: none"> - In all their dealings with returning persons, border officials should ensure that they are allowed to retain a sense of self-sufficiency and control over their own lives. - Once a person found not to be in need of international protection has made an informed decision to comply with a removal order, this should take place promptly.¹¹ Returnees should be allowed sufficient time to return, but border officials should also endeavour to avoid delays. There should be appropriate communication with returnees, who should be offered choices about the timing of return, means of transport etc. and be made aware of all appropriate information relating to the journey. - Unsuccessful asylum-seekers should be helped to retain or regain their self-esteem and self-respect. Return is more likely to succeed if they are assisted in making contact with their families and friends in the country of origin; and in acquiring or developing skills and knowledge that they can take back home.¹² - Assistance should include adequate pre-departure services such as health care for the medically or mentally ill (assuming that their condition is not serious enough to warrant the granting of a humanitarian status or the delaying of their removal).¹³ - It is important that any return assistance offered to asylum-seekers whose applications have failed addresses as far as possible the particular needs of the individual, especially in relation to vulnerable persons. In particular, authorities dealing with return programmes should ensure that support to returnees in the form of counselling, accompaniment and assistance packages for voluntary return take into consideration the needs of children, single heads of households and other persons with specific needs.¹⁴ - In the case of those whose applications have been unsuccessful and who cannot immediately return, forms of assistance should be provided that help them prepare for their eventual return. This could include the provision of appropriate training, so that persons awaiting return can acquire skills that will provide them with opportunities in their country of origin and help make their return sustainable. - All returning persons should have appropriate documentation to enable them re-enter their countries and reach their final destinations. A good practice is that foreseen in most Tripartite Agreements, whereby it is agreed that each adult man and woman repatriating voluntarily should duly sign completed VRFs – Voluntary Repatriation Forms- issued in country of asylum / migration in cooperation with UNHCR. This form should be recognized by all parties as a valid travel document for the purpose of the return to their final destinations within their country of origin. Border authorities involved in supporting return procedures should ensure that all persons repatriating hold such form or any other document serving similar purposes.¹⁵ - Procedures should be put in place to check that returnees have reached their destination safely, particularly where there are no reception arrangements upon arrival. There should be follow-up and monitoring of returned asylum-seekers whose applications have been rejected to identify whether return policies prove to be effective and safe. This would help ensure the safety of returnees and act as a check on states' fulfilment of their obligations under international law to protect individuals from <i>refoulement</i>. It would also help evaluate the success of (re-) integration efforts and the sustainability of return.¹⁶
	Family unity	<ul style="list-style-type: none"> - When implementing the EU Return Directive, border authorities must take due account of family life.¹⁷ - Where all members of a family decide to or are to be returned, and all are nationals of the country of return, border officials should make every effort to ensure that families are repatriated as units and that involuntary separation is avoided. Where such efforts fail, a mechanism should be established for their reunification in the country of origin or of asylum, as appropriate.¹⁸

¹¹ UNHCR ExCom Conclusion on Return No.96 (LIV), 2003.

¹² UNHCR, Legal and practical aspects of the return of persons not in need of international protection, 2001.

¹³ ECRE Position on Return, 2003.

¹⁴ Save the Children and UNHCR, The Separated Children in Europe Programme *Position Paper on Returns and Separated Children, September 2004, p.3-4, ECRE, The Way Forward: 'The Return of Asylum Seekers whose Applications have been Rejected, 2005.*

¹⁵ Based on Tripartite Agreement for UK, Afghanistan and UNHCR.

¹⁶ ECRE Position on Return, 2003.

¹⁷ EU Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals., (EU Return Directive).

¹⁸ Based on Tripartite Agreement for the VOLREP from the UK to Afghanistan.

Aspects of the return process		INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
DETENTION	Use of detention for pre-removal purposes	<ul style="list-style-type: none"> - Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when, <ul style="list-style-type: none"> a) there is a risk of absconding or b) the third-country national concerned avoids or hampers the preparation of return or the removal process.¹⁹ - Detained persons should be informed promptly, in a language which they understand, of the legal and factual reasons for the detention and the possible remedies available.²⁰ - Victims of torture should be promptly identified to ensure that they do not get re-traumatized through incarceration.²¹ In their communication and reporting to other bodies, including judicial and administrative authorities, officials running detention centres could suggest other alternatives to detention for individuals who do not hamper the preparation of the return process nor present a tangible risk of absconding. - Such measures may include the surrendering of the passport or other identity documents to the authorities; an obligation to reside in a particular place or within a certain district; and/or an obligation to report at regular intervals to the authorities, such as the closest police station, bail or sureties.²²
	Duration of pre-removal detention	<ul style="list-style-type: none"> - Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.²³ - Authorities in detention centres should ensure access to legal aid to ensure the availability of a legal remedy against detention at any point. Equally, they should ensure the detained persons' access to information related to legal aid and possible support organizations in a language they understand. - When it appears that a reasonable prospect of removal no longer exists for legal or other considerations, or there is no more risk of absconding, or of obstruction of the return process by the detainee or there is no progress in removal arrangements, detention ceases to be justified and the person concerned shall be released immediately.²⁴
	Conditions of pre-removal detention	<ul style="list-style-type: none"> - Detention should always take place in specialized detention facilities. Where a Member State is obliged to resort to prison accommodation, the detainees should be separated from ordinary prisoners.²⁵ - The living space should be adequately furnished, clean and in a good state of repair; there should be sufficient living space for the numbers involved. Design and layout should avoid the impression of a "prison-like" environment. Outdoor exercise, access to a day room, newspapers & other means of recreation should also be made available. Staff must be carefully selected and receive appropriate training.²⁶ - There should be female guards in every shift for female detention centres. Officials in the detention centre will have to be sensitive to the needs of women. Moreover, detention conditions need to be adequate for women's needs, including distribution of hygienic items. - Officials working in detention centres should redouble efforts to become familiar with cultural and religious rules of detainees and endeavour to develop basic relevant language skills. Communication leads to a more humane treatment, thus increasing the dignity of the detainees. Regularly discuss conditions of detention with detainees to foster communication and better understanding of their needs. - In the (undesirable) case that there are pregnant women in detention, ensure supply of supplementary nutrition, appropriate living conditions and regular access to health care. - Ensure that access to psychologists is not only granted in cases of extreme urgency, for example due to aggressive behaviour.

¹⁹ EU Return Directive, Art. 15.

²⁰ ECHR, Art. 5 in relation to Council of Europe Guidelines on Forced Return", Guideline 6(2).

²¹ UNHCR on the basis of participatory assessments in Eastern Europe, 2007.

²² Council of Europe, Guidelines on Forced Return.

²³ Return Directive, Art. 15(1); Council of Europe Guidelines on Forced Return, Guidelines 7&8; ECHR 5(1).

²⁴ Return Directive, Art. 15(4).

²⁵ Return Directive, Art. 16(1).

²⁶ Council of Europe, Twenty Guidelines on Forced Return, Guideline 10.

Aspects of the return process		INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
DETENTION	Pre-removal detention of children and families	<ul style="list-style-type: none"> - Unaccompanied / separated children and families with children should only be detained as a measure of last resort and for the shortest appropriate period of time.²⁷ - States must also ensure that the child's best interest is a "primary consideration" in all actions concerning the child, including in the context of the detention of children pending removal.²⁸ - Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.²⁹ - Children in detention must be able to engage in leisure activities, including play and recreational activities according to their age, and shall have, depending on the length of their stay, access to education.³⁰ - Unaccompanied / separated children must, as far as possible, be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.³¹ Their access to psychologists and social workers should also be facilitated by staff in these institutions.
	Legal assistance and counselling during detention	<ul style="list-style-type: none"> - From the very beginning of detention,³² detainees should be allowed to contact legal representatives, family members and competent consular authorities.³³ - This is essential for them to be able to make informed decisions about their legal situation. It is also vital for them to be able to challenge the legality of detention in court, if needed.³⁴ - The period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is the greatest. The fact that the detention is on grounds of preparation for removal, and the irreversible character of the execution against that person of the removal order, make it of even higher importance that the person can contact a lawyer to inform him or her of the arrest.³⁵ - To that end, UNHCR and other international and national organizations, as well as NGOs, should have the possibility to visit detention facilities used for pre-return detention. Detainees should be informed of their right to contact such organizations and bodies.³⁶ Ensure access to communications facilities and to the directories of relevant organizations. - Authorities working in migration detention centres should establish regular contact with UNHCR, NGOs and other bodies to discuss possible arrangements for detainees wishing to contact them, such as specifying names of relevant liaison officers and contact modalities in case of emergency, etc.³⁷ - Telephone and fax numbers for contacting the detainees should be made available to the relevant organizations; and personnel responsible to deal with representations in cases of forcible return should be appointed. Legal representatives should have access to those asylum-seekers referred to deportation procedures.³⁸ - Where all legal rights of appeal have been exhausted and the relevant authorities intend to execute the return order, the asylum-seeker and his or her representative should be given notice and time allowed for the asylum-seeker to finalize his/her affairs. If the authorities believe that such notification would lead to absconding, then a surety could be demanded.³⁹

²⁷ Convention on the Rights of the Child, Art. 37(2) and Return Directive, Art. 17.1.

²⁸ Convention on the Rights of the Child and Return Directive, Art. 17.5.

²⁹ Return Directive, Art. 17.2.

³⁰ Return Directive, Art. 17.3.

³¹ Return Directive, Art. 17.4.

³² Council of Europe Guidelines on Forced Return.

³³ Return Directive, Art. 16(2).

³⁴ Article 5(4) ECHR and Article 9(4) ICCPR.

³⁵ Council of Europe "Forced Return Guidelines", Guideline 6, and Committee Against Torture.

³⁶ EU Return Directive, Art. 16. 3 & 4.

³⁷ UNHCR.

³⁸ Based on report by British Refugee Council "How UK Border Controls are Endangering the Lives of Refugees", December 2008.

³⁹ Ibid.

Aspects of the return process		INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
FORCIBLE RETURNS	Procedural safeguards related to removals	<ul style="list-style-type: none"> - A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.⁴⁰ Decisions on return shall be taken on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an irregular stay.⁴¹ (Although border officials do not issue removal orders, this provision is relevant with regard to possible “rejections at the border” without a due process of law). - Forcible return procedures are subject to the principles of due process of law and non-discriminative access to justice; access to legal aid for those who need it; protection of personal property; protection of investments and respect for applicable international obligations. Return decisions and, if issued, entry ban decisions and decisions on forcible returns must be formal, in order for the person concerned to be afforded an opportunity to appeal.⁴² - Border officials should be able to refer interested persons to the national bodies and organizations from whom further information may be obtained concerning the execution of removal orders and the consequences of non-compliance with the removal orders.⁴³ - Forcible return decisions shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return.⁴⁴
	Forcible return of unaccompanied / separated children	<ul style="list-style-type: none"> - Before removing an unaccompanied / separated child from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.⁴⁵ Border authorities participating in return procedures should ensure that that the family or guardian has been identified and that there is clarity about reception arrangements in the country of origin. - Border authorities should verify that children in return procedures have a legal representative and guardian who accompany them through the different stages of the procedures. The legal guardian should not have a conflict of interests with those of the child. - No return or removal decisions should be issued without completion of an assessment of the best interests of the child. There needs to be an appropriate process for assessing within a reasonable timeframe what is in the child’s “best interest”.⁴⁶ Border authorities should ensure that a best interest determination procedure has taken place.
	Confidentiality	<ul style="list-style-type: none"> - The confidentiality principle should be respected, and information relating to an asylum application should never be shared with the individual’s country of origin, even in the cases of rejected asylum-seekers.⁴⁷ - Only information necessary for the purpose of organized voluntary return, for instance in order to obtain clearance for administrative formalities or in order to benefit from amnesty guarantees, should be disclosed.⁴⁸

⁴⁰ Council of Europe Guidelines on Return.

⁴¹ EU Return Directive. Introductory Par. 8.

⁴² International Law commission, Report of the Fifty-Seventh Session, (2005), A760/10.

⁴³ Adapted from Council of Europe Guidelines on Return.

⁴⁴ EU Return Directive, Art. 12.

⁴⁵ EU Return Directive. Art. 10.

⁴⁶ The Committee on the Rights of the Child: General Comment No. 6 (2005).

⁴⁷ Council of Europe Twenty Forced Return Guidelines, Guideline 12.

⁴⁸ UNHCR’s Confidentiality Guidelines, Internal document, August 2001.

Aspects of the return process	INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
<p style="text-align: center;">Enforcement of returns whilst ensuring safety and dignity</p> <p style="writing-mode: vertical-rl; transform: rotate(180deg);">F O R C I B L E R E T U R N S</p>	<ul style="list-style-type: none"> - The return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity, and force should only be used if necessary. In such case, it should be proportional and undertaken in a manner consistent with human rights law.⁴⁹ - Operations involving the forcible return of immigration detainees must be preceded by measures to help the persons concerned organize their return, particularly on the family, work and psychological fronts.⁵⁰ - It is essential that immigration detainees be informed sufficiently far in advance of their prospective deportation, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. A constant threat of forcible return can bring about a condition of anxiety that comes to a head during deportation and may often turn into a violent agitated state.⁵¹ - Where appropriate, Member States shall postpone removal for an appropriate period taking into account the specific circumstances of the individual case. In particular, take into account the third-country national's physical state or mental capacity (Return Directive, Art. 9) - The escort should comprise at least one person of the same sex as the deportee: this will facilitate communication with the returnee as well as help preserve the intimacy and dignity of the returnee. It is also a confidence building measure. - The lack of communication between the members of the escort and the returnee often explains panicked reactions from the returnee, especially when he/she has been given little or no information about the return procedure and the situation in the country of origin. Lack of communication may also result in a lack of respect on the part of the escort members for the returnee. Contact should take place before the actual return operation begins.⁵² - Where appropriate, Member States shall postpone removal for an appropriate period taking into account the specific circumstances of the individual case. In particular take into account: technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.⁵³ The obligation of States to ensure the safety of persons subject to removal proceedings cannot be transferred, formally or informally, to organisations assisting in the return process such as airlines. - Assignment of escort duties to staff who volunteer, combined with compulsory rotation (in order to avoid professional exhaustion syndrome and the risks related to routine, and ensure that the staff concerned maintained a certain emotional distance from the operational activities in which they were involved) as well as provision, on request, of specialised psychological support for staff. - Psycho-social service attached to the units responsible for deportation operations, staffed by psychologists and social workers responsible, in particular, for preparing immigration detainees for their deportation (through ongoing dialogue, contacts with the family in the country of destination, etc.)

⁴⁹ UNHCR ExCom Conclusion No. 96 (LIV) – 2003 par.(c).

⁵⁰ Council of Europe Twenty Forced Return Guidelines, Guideline 15.

⁵¹ Committee on the Prevention of Torture, 13th General Report, CPT-Inf/(2003)35.

⁵² Ibid.

⁵³ EU Return directive Art. 9.

Aspects of the return process	INTERNATIONAL STANDARDS on RETURN Related to the work of entry officials and officials in migrant detention centres
<p style="text-align: center;">F O R C I B L E R E T U R N S</p> <p>Use of coercive measures and means of restraint</p>	<ul style="list-style-type: none"> - The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.⁵⁴ - The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.⁵⁵ - The return operation should not be presented to the escort as having to succeed “at all costs”. Each deportation operation where difficulties are foreseeable to be monitored by a manager from the competent unit, able to interrupt the operation at any time. - While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee SHALL be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.⁵⁶ - Specific limitations to concrete measures of coercion or restraint:⁵⁷ <ul style="list-style-type: none"> - Absolute ban on use of means likely to obstruct airways (nose and or mouth) - Prohibition of restraint and coercive measures forcing the returnee into positions where he/she risks asphyxia. - (In an aircraft, for instance, when a deportee struggles and escort staff, by applying force, might oblige him/her to bend forward, head between the knees, thus strongly compressing the ribcage. This is strictly prohibited in most countries, and permitted only if it is absolutely indispensable for brief, authorized operations, such as putting on, checking or taking off handcuffs). - In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilization of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia. - Take off means of restraint during the flight, such as handcuffs, and if they need to be left on, a blanket should be placed on top. - Prohibition of medication to persons during their removal. Only to be used on the basis of a medical decision taken in respect of each particular case.⁵⁸ - Save for clearly and strictly defined exceptional circumstances, medication should only be administered with the informed consent of the persons concerned. - Measures such as the use of nappies on persons undergoing removal procedures, to prevent them from getting up to go to the toilet, can only lead to a degrading situation.

⁵⁴ EU Return Directive, Introductory Par. 13.

⁵⁵ Council of Europe Guidelines on Forced Return, Guideline 19; in relation to Art. 3 ECHR.

⁵⁶ Council of Europe, Guidelines on Forced Return, Guideline 17.

⁵⁷ Committee on the Prevention of Torture, 13th General Report, CPT-Inf/(2003)35.

⁵⁸ 1997 Convention for the Protection of Human Rights and dignity of the human being with regard to the application of biology and medicine. Art. 5; Council of Europe, “Guidelines on Forced Return”, Guideline 19.



Background documents and further reading for facilitators

A) On reception conditions and pre-removal detention

- Amnesty International, *Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees*, November 2007. POL 33/005/2007. [↗](#)
- UNHCR (Malta), *The Detention of Refugees and Asylum-Seekers by Reason of Their Unauthorised Entry or Presence*, July 2007. [↗](#)
- UNHCR “Being a refugee” – *How refugees and asylum seekers experience life in central Europe, an Age, Gender and Diversity Mainstreaming Report*, 2007. [↗](#)
- UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006. POLAS/2006/03 [↗](#)
- COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. [↗](#)

B) On the return of persons not in need of international protection

- British Refugee Council, *How UK Border Controls are Endangering the Lives of Refugees*, December 2008 [↗](#)
- COUNCIL DIRECTIVE 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals. [↗](#)
- UNHCR *Position on the Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, June 2008. [↗](#)
- John Gibson, *The removal of failed asylum seekers: international norms and procedures*, New Issues in Refugee Research, Research Paper No. 145, December 2007. [↗](#)
- ECRE, *The Way Forward. The return of Asylum Seekers whose Applications have been rejected in Europe*, 2005 [↗](#)
- Council of Europe, *Guidelines on Forced Return*, CoE Committee of Ministers, CM (2005) 40 Final, 9 May 2005. [↗](#)
- Committee on the Rights of the Child: General Comment No. 6(2005): *Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, Chapter VII(c), Return to the country of origin. [↗](#)
- UNHCR, *Executive Committee Conclusion on the return of persons found not to be in need of international protection*, 10 October 2003 No. 96 (LIV) - 2003. [↗](#)
- European Council on Refugees and Exiles, *Position on Return*, October, 2003. [↗](#)
- UNHCR, *Legal and Practical Aspects of the Return of Persons not in Need of International Protection*, Global Consultations Paper, May 2001. [↗](#)
- Khalid Koser, *Return and Reintegration of rejected asylum seekers and irregular migrants, an analysis of government assisted return programs in selected European countries*, report prepared for the International Organization for Migration, May 2001. [↗](#)