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A detailed illustration of a border crossing. In the foreground, four people are walking away from the viewer. They are dressed in heavy, dark clothing and hats, suggesting a cold climate. One person on the right is using a walking stick. In the background, a large, multi-story building with a red flag on top is situated on a hillside. The scene is rendered in a sketchy, expressive style with a color palette dominated by blues, browns, and greys, with a prominent red scarf on one of the figures.

**HANDBOOK**  
**ON HUMAN RIGHTS AND SCREENING**  
**IN BORDER SECURITY AND MANAGEMENT**

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# I. INTRODUCTION

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## A. BACKGROUND

The present handbook is an initiative of Counter-Terrorism Implementation Task Force (CTITF) Working Group on Protecting Human Rights while Countering Terrorism. The handbook, and a sister pocketbook, aim to assist Member States in strengthening the protection of human rights in border security and management in the context of counter-terrorism, especially in screening of individuals at borders. That initiative was funded by the United Nations Counter-Terrorism Centre.

Those who created the United Nations Global Counter-Terrorism Strategy urged Member States to increase national efforts and bilateral and multilateral cooperation to enhance effective border controls to prevent and detect the movement of terrorists.<sup>1</sup> That reflects the increasing recognition of the threat of individuals who transit through or travel to a State other than that of their residence or nationality for the purpose of perpetration, planning or preparation of, or participation in terrorist acts. The Security Council has repeatedly emphasized the significance of border controls, calling on Member States to increase border security measures.<sup>2</sup> These measures could include traveller risk assessments and screening procedures to identify individuals of concern. At the same time, the Global Counter-Terrorism Strategy and relevant Security Council resolutions all emphasize the importance of compliance with international human rights law and international refugee law in implementing measures for border security and management.

The Security Council has repeatedly stressed that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law. The Security Council has also underscored that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort. Failure to comply with the rule of law and other international obligations, including under the Charter of the United Nations, while countering terrorism is one of the factors that contributes to increased radicalization and fosters a sense of impunity.<sup>3</sup> In developing and implementing measures to identify individuals suspected of being terrorists at international borders, it should be stressed that human rights are universal. Even those suspected or convicted of involvement

in terrorist acts are entitled to respect for and protection of their human rights.

The New York Declaration for Refugees and Migrants<sup>4</sup> recognizes that States are responsible for the management and control of their borders. Member States committed to implementing border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law. They also committed to train public officials and law enforcement officers who work in border areas accordingly. The Declaration highlighted the promotion of international cooperation on border control and management as an important element of security for States, including for combating transnational organized crime and terrorism.

States have legitimate interests in exercising immigration controls to screen who enters their territories. They are also obliged to take measures to address security concerns, notably transnational organized crimes and terrorism. The handbook builds on the Recommended Principles and Guidelines on Human Rights at International Borders (2014), published by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which provides a comprehensive guide on applicable international human rights standards. The focus of the present handbook is on screening processes for border security and management in the counter-terrorism context. That may be related to screening for other purposes such as immigration control or customs enforcement, but the handbook primarily addresses the counter-terrorism context. It is designed to support policymakers working in the field of border security and management to fulfil their international commitments on counter-terrorism, international human rights and refugee law.

## B. WHAT IS COVERED IN THE HANDBOOK

Policies and procedures around border security and management are wide ranging and raise a variety of issues related to human rights. The present handbook is not an exhaustive study of international borders and human rights. It focuses on specific human rights issues around policies and processes for screening and assessing individuals at international borders in the context of counter-terrorism. Measures concerning screening include the following which are covered to the extent possible in the handbook:

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<sup>1</sup> General Assembly resolution 60/288.

<sup>2</sup> Security Council resolutions 1373 (2001) and 2178 (2014).

<sup>3</sup> Security Council resolution 2178 (2014).

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<sup>4</sup> General Assembly resolution 71/1.

## AT THE POLICY LEVEL

- Entry criteria
- Frameworks for effective remedies

## IN PRE-TRAVEL SCREENING

- Collection, analysis and storage of data on migrants at the national and international level
- Pre-travel authorizations such as the decision to grant a visa
- Advance passenger information (API), passenger name records (PNR), etc.
- Profiling and risk-assessment of migrants
- Cross-border cooperation and information exchange on migrants

## SCREENING AT THE BORDER

- Controls at clearly defined border crossing points
- Interception at sea
- Designated buffer zones for the purpose of border control
- Controls by border authorities beyond the border
- Verification of travel documents and visas
- Consultation of databases
- Collection of biometric data
- Criminal records and security checks
- Risk assessments based on behaviour or responses to questioning
- Identification and referral for international protection
- Decisions to refuse entry
- Decisions to detain returning foreign terrorist fighters based on border security and management screening measures

## II. OVERARCHING PRINCIPLES<sup>5</sup>



The following key principles of international human rights law apply to all interactions between border officials and individuals at international borders, including border security and management in the counter-terrorism context.

### A. PRIMACY OF HUMAN RIGHTS

International human rights law puts obligations on States to respect, protect and fulfil human rights in good faith in the governance of their borders. Human rights must be at the centre of all border governance policies and practices at international borders, including screening for counter-terrorism purposes. Human rights obligations apply wherever a State is exercising jurisdiction or effective control. That includes extra-territorial border security and management by government agencies or border security measures undertaken by private-sector agents employed by the State.

States need to ensure that measures such as screening that are aimed at combating irregular migration, organized crime or terrorism at international borders do not adversely affect the enjoyment of the human rights and dignity of people at the border, whatever their status. The objectives of combating terrorism or violent extremism do not override a State's international human rights obligations, nor do international obligations regarding counter-

ing terrorism at borders automatically apply to other categories of state action or security concerns.

Some rights are particularly relevant at borders. For example, everyone has the right to enter their own country and to leave any country, including their own.<sup>6</sup> Any restrictions on that right must have a clear legal basis and meet the tests of necessity and proportionality and non-discrimination described in chapter III of this handbook. That right should be reflected in policies on screening at international borders. The right to due process applies to all people at areas where States have jurisdiction or effective control, including international borders. Due process includes the right to an individual examination, the right to a judicial and effective remedy and the right to appeal decisions that affect an individual's human rights, and should be reflected in policies on screening for security risks at international borders.

### B. NON-DISCRIMINATION

Non-discrimination, equality before the law and equal protection of the law without discrimination are fundamental principles of international human rights law.<sup>7</sup> According to international human rights law, a person may not be discriminated against on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status or economic and social situation. The principle of non-discrimination must be at the centre of all border governance measures. Not all differential treatment amounts to discrimination, but any differential treatment of people at international borders must be justified in lawful and proportionate pursuit of a legitimate aim.

Law and regulations that provide the framework for border security and management, including screening processes must not be discriminatory either in purpose or effect. Measures that are either directly or indirectly discriminatory are in breach of international law. That means that subjecting people to security profiling at international borders based purely on prohibited grounds, such as their race, religion or ethnicity, is not permitted. For example, laws and regulations that restrict access to people of a particular religion, whether by design or by effect, would not be lawful.

<sup>5</sup> See OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, 2014. Available at [www.ohchr.org/Documents/Issues/Migration/OHCHR\\_Recommended\\_Principles\\_Guidelines.pdf](http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf).

<sup>6</sup> International Covenant on Civil and Political Rights, art. 12.

<sup>7</sup> *Ibid.*, arts. 2.1 and 26.





States must address and combat all forms of discrimination that arise out of policies and systems, or through the actions of State officials or private actors contracted by the State at international borders. That includes addressing problems in state policy or systems that lead to discriminatory practices. To prevent discrimination, all those engaged in border security and management should be adequately trained in the non-discrimination principle and able to apply it in practice. There should also be measures taken against discriminatory behaviour, including complaints and disciplinary processes against officials and redress for victims of discrimination.

### C. ASSISTANCE AND PROTECTION FROM HARM

Human rights obligations are not overridden by law enforcement and migration management objectives, but many rights allow for restrictions in certain circumstances. Ensuring security is a part of a State's international human rights obligations, including the duty to protect the right to life of all persons under its jurisdiction. Consequently, States must also protect and assist people at international borders without discrimination, regardless of their immigration status or their reasons for travelling. However, for some categories of people, such as refugees, specific international legal regimes apply.

The principle of *non-refoulement* under international human rights law and refugee law prohibits a State from returning a person to a place where she or he would be at risk of serious human rights abuses.<sup>8</sup> While there are limited exceptions to that under international refugee law,<sup>9</sup> which are to be read restrictively,<sup>10</sup> it is an absolute prohibition under human rights law. Arbitrary or collective expulsions are also prohibited.

Attention also needs to be given to people who may be particularly vulnerable or have specific needs at international borders, many of whom may also be refugees. That includes, but is not limited to; individuals in irregular situations, migrants in smuggling situations, trafficked persons, as well as children (accompanied by family members or unaccompanied or separated), women (including pregnant women and new and/or breastfeeding mothers), persons who have suffered abuse, including sexual and gender-based violence, victims of torture and cruel, inhuman or degrading treatment, and victims of violence and trauma; persons with disabilities; older persons; stateless persons; indigenous persons; persons who are members of minority communities; persons with HIV/AIDS or particular health concerns; lesbian, gay, bisexual, transgender and intersex persons; human rights defenders and political dissidents. Such people may have specific rights and needs that must be considered during any screening process, as explained further in chapter IV.<sup>11</sup>



<sup>8</sup> See chap. IV, sect.D for special considerations.

<sup>9</sup> 1951 Convention Relating to the Status of Refugees, art. 33.2.

<sup>10</sup> See United Nations High Commissioner for Refugees (UNHCR), Guidance Note on Extradition and International Refugee Protection, April 2008, paras. 13–16. Available at: [www.refworld.org/docid/481ec7d92.html](http://www.refworld.org/docid/481ec7d92.html).

<sup>11</sup> Screening for vulnerability is not covered extensively in the present handbook. Such an assessment should be individualized and undertaken by expert trained professionals.

States need to ensure that there is equal and effective access to justice as well as effective remedies and reparation for anyone who has suffered human rights violations or abuses because of border security and management measures. Effective access to justice includes access to relevant information on rights and reparation mechanisms in a language that the person can understand.

Human rights violations or abuses must be investigated and, where warranted, the perpetrators should be prosecuted. Sentences for human rights violations must be commensurate with the seriousness of the offence. States must take measures to ensure the non-recurrence of such abuses, including disciplinary measures, additional human rights training and improvement in border security and management systems and policies to prevent further abuses.



### III. HUMAN RIGHTS GUIDANCE ON THEMATIC ISSUES AT THE POLICY LEVEL



#### A. HUMAN RIGHTS IN LAW AND PRACTICE

International human rights law is made up of international treaties at the global level, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. There are similar treaties at the regional level; for example, the European Convention on Human Rights, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights. Other treaties focus on the rights of specific groups or on particular issues.<sup>12</sup>

Some human rights provisions are considered to have the status of customary international law. Such provisions are applicable regardless of whether a particular State has signed the relevant instruments. For example, although the Universal Declaration of Human Rights is not a binding treaty, it provides examples of standards that have become accepted as customary international law, such as the prohibitions on genocide and mass killings,<sup>13</sup> slavery,<sup>14</sup> and torture.<sup>15</sup>

<sup>12</sup> For example, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities.

<sup>13</sup> Universal Declaration of Human Rights, art. 3.

<sup>14</sup> *Ibid.*, art. 4.

<sup>15</sup> *Ibid.*, art. 5.

International human rights law evolves to meet new contexts. Human rights bodies, such as human rights treaty bodies and regional human rights courts, have recognized that human rights law is made up of “living instruments”, which can be adapted to reflect a changing society. Such adaptations include the development of new treaties so that human rights law can meet new and emerging challenges.

Human rights are not ideals, they are international legal obligations. As such, they need to be real and effective. That means that they should be incorporated at all levels of State engagement on counter-terrorism measures in border and security management. Such measures encompass the process of developing legislation, policy and practical guidance, such as standard operating procedures, and in training and accountability frameworks for State agents.

At the domestic level, international human rights law may be reflected in constitutional law, common law, human rights-specific legislation or wider legislation and standards. States are obliged to respect, protect and fulfil<sup>16</sup> human rights. These obligations are binding on all State agents and organs of the State at all stages of policymaking and implementation. State obligations apply whether or not States outsource State functions to actors from the private sector. International human rights law provides a baseline, but States may provide for higher standards domestically.

#### DIFFERENT TYPES OF RIGHTS

Human rights are universal, inalienable, interdependent and indivisible. States cannot pick and choose which rights to apply or to whom they should apply. However, international human rights law recognizes that some rights may be subject to derogations or limitations in certain circumstances, while others may not.

#### Derogable and Non-Derogable Rights

A derogation is a partial suspension of the application of a law. International human rights law allows for some rights to be lawfully derogated from in times of war or other public emergency threatening the life of the nation.<sup>17</sup> Other rights, such as the prohibition on torture,<sup>18</sup> do not allow for derogation in any circumstances.

<sup>16</sup> See Human Rights Committee general comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, paras. 6–7.

<sup>17</sup> See, for example, International Covenant on Civil and Political Rights, art. 4.

<sup>18</sup> See, for example, Universal Declaration of Human Rights, art. 5; and International Covenant on Civil and Political Rights, art. 7.

In the context of counter-terrorism, that distinction is important in situations where States may seek to use exceptional powers to address security threats. Some border and security management measures that substantially limit rights in the context of counter-terrorism may require derogation. Any derogation from international human rights law must meet several requirements to be valid. Such requirements include being lawful and compliant with international law, the exceptional and temporary nature of the derogation and notice to the Secretary-General of the United Nations about the derogation measures.

### Absolute Rights and Limited or Qualified Rights

In addition to the possibility of derogation, international human rights law allows States to restrict some rights in certain circumstances. For example, there may be lawful grounds for limiting the right to liberty and security of the person,<sup>19</sup> such as when a person faces criminal charges or lawful expulsion. The right to freedom of expression may also be restricted as provided for by law insofar as it is necessary to protect the rights or reputations of others, national security, public order, public health or morals.<sup>20</sup>

Other rights can never be restricted under any circumstances. These are known as “absolute rights”. The prohibitions on slavery<sup>21</sup> and torture are among such rights. There are no circumstances that can justify these kinds of treatment, and the framework that guarantees those rights reinforces the absolute nature of the prohibition.<sup>22</sup>

## RESTRICTING RIGHTS IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Any restriction of human rights by a State needs to fulfil certain criteria to be compliant with international law. Policymakers and officials implementing laws and policies need to ask the following questions about any measure that has an impact on human rights:

### 1. *Is it lawful?*

The principle of legality means that a measure restricting rights must have a clear legal basis. The law must be sufficiently clear and accessible so that a person can understand or find out what it means. Even if a measure is allowed in domestic law, it is not lawful if it is not compatible with international human rights law.

### 2. *Is it justified to achieve a legitimate aim?*

Any limitation on rights must be justified on grounds that are set out in the relevant provisions in international human rights law. For example, limitations may be objectively justified to protect the rights of others, for national security, public order, public health or morals.<sup>23</sup>

<sup>19</sup> International Covenant on Civil and Political Rights, art. 9.

<sup>20</sup> *Ibid.*, art. 19.3.

<sup>21</sup> *Ibid.*, art. 8.

<sup>22</sup> For example, the principle of *non-refoulement* and the obligation to prosecute.

<sup>23</sup> See International Covenant on Civil and Political Rights, arts. 17 and 19.

### 3. *Is it necessary and proportionate to the aim?*

Whether or not a measure is necessary should be based on an objective assessment that the limitation meets a legitimate need. A measure that limits rights must not impair the democratic functioning of society in full respect of the Charter of the United Nations and the Universal Declaration of Human Rights. If a measure is not proportionate to its aim, it cannot be considered necessary. Restrictions on rights cannot be applied or invoked in a way that impairs the essence of the right. That applies at both the policy-making and implementation stages.

### 4. *Is it non-discriminatory?*

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

## B. ACCOUNTABILITY FRAMEWORKS

Individuals are rights holders and must have the ability to claim their rights if they believe their rights have been violated. The right to an effective remedy<sup>24</sup> provides a fundamental guarantee in human rights law to ensure the enjoyment of other rights. States must make the application of international human rights law effective in practice through their domestic legislation, policies and procedures. That includes effective remedies which must be incorporated into border security and management processes to ensure that people whose rights may have been affected by measures at international borders have the chance to challenge those measures.

For a remedy to be effective, it must be accessible in practice. That means that an individual must be able to bring a complaint from inside or outside the State. In some cases, for example where there is a risk of serious human rights violations if a person is returned to another State, a remedy is effective only if it includes the possibility of suspending the application of a measure pending appeal. To facilitate access to remedies, information about complaint processes should be provided to the persons who are affected or concerned. Such information should be in a language the person can understand.

Accountability for breaches of human rights should be incorporated into internal disciplinary frameworks to ensure that State agents understand that failure to respect human rights have direct consequences for them. Training for border officials on human rights and their importance in supporting effective counter-terrorism measures can also help to raise awareness about the way human rights standards should be applied at the operational level, and highlight the consequences of failure to respect human rights.

<sup>24</sup> *Ibid.*, art. 2. See also General Assembly resolution 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

## C. SECURITY AND MIGRATION

International human rights law places an obligation on States to protect the right to life and the security of all people under their jurisdiction. Security and human rights should not be viewed as opposing interests. Guaranteeing the safety and security of the public is a fundamental part of a State's duty to protect human rights. The Security Council, for example, has called on Member States to ensure that border security measures help identify and intercept those who cross borders to engage in terrorist acts, but has also repeatedly stressed that such measures must be compliant with international law, including human rights law.<sup>25</sup>

Security measures sometimes interfere with the enjoyment of human rights. For example, surveillance techniques interfere with the right to privacy. That type of interference may be permissible; however, it is crucial that States take human rights law into account when designing and implementing effective security measures to ensure they are compliant with international human rights law.

States should ensure that policies on border security and management or political statements about border control or migration do not conflate the threat of terrorism with migrants, refugees or persons from particular countries, religions or ethnicities. People crossing borders, whatever their status, should not be treated with undue suspicion, as that could affect the way they are dealt with by border officials, which could undermine their dignity and the effective protection of human rights. The demonization and criminalization of migrants and refugees in public discourse in some countries have led to increased discrimination and xenophobia. International human rights law prohibits hate speech and provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>26</sup>

While the threat posed by individuals travelling across international borders to commit terrorist acts requires an international response, such measures must be compliant with States' obligations under international human rights law. Security concerns related to terrorism and the need to manage migration may both amount to legitimate aims justifying restrictions on human rights that are necessary, proportionate, non-discriminatory and in accordance with the law. However, the two issues are separate and may give rise to different legal considerations. Vague justifications that conflate migration and security are unlikely to meet the objective tests of necessity and proportionality. It is therefore very important that States provide precise justification for and the specific objectives of individual border management measures whenever any right is restricted.



## D. LOCATION OF SCREENING

International human rights law applies to border security and management screening wherever and however it takes place. Border controls may take place at airports, at sea or on land, either through official border posts or along porous borders that are difficult to control. Security screening for travel may be done remotely or in person at an international border or elsewhere.

States sometimes seek to establish immigration screening processes away from their borders, either externally in other States or internally where people may be subjected to immigration-related security screening, such as identification checks to establish immigration status throughout the State. Some States have created "buffer zones" at borders with different legal frameworks for the treatment of people in those zones. Nevertheless, the location of the screening or border controls does not affect the application of international human rights standards. A State is responsible for the human rights of all persons within its jurisdiction or under its effective control, no matter what their nationality or status.

The prohibition of refoulement and collective expulsions applies wherever screening could result in a person being pushed back from entering the State. Regional or bilateral agreements about migration or border control cannot override States' obligations under human rights and refugee law.

<sup>25</sup> See Security Council resolutions 1373(2001), 2178(2014) and 2368(2017).

<sup>26</sup> International Covenant on Civil and Political Rights, art. 20.2.



## E. VISAS AND ENTRY CRITERIA

The principle of sovereignty allows States to design their own visa policies and entry criteria and to differentiate between people of different nationalities. Non-citizens do not have the right to enter or reside in the territory of a State. However, the rights set out in international human rights law and, where relevant, international refugee law apply to every individual under the jurisdiction of the State without discrimination, regardless of the nationality or statelessness of the person concerned.

The design of security and immigration screening measures and entry criteria, as well as the way in which they are applied in practice must not be discriminatory and must include provisions that take into account human rights, including the prohibition of inhuman or degrading treatment and respect for family life. Overly broad and intrusive questioning should be avoided as it may undermine a person's inherent dignity and may amount to a disproportionate interference with the right to privacy.

Overly broad entry criteria could also have a discriminatory effect. For example, refusing entry because a person's having a criminal conviction in another country may be discriminatory because the conviction could be for conduct that is not considered a crime in the State into which entry is being sought. In cases where such a conviction targets particular groups, such as women or sexual minorities, refusal to enter could amount to discrimination.

The potential impact of a measure on a person's human rights should be borne in mind when assessing whether or not refusal to enter a country would be proportionate. For example, refusing to grant a tourist visa to a potential visitor would not have the same impact as refusing entry to a person who has settled or pre-settled status in a country or who is moving to join close family members.

## F. FREEDOM OF MOVEMENT

The right to freedom of movement is protected in international human rights law.<sup>27</sup> The International Covenant on Civil and Political Rights provides that everyone has the right to leave any country, including their own.<sup>28</sup> Any restrictions on that right must have a clear legal basis and meet the tests of necessity and proportionality and non-discrimination. Freedom to leave a country includes the right to choose the destination, although entry into another country would be subject to the agreement of that State. Where a State is expelling a non-citizen, that person should still have the right to choose the destination, again subject to the agreement of the other State. Restrictions on the right to leave a country are permissible only in exceptional circumstances and must meet the requirements of legality, legitimate aim, necessity, proportionality and must not be discriminatory.

The Covenant also guarantees, in absolute terms, that no one shall be arbitrarily deprived of the right to enter their own country.<sup>29</sup> Those provisions must be respected where States take action to limit the travel of their own nationals or revoke citizenship, for example in the case of foreign terrorist fighters with dual nationalities, who are refused entry into the country to which they are returning. It should be noted that the concept of "own country" is broader than nationality, so a person who has significant ties to a country may not be arbitrarily refused entry to that country even if they are not, or are no longer, a citizen thereof.

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<sup>27</sup> Ibid., art. 12.

<sup>28</sup> Ibid., art. 12.2.

<sup>29</sup> Ibid., art. 12.4.

## IV. HUMAN RIGHTS GUIDANCE ON SPECIFIC SCREENING PRACTICES

Screening practices around migration, security and international borders vary significantly from country to country and region to region. The level of personnel and technical capacity, type and scale of migration that authorities are managing, level of actual or perceived security risks, geographical characteristics of a country's borders, applicable regional legal frameworks and available resources all affect such practices. This chapter highlights some of the human rights considerations that States should take account when designing and implementing measures to screen individuals in the context of border security and management. Individual screening measures such as questioning, surveillance at borders and automatic checks against databases may serve a number of purposes, including immigration control, security and customs checks. This chapter looks at the human rights implications of the types of screening that are commonly used at international borders in the context of counter-terrorism.<sup>30</sup>

### A. AUTOMATIC SCREENING— COLLECTION, STORAGE AND USE OF PERSONAL DATA

Screening of people crossing international borders is increasingly undertaken through automatic processing of personal data. That may involve remote screening, such as the consideration of a visa application or travel authorization before a person travels or screening at the border where an individual's data is checked against databases before they enter or leave a country. Data may be collected, stored or used by both public authorities and private sector actors such as airlines or private security contractors in the context of border security and management. However, international human rights standards apply regardless of the type of data processor.

National and international databases may have a variety of purposes and varying implications for human rights. Human rights concerns have been raised about the trend to blur the distinction between migration management and counter-terrorism or law enforcement in the use of databases on people crossing international borders. Access by law enforcement services to databases designed for



migration purposes should be the exception rather than the rule. This chapter summarizes some of the key human rights considerations concerning automatic screening.

### HUMAN RIGHTS AND DATA

While the collection, storage and use of personal data for screening amounts to an interference with the right to privacy,<sup>31</sup> that right can be restricted when the requirements of international human rights law are met.<sup>32</sup> Careful thought needs to be given to the aim of any such measures, their legal basis, necessity and proportionality, as well as any potential for discriminatory design or impact. Massive, non-targeted and indiscriminate collection of data is unlikely to meet the requirements for necessity and proportionality. Similarly, the retention of data for longer than is necessary is a breach of international human rights law.

Laws establishing automatic collection, storage and use of personal data should include details of the purpose for which the data is collected, the way in which it is used, who has access to the data, the purpose(s) for which it may be used and the length of time that the data may be stored. Technology is moving very quickly, opening new opportunities for interpreting and processing personal data. Nevertheless, technological developments need to be accom-

<sup>30</sup> Screening for vulnerability may also be required for certain groups of people, such as refugees. However, such screening ideally should be undertaken by experts or trained professionals. The present handbook does not address vulnerability screening in any detail. For more information, see, for example, UNHCR and International Detention Coalition, *Vulnerability Screening Tool: Identifying and addressing vulnerability: a tool for asylum and migration systems* (2016). Available at [www.unhcr.org/en-us/protection/detention/57fe30b14/unhcr-ids-vulnerability-screening-tool-identifying-addressing-vulnerability.html](http://www.unhcr.org/en-us/protection/detention/57fe30b14/unhcr-ids-vulnerability-screening-tool-identifying-addressing-vulnerability.html).

<sup>31</sup> International Covenant on Civil and Political Rights, art. 17.

<sup>32</sup> See chap. III.

panied by appropriate human rights-compliant legislation before they can be used for processing personal data. It is not enough for a State to show what they can do with data. They must show that any interference with privacy involving personal data is lawful, necessary and proportionate to a legitimate aim and is non-discriminatory.

Increasingly, technology is being used to interpret behaviour and risk by processing data with the use of complex algorithms. Some techniques such as facial recognition and behavioural screening technology may be much more intrusive than standard screening by personnel. In addition, algorithms themselves may produce discriminatory results. Developments in the interpretation of data, for example through the detection of suspicious body movements or facial micro-expressions to make an assessment of someone's mental state or intentions may also engage the right to freedom of thought. Unlike the right to privacy, the right to freedom of thought is an absolute right and may not be interfered with under any circumstances.<sup>35</sup> Techniques that interfere with the right to freedom of thought are not compliant with international human rights law.

Despite the risk of error in assessments made using technology, it may be difficult to challenge or unpick the reasons why an assessment has been made. The use of technology in profiling must be established in law, and the law must include adequate oversight and accountability mechanisms to ensure that effective remedies are available,<sup>34</sup> and that the technology is being used in accordance with the law in a way that is necessary, proportionate and non-discriminatory. An effective and accessible framework for challenging decisions taken on the basis of automated risk assessments must be in place. That must include the possibility for an individual to request information on the data being held on them and to have incorrect data removed from databases and/or corrected.

## ADEQUATE SAFEGUARDS FOR SENSITIVE DATA

Certain types of data, such as biometric data, including photos, iris scans and fingerprints, are particularly sensitive because of the level of intrusiveness and the information they can provide about an individual. Sensitive data also includes any information that reveals racial or ethnic origin, sexual orientation, political opinions, religious or philosophical beliefs, trade union membership or information concerning a person's health or sex life. For example, meal preferences on flights may give sensitive information about a person's religion or health issues. The collection of health data is particularly intrusive and may have discriminatory consequences. The rules around the collection, storage and use of such data should be formulated to provide adequate safeguards, which is particularly important in relation to the collection of biometric data from children, who are particularly vulnerable and less able to understand the future implications of sharing their data or to challenge interference with their human rights. Authorities should al-

ways consider the exact purpose for which such data is collected and ensure that the treatment of the data is strictly necessary for that purpose. In addition, States must make sure that the misuse of data does not lead to potential violations of absolute rights where, for example, a person is subjected to inhuman or degrading treatment owing to the information shared about their political beliefs or sexual orientation.

## SAFEGUARDS FOR REVIEW OF CRIMINAL RECORDS AND SECURITY FLAGS

Screening at borders can include the review of criminal records or other security flags on national and international databases.<sup>35</sup> Compliance with international human rights standards of such screening depends very much on the nature and purpose of the databases consulted and the purpose of the screening. Automated screening against databases may be unreliable if the bases are not carefully maintained, and false positives may occur. In addition, the standards of evidence or relevance for including information in databases for security and intelligence purposes are much lower than those required for a criminal conviction and may often be unverified, inaccurate or misleading. People affected by decisions based on screening against flawed information and databases must have avenues to challenge those decisions and to obtain effective remedy.<sup>36</sup>

Where a criminal conviction is flagged, it should not automatically result in a person's being refused entry to a country. The questions of lawfulness, necessity, proportionality and non-discrimination must be applied on a case-by-case basis. That should take into account issues such as the severity of the crime, the amount of time that has elapsed since the conviction and the impact of a refusal to enter the country on the individual concerned. The nature of criminal convictions on record or disclosed by an individual may raise human rights questions where, for example, a person was convicted in absentia, the conviction was based on an unfair trial, or the offence itself could be considered as discriminatory.

If a person with a criminal conviction requests asylum at the border, both the conviction and the underlying claim for asylum should be considered in the course of the asylum proceedings, not at the border. Depending on the nature and seriousness of the crime, it could be evidence of persecution in the country of origin, or it may be the basis for exclusion from refugee status. Therefore, any decision based on the existence of a criminal conviction should take into account all possible circumstances.

## APPROPRIATE USE OF PROFILING AND RISK ASSESSMENT

Automatic screening may include some form of profiling to assess whether an individual is a security risk or to help detect irregular migration. Profiling means using information about a person to establish whether they are likely to pose

<sup>35</sup> International Covenant on Civil and Political Rights, art. 18.1.

<sup>34</sup> *Ibid.*, art. 2.3.

<sup>35</sup> See chap. IV for a fuller analysis of the human rights implications of screening using international databases.

<sup>36</sup> See chaps. II and III for information on effective remedies.



a security or other risk. For example, factors such as travel from conflict zones may be used as part of a security risk assessment. It may be done either automatically through the collection of data remotely or in person, for example, through questioning at the border or consideration of the information provided on landing cards. States must ensure that the purpose or result of profiling is not discriminatory<sup>37</sup> and that adverse decisions based on automated profiling can be challenged by the individuals concerned.<sup>38</sup>

Although States may differentiate between nationals of different countries in their visa policies, screening that involves risk profiling to refuse entry or assess an individual's security risk based purely on prohibited factors such as nationality, religion or ethnic origin without any objective justification is discriminatory. The way in which screening questions are designed to assess risk and the way answers are used should take that into account. Where information is requested, authorities should always be able to explain why the information is required and how it will be used to demonstrate that it is lawful, necessary, proportionate and non-discriminatory. Both direct and indirect discrimination are prohibited, so profiling based on something that has a particular impact on people of certain ethnic, religious or national origins may be discriminatory even if it is not described as a physical or ethnic characteristic. For example, information about birthplace may be a strong indicator of ethnicity. Decisions taken on a discriminatory basis that result in a person's being refused entry to a country without individual consideration may also be a breach of the prohibition on collective expulsion<sup>39</sup> or *refoulement*<sup>40</sup> and may amount to inhuman or degrading treatment.

Profiling based on a person's declared opinions, views or sympathies may engage other human rights. International human rights law protects the rights to freedom of expression and opinion,<sup>41</sup> freedom of thought,<sup>42</sup> protection of personal honour and reputation, freedom of association<sup>43</sup> and assembly<sup>44</sup> among others. Penalizing a person because of what they have said or their associations in the past has a chilling effect on the exercise of those rights. Some of those rights<sup>45</sup> can be limited in certain circumstances, but only insofar as the limitations are in accordance with the law, necessary, proportionate and non-discriminatory.

Policies that impose blanket requirements for checking social media use, correspondence or call data are unlikely to be considered proportionate. In addition, social media "likes" and connections may reveal patterns of thought and behaviour that individuals are unaware that they are sharing. Freedom of thought is an absolute right and actions that interfere with that right are always unacceptable. Pol-

<sup>37</sup> See chap. II, sect. B for information on discrimination.

<sup>38</sup> See chap. III, sect. B for information on the right to an effective remedy.

<sup>39</sup> International Covenant on Civil and Political Rights, art. 13.

<sup>40</sup> 1951 Convention Relating to the Status of Refugees, art. 33.

<sup>41</sup> Universal Declaration of Human Rights, art. 19; and International Covenant on Civil and Political Rights, art. 19.

<sup>42</sup> Universal Declaration of Human Rights, art. 18; and International Covenant on Civil and Political Rights, art. 18.

<sup>43</sup> International Covenant on Civil and Political Rights, art. 22.

<sup>44</sup> *Ibid.*, art. 21.

<sup>45</sup> The right to freedom of thought is an absolute right insofar as it covers the *forum internum*, or inner thoughts.

icies that identify groups of people for checks based on discriminatory or political grounds are not human rights compliant.

Freedom of expression protects speech and ideas of all kinds.<sup>46</sup> Individuals should not be penalized for expressing views that authorities disagree with or that some people may find deeply offensive. People should not be discriminated against because of their political views or their association with political groups, trade unions or civil society organizations. International human rights law does, however, oblige States to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,<sup>47</sup> and that may include steps to prevent people who intend to engage in that type of activity from entering a country, which is consistent with international legal obligations.

## B. SCREENING AND INTERNATIONAL COOPERATION

Screening for the purposes of border security and management can involve receiving data from other countries or organizations and sharing data across borders. International human rights law provides overarching protections of the right to privacy. However, a large variation in standards of data protection set out in national and regional law frameworks should be considered when exchanging information. Data sharing is human rights compliant only if it is in accordance with the applicable domestic and regional laws, as well as international law standards. Agreements for data sharing across borders need to reflect that.

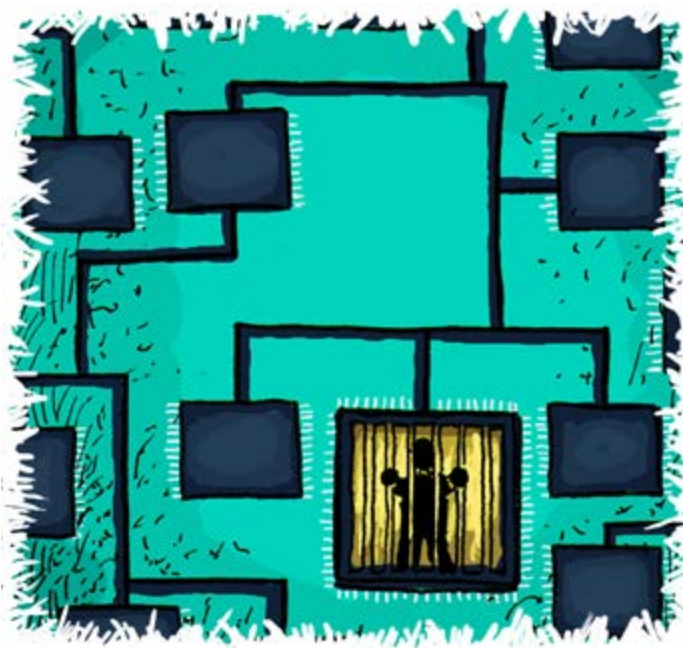
Security Council resolution 2396 (2017) calls upon Member States to notify, in a timely manner, upon travel, arrival, or deportation of captured or detained individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters, as appropriate, the source country, destination country, any transit countries, all countries where the travellers hold citizenship, and including any additional relevant information about the individuals, and further calls upon Member States to cooperate and respond expeditiously and appropriately, and consistent with applicable international law, and to share such information with INTERPOL, as appropriate.<sup>48</sup> The international human rights law standards highlighted throughout the present handbook should be taken into account by States implementing Security Council resolution 2396 (2017).

Sharing data with other countries and organizations about people travelling can have very serious consequences for individuals and their families. Sharing the data of people who are in need of international protection, such as refugees, may result in the country in which they are at risk being notified of their situation or whereabouts, which could put them or their families at serious risk of further human

<sup>46</sup> Universal Declaration of Human Rights, art. 19; and International Covenant on Civil and Political Rights, art. 19.

<sup>47</sup> International Covenant on Civil and Political Rights, art. 20.

<sup>48</sup> Security Council resolution 2396 (2017), para. 3.



rights abuses. Therefore, careful thought needs to be given to the potential repercussions of data sharing. That is particularly important with passenger name records, which may reveal an individual's religious, philosophical or political beliefs, membership in trade unions or other organizations or their health status or sexual orientation. Such information may result in their being targeted for those reasons or subjected to human rights violations.

## COUNTER-TERRORISM CONTEXT

In some States, counter-terrorism measures are established as a type of emergency law or are set up as specialized laws in a way that separates them from standard legal protections. Data and information provided in the context of counter-terrorism intelligence sharing may therefore lead to an individual's being subjected to procedures outside standard legal frameworks in another State. That could result in very serious human rights abuses, including torture, arbitrary and incommunicado detention or extrajudicial and arbitrary killing. A State may be held accountable for human rights abuses that arise in other countries as a result of their sharing information or intelligence in the context of border security and management. International human rights law requires individuals to have access to effective remedies for breaches of human rights. Where several States are responsible for violations of an individual's rights, each State has an obligation to provide an effective remedy in relation to its responsibility for the violation.

## INTERNATIONAL DATABASES

When sharing data with or receiving data from international databases, border authorities need to bear in mind different standards and frameworks for inclusion on such databases. For example, INTERPOL's constitution strictly

forbids it from undertaking "any intervention or activities of a political, military, religious or racial character",<sup>49</sup> which could include collecting that type of data. Where a person is the subject of an INTERPOL Red Notice, they should, where possible, be provided with information on how to challenge the notice. The legitimacy of a criminal conviction or a warrant of arrest may also be in question and therefore requires careful assessment in the light of all relevant circumstances. Officials should also check with the local INTERPOL office to ensure that the information provided is correct and up to date.

Databases in some regions are increasingly interconnected, which may make it difficult to identify who has access to data and for what purposes, as once data has been shared with one database it may be accessible more widely and shared across other databases. Border authorities should ensure that the terms of access to data that they share are clear, transparent and enforceable. Before entering information into a database that will be shared internationally, border authorities should consider whether the sharing of information is established in law, necessary and a proportionate approach in the particular circumstances of the case.

## TERRORIST LISTING MECHANISMS

The Security Council resolution 2178 (2014) calls upon States to report to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) the departure from their territories or the attempted entry into or transit through their territories of individuals designated by the Committee, as well as share this information with the State of residence or nationality of said individuals, as appropriate and in accordance with domestic law and international obligations.<sup>50</sup>

States should take into account the potential consequences for the human rights of the individual concerned or others, such as family members, of informing the State of residence or nationality, particularly in cases in which the individual has sought international protection or has refugee status. Inclusion on terrorist listing mechanisms such as the United Nations ISIL (Da'esh) and Al-Qaida sanctions list can be difficult to challenge, and States need to ensure that the information they provide to such mechanisms is accurate and up to date to avoid interfering with individuals' rights beyond what is necessary. Individuals must have an effective means of challenging their inclusion on such lists. Delisting requests can be made by States and by the individuals or associations listed. Affected individuals should be directed through the Office of the Ombudsman to the Committee which deals with requests for delisting.

In some circumstances, screening is undertaken at international borders to identify members of terrorist or extremist groups that are not necessarily included in United Na-

<sup>49</sup> Constitution of the International Criminal Police Organization—INTERPOL (1956), art. 3.

<sup>50</sup> Security Council resolution 2178 (2014), para. 9.

tions lists. That may be because they are not connected to Al-Qaida or ISIL or are designated as terrorists or extremist organizations only according to domestic or regional definitions that are not universally recognized. That may be an important method for identifying a terrorism-related security risk. However, because of the very serious consequences of such a classification, caution needs to be taken in assessing what should or should not be considered as a terrorist organization or group in the absence of an internationally accepted definition and the reliability of the source of information. Overly broad interpretations of the term “terrorist organization” may have a disproportionate impact on freedom of association<sup>51</sup> and may lead to discrimination against particular groups on religious, ethnic or political grounds.

When border authorities receive data from other sources or databases, whether domestic or international, they must consider the provenance and reliability of the data. Information that has been acquired through human rights abuses, such as the use of torture, cannot be considered. The absolute prohibition on torture, inhuman or degrading treatment or punishment means that information acquired in that way cannot be relied upon in court proceedings.<sup>52</sup> States are responsible for the consequences of screening and sharing data to an individual’s human rights even if the screening is carried out by a private company, such as an airline, on behalf of the State.

## ADVANCE PASSENGER INFORMATION AND PASSENGER NAME RECORDS

Advance passenger information (API) is the information extracted from identity documents provided for verification when a person is travelling. Passenger name records (PNR) include a broader range of unverified information provided when travel is booked, including information such as payment, advance seat selection and meal preferences. Security Council resolution 2178 (2014) calls upon States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011).<sup>53</sup> States are also required to report to the Committee and share that information with the State of residence or nationality, as appropriate and in accordance with domestic and international obligations.<sup>54</sup>

That requirement was further developed in Security Council resolution 2396 (2017), which obliged States to establish advance passenger information (API) systems and to report any departure from their territories, or attempted entry into or transit through their territories, by sharing that information with the State of residence or nationality, or

the countries of return, transit or relocation, and relevant international organizations, as appropriate and in accordance with domestic law and international obligations, and to ensure API is analysed by all relevant authorities, with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses and travel.<sup>55</sup> The Council also called upon States to develop the capability to collect, process and analyse, in furtherance of International Civil Aviation Organization (ICAO) standards and recommended practices, passenger name record (PNR) data and ensure that it is used and shared appropriately.<sup>56</sup> Before providing such information to the States of residence or nationality, States need to consider whether doing so could put the individual or others at risk of serious human rights violations.

International human rights law and international refugee law should be taken into account when designing legislation to implement those Security Council resolutions. The international standards applicable under international human rights law include those described above. In particular, given possible implications on the right to privacy and the right to freedom of movement, the collection, storage and sharing of API and PNR must be established by law, justified by a legitimate aim, necessary and proportionate to that aim and non-discriminatory.

When designing human rights-compliant legislative frameworks for API and PNR, the following considerations should be borne in mind:

What is the purpose of the API or PNR?

- Is there a clear purpose or comprehensive list of purposes for which API or PNR will be used?
- Are the stated purposes compatible with international human rights law?
- Should the use of the data for any purpose not listed be prohibited?
- Where is the data retained? (The purpose of retention should be specified by law and time limits should be clearly set for data retention.)

Who can have access to the API or PNR?

- Which agencies need to have access to the data and for what purposes?
- Which occupational roles within agencies need to have access to the data and for what purposes?
- Which agencies are authorized to collect data from airlines and share with other agencies?
- In cases of international transfer to countries with different standards on privacy protection, what are the minimum acceptable standards?

What are the oversight and complaint mechanisms?

- An independent, effective and impartial oversight mechanism should be established by law to monitor the transfer and use of API and PNR.

<sup>51</sup> International Covenant on Civil and Political Rights, art. 22.

<sup>52</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15.

<sup>53</sup> Security Council resolution 2178 (2014), para. 9.

<sup>54</sup> Ibid.

<sup>55</sup> Security Council resolution 2396 (2017), para 11.

<sup>56</sup> Ibid., para. 12.



- The oversight mechanism should have the power to monitor and assess the adequacy of safeguards for the data.
- Individuals should be able to contact the oversight mechanism for information about their data and to lodge a complaint, whether they are inside or outside the country.
- Information should be provided to the relevant individuals about the use of their data and the potential complaint mechanisms.
- Adequate remedies for breach of human rights should be provided by law.

When API is shared before departure, there is a risk that it may result in a person's being denied boarding, which would render them unable to leave the country. In such cases, States must have particular regard to the right of all persons to leave any country, including their own, and must ensure that the individuals concerned have access to due process to address the problem. Denial of boarding may put an individual at risk, and may deprive them of the opportunity to seek asylum. Such decisions require careful consideration of the human rights implications for the individuals concerned.

### C. FACE-TO-FACE SCREENING



In general, border officials undertake primary screening of all incoming or outgoing individuals. In the process, they may decide whom to interview further, what questions to ask and how to conduct those interviews. The basis for those decisions must not be discriminatory. Face-to-face

as well as automatic screening processes may give rise to risk profiling, as described in section A above. Racial or ethnic profiling describes the use by law enforcement or immigration authorities of race, ethnicity, religion or national origin, rather than individual behaviour, as the basis for making decisions about involvement in criminal activity. International human rights law makes it clear that physical or ethnic characteristics should not form the basis of decisions about who to target for immigration or security controls.

The dignity of individuals crossing international borders should be at the heart of policy and practice concerning screening by border authorities. Policies that specifically target persons with certain physical characteristics or ethnic backgrounds undermine the dignity of those persons and contribute to the spread of xenophobic and racist attitudes in the general population. Different groups of people may require particular sensitivity in face-to-face screening, for example, individuals in irregular migration situations; migrants in smuggling situations; trafficked persons; children (accompanied by family members or unaccompanied or separated); women (including pregnant women and new and/or breastfeeding mothers); persons who have suffered abuse, including sexual and gender-based violence; victims of torture and cruel, inhuman or degrading treatment; victims of violence and trauma; persons with disabilities; older persons; stateless persons; indigenous persons; members of minority communities; persons with HIV or particular health concerns; lesbian, gay, transgender or intersex persons; human rights defenders; and political dissidents. Persons in need of international protection, such as refugees, asylum seekers and stateless persons, are entitled to particular protection under international human rights and refugee laws, in addition to having specific assistance needs.<sup>57</sup>

### SAFEGUARDING BIOMETRIC DATA AND DATA STORED ON ELECTRONIC DEVICES

Photographs and other biometric data such as fingerprints or iris scans are often taken of migrants at borders. Those types of data are particularly sensitive, and travellers may be resistant to providing such data. Border authorities must take into account personal and cultural sensitivities when requesting that type of data for screening purposes at international borders.<sup>58</sup> For example, where a traveller is wearing religious headgear, they should not be required to remove it for identity checks, unless a clear justification and necessity can be shown. The privacy considerations highlighted in the section A above apply to that kind of data. Border officials must ensure that data is dealt with in accordance with the law, necessary and proportionate to a legitimate aim and non-discriminatory.

Accessing social media, telephones and computers as part of a screening process has a particularly acute impact on several human rights because of the amount and depth of

<sup>57</sup> Ibid.

<sup>58</sup> See United Nations Office of Counter-terrorism, United Nations Compendium of recommended practices for the responsible use and sharing of biometrics in counter-terrorism, 2018.

information that can be acquired in that way. Information stored in telephones and computers may be extremely sensitive, private or professional data. Therefore, the same considerations applicable to the right to privacy and the right to freedom of thought described in section A above should be borne in mind in face-to-face screening.

## HUMAN RIGHTS-COMPLIANT DETENTION OR HOLDING CONDITIONS

Where an individual is required to undergo additional screening, including physical searches or additional questioning, the dignity of the individual should be respected at all times. A sufficient number of trained women personnel must be available to undertake additional screening of women, where required. The least intrusive measures should be used to ensure proportionality on a case-by-case basis. In the context of border security and management, detention should be the last resort and imposed only when other, less restrictive alternatives have been considered but found to be inadequate to meet a legitimate aim. In the case of children, detention should be avoided wherever possible.

The right to liberty and security of the person is guaranteed under the International Covenant on Civil and Political Rights, which provides that no one shall be deprived of their liberty arbitrarily.<sup>59</sup> Holding an individual for questioning or limiting their ability to leave a border area may amount to deprivation of liberty. Therefore, where people are held for further screening or are arrested or detained as part of the border screening process, the reasons for the deprivation of liberty must be clearly defined in law, of limited scope and duration, necessary and proportionate, and the reasons must be explained to the individual concerned. Decisions on deprivation of liberty should be made only after the individual screening and assessment of the person has resulted in a situation in which the official considers that no alternative to detention is available in the particular case.

Persons being held or detained as part of a border screening process are under the jurisdiction of the State in charge of the screening, regardless of the exact location of the screening. That means that the right to liberty must be respected if the persons are held in buffer zones or transit zones at airports, and have not yet entered the territory of the State. They should be told why they are being detained and, if they are free to leave, that should be made clear. They must also have access to an effective mechanism to challenge the legality of their detention and obtain remedy.<sup>60</sup>

The conditions in which a person is held as part of the screening process must also be human rights compliant in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) and any other relevant international standards on conditions of confinement, which should include guaranteeing

adequate access to food and water. Medical assistance and access to health care should be unconditional, and border officials should be aware of situations in which people are at acute health risks, for example, where an individual is suspected of having ingested illegal drugs.

Adequate conditions to safeguard children and protect vulnerable individuals from abuse by other detainees or border officials should also be in place. Unaccompanied children should not be kept with unrelated adults and, unless there are compelling reasons for separation, children should be kept with their families. Men and women should be held separately, unless they belong to the same family. There should be an adequate number of male and female staff available to ensure that female staff are always present where women are detained. The provision of additional facilities, such as private washing facilities and prayer rooms, would contribute to guaranteeing the dignity of detainees and limit the impact of detention on other rights, such as the right to freedom of religion.<sup>61</sup> Those facilities should be gender-responsive and be provided separately for women and men.

## D. SPECIAL CONSIDERATIONS

While screening processes must not be discriminatory in general, human rights are the rights of individuals and it is important to bear in mind that some individuals or groups may have different needs or face different human rights risks. Screening processes and procedures should be tailored to those different needs. For example, specific procedures may need to be developed for screening children, including unaccompanied or separated children, persons with disabilities, potential victims of trafficking, survivors of sexual and gender-based violence, stateless persons and religious minorities, regardless of migration status. Procedures for those seeking international protection, such as refugees and stateless persons, should also be in place. Those are separate from the screening procedures for identifying particular needs in order to refer people for specialized services.

## SENSITIVE SCREENING PROCESSES

Screening processes should be designed to recognize and respect the inherent dignity of all individuals crossing borders. That may require particular considerations and sensitivity with regard to certain groups.

States should ensure that protection-sensitive border management and entry systems are in place, with appropriate referral procedures for persons seeking international protection and/or requiring support for specific needs. States are obliged to promote safe migration procedures that respect, protect and fulfil the rights of women throughout the migration cycle, including during security screening processes. In the context of screening for terrorism-related risks, women may pose a threat as foreign terrorist

<sup>59</sup> International Covenant on Civil and Political Rights, art. 9.

<sup>60</sup> See chap.III for information on effective remedies and accountability in general.

<sup>61</sup> International Covenant on Civil and Political Rights, art. 18.



fighters. At the same time, women may have heightened vulnerability to exploitation, violence and abuse, particularly those with an irregular migration status. Therefore, it is of utmost importance to adopt a gender-responsive approach during screening processes and ensure that border officials are provided with gender-responsive and human rights-based training. That should help officials to take into consideration women's and men's status in the country to or from which they are travelling, and to identify any possible vulnerability to risk and abuse. Border authorities should ensure gender sensitivity in screening processes; for example, having female officers question or screen women; consider the particular needs of pregnant women and nursing mothers; put in place procedures to prevent and eliminate gender-based violence, abuse or harassment of women travelling across international borders, who may find themselves in vulnerable or coercive situations.

Persons with disabilities may encounter accessibility issues at borders and may have needs that should be taken into consideration in the design and use of border screening areas in order to respect their dignity. The provision of interpretation and translation services, including sign language interpretation and the availability of information in different languages and formats would help to ensure that information on border screening processes and procedures is as accessible as possible.

Border officials should also consider religious and cultural sensitivities. For example, a person wearing religious headgear should not be asked to remove it, unless it is deemed necessary and proportionate for a legitimate aim.

## CHILDREN, INCLUDING UNACCOMPANIED OR SEPARATED CHILDREN

Children face greater risks of neglect, abuse and exploitation, and might have witnessed or experienced violent acts. For the purposes of international law, a child is any human being below 18 years of age, unless under the law applicable to the child, majority is attained earlier.<sup>62</sup> In case of doubt as to whether or not an individual is a child, if there is a chance that they may be a child, they should be treated as a child. Children are entitled to specific protections under international human rights law. Some children may be travelling unaccompanied or separated from their family; such children face a very serious risk of harm.<sup>63</sup> In such cases, States should appoint a suitable guardian or adviser as soon as the child is identified.

Children may be less able to understand the consequences of providing their data at borders and may not know about existing procedural safeguards or about their human rights. That may mean that they are not able to give consent as required by law if they are not travelling with a parent. Children may also be nervous about engaging with authority. Care should be taken to ensure that border authorities treat children with sensitivity and refrain from intrusive screening methods such as fingerprinting, unless they are clearly necessary and proportionate to a legitimate aim. Particular effort should be made to make sure that children understand what is being asked of them as part of the screening process, including, where needed, the provision of support through an adult family member or a legal guardian.

States must take all appropriate measures to ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of their parents, legal guardians or family members.<sup>64</sup> That means that screening processes that reveal suspected terrorist activity or other issues related to family members or guardians should not result in children being considered or recorded as connected to such activity.

In some cases, children may be travelling, accompanied or unaccompanied, to join family members in another country. Children whose parents reside in different States have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents.<sup>65</sup> Exceptional circumstances might include situations in which the child would be in danger as a result of direct contact with a parent.

Particular attention should be paid to the training of officials working or dealing with separated or unaccompanied children. Specialized training is equally important for legal representatives, guardians, interpreters and others personnel dealing with such children.

<sup>62</sup> Convention on the Rights of the Child, art. 1.

<sup>63</sup> See UNHCR, *Vulnerability Screening Tool: Identifying and addressing vulnerability: a tool for asylum and migration systems* (2016). Available at [www.unhcr.org/en-us/protection/detention/57fe30b14/unhcr-ids-vulnerability-screening-tool-identifying-addressing-vulnerability.html](http://www.unhcr.org/en-us/protection/detention/57fe30b14/unhcr-ids-vulnerability-screening-tool-identifying-addressing-vulnerability.html).

<sup>64</sup> Convention on the Rights of the Child, art. 2.2.

<sup>65</sup> *Ibid.*, art. 10.



## PERSONS IN NEED OF INTERNATIONAL PROTECTION, INCLUDING REFUGEES AND ASYLUM SEEKERS

Some groups, such as refugees and asylum seekers, are entitled to specific protection under international human rights and international refugee laws. In addition to screening for security risks, border authorities should incorporate into their processes, screening for the international protection needs of particular groups. That should include the provision of referral mechanisms to allow for the adjudication by appropriate officials of claims for international protection.

The 1951 Convention Relating to the Status of Refugees provides for the exclusion from refugee status of persons with respect to whom there are serious reasons for considering that they have committed certain serious crimes, including terrorist acts.<sup>66</sup> In general, decisions on refugee status should not be made by border officials, but rather in the course of regular asylum procedures that allow for a full, factual and legal assessment of the individual case by qualified personnel. The summary rejection of asylum seekers at borders or points of entry may amount to *refoulement* or collective expulsion. All persons in need of international protection have the right to seek asylum.

International refugee law does not absolutely prohibit the *refoulement* of recognized refugees. The 1951 Convention Relating to the Status of Refugees (art. 33.2) provides for *refoulement* if there are reasonable grounds for regarding a refugee as a danger to the security or the community of the country in which they are seeking refuge and the danger presented outweighs the risks to the individual upon return. Given the potentially serious consequences, however, of denying refugee status or protection from *refoulement* to persons who otherwise may face harm upon return to their country of origin, those provisions are to be interpreted in a restrictive manner.<sup>67</sup> The *non-refoulement* obligation under certain human rights instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is absolute.<sup>68</sup> Where the risk of harm upon return is present, decisions to deny entry should be made in the course of appropriate procedures and not during border screening procedures.

Furthermore, information on asylum seekers should not be shared with the country of origin. That could endanger the safety of the asylum seeker and/or family members remaining in the country of origin. Good State practice in that area incorporates a strict confidentiality policy. Should it exceptionally be deemed necessary to contact the authorities in the country of origin, for example, in case there is suspicion



of terrorist involvement and the required information may only be obtained from those authorities, there should be no disclosure that the individual has applied for asylum.<sup>69</sup>

### E. SCREENING TO IDENTIFY FOREIGN TERRORIST FIGHTERS

Protecting the lives and security of persons under their jurisdiction by taking steps to prevent terrorist acts is part of States' international obligation to protect human rights, including the right to life. The Security Council has expressed grave concern over the acute and growing threat posed by foreign terrorist fighters, that is, individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, as well as about those who attempt to travel to become foreign terrorist fighters.<sup>70</sup>

### SECURITY COUNCIL RESOLUTIONS AND BORDER SECURITY AND MANAGEMENT

The Security Council has repeatedly emphasized that border security and management is a key element in addressing the threat posed by movement of suspected terrorists. States are encouraged to employ evidence-based traveller risk assessment and screening procedures, including the collection and analysis of travel data. However, profiling based on stereotypes founded on grounds of discrimination prohibited by international law should not be used.<sup>71</sup> In addition to raising human rights concerns, profiling based on stereotypes is a threat to security, as authorities may

<sup>66</sup> 1951 Convention Relating to the Status of Refugees, art. 1.F.

<sup>67</sup> See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05), September 2003, available at [www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html](http://www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html); and UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, paras. 13–16, available at [www.refworld.org/docid/481ec7d92.html](http://www.refworld.org/docid/481ec7d92.html).

<sup>68</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3.

<sup>69</sup> UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection—UNHCR's Perspective*, December 2015, para. 17, available at [www.refworld.org/docid/5672aed34.html](http://www.refworld.org/docid/5672aed34.html).

<sup>70</sup> Security Council resolution 2178 (2014).

<sup>71</sup> *Ibid.*

fail to identify foreign terrorist fighters who do not fit with a preconceived idea about the profile of such individuals. Those processes should also be more broadly compatible with international human rights standards, including those summarized in this handbook.

The Security Council requires States to prevent the entry into or transit through their territories of any individual about whom they have credible information that provides reasonable grounds to believe that the individual is seeking entry into or transit through their territory for the purpose of participating in terrorist acts.<sup>72</sup> States must carefully examine the credibility of any such information on which they seek to rely as part of the screening process, including the possibility that it may be politically motivated, before deciding whether there are reasonable grounds to take action. States must also respect their obligations under international human rights law and refugee law regarding *non-refoulement*. As there is no universally agreed definition of terrorism, border officials should also be sure that the activities to which the information relates would be considered as terrorist acts in their domestic law or international law.

## NATIONALS OF A COUNTRY

International human rights law provides that no one shall be arbitrarily deprived of the right to enter their own country.<sup>73</sup> The Security Council does not oblige States to deny entry or require the departure from their territories of their own nationals or permanent residents.<sup>74</sup> The Council highlighted the situation of individuals with more than one nationality who travel to their States of nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.<sup>75</sup> In that light, some States have made provisions in their domestic law that allow for the removal of citizenship for persons involved in terrorism. Border officials may encounter such persons seeking to enter the country that they consider to be their own. Deprivation of nationality must not be arbitrary. The decision must respect due process and it must be prescribed by law. Additionally, the grounds for such a decision must be clear and accessible and the person concerned must have access to an effective remedy from inside or outside the country. Those considerations should be borne in mind at borders when screening individuals who may have lost their citizenship and are seeking entry to their country of origin.

## CHILDREN

The Security Council resolution 2396 (2017) recognizes that foreign terrorist fighters may be travelling with family members they brought with them to conflict zones, with families they have formed or family members who were

born while in conflict zones. The Council underscores the need for Member States to assess and investigate those individuals for any potential involvement in criminal or terrorist activities, including by employing evidence-based risk assessments, and to take appropriate action in compliance with relevant domestic and international laws, including by considering appropriate prosecution, rehabilitation, and reintegration measures.<sup>76</sup> The Council notes that children may be especially vulnerable to radicalization to violence and in need of particular social support, such as post-trauma counselling, and stresses that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law.<sup>77</sup>

In cases where children are suspected of involvement in terrorism or may be considered as foreign terrorist fighters, border authorities must ensure that they are treated in a manner that reflects their age and status as children, including the need for representation by an appropriate and independent adult. The situation of such children may be compared with that of children recruited or used in hostilities. States have the obligation to take measures to prevent armed groups from recruiting or using children in hostilities<sup>78</sup> and to prevent the re-recruitment of children who have escaped from hostilities. Children in those circumstances should be considered primarily as victims of armed conflict. States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment or participation, directly or indirectly, in hostilities. States must also take measures to prevent the illicit transfer and non-return of children abroad.<sup>79</sup> In the context of terrorism, children connected to terrorist groups may also be victims of trafficking in human beings. In all actions taken involving children at international borders, the best interests of the child should always be the primary consideration.<sup>80</sup>

## SAFETY AND SECURITY AT THE BORDER

International human rights protections apply to all individuals at international borders, including border officials. The safety and security of border officials involved in screening processes should be guaranteed through adequate planning and resources that reflect the particular circumstances in which they are working. Similarly, in the context of counter-terrorism, efforts must be made to ensure the security and safety of the general public at border points or screening centres. Those provisions should be factored into the planning of counter-terrorism operations that may involve terrorism suspects crossing borders so that steps can be taken to prevent heightened risks, either to the public, security personnel or the suspects themselves.

<sup>72</sup> Ibid.

<sup>73</sup> International Covenant on Civil and Political Rights, art. 12.4.

<sup>74</sup> See, for example, Security Council resolution 2178 (2014).

<sup>75</sup> Ibid.

<sup>76</sup> Security Council resolution 2396 (2017).

<sup>77</sup> Ibid.

<sup>78</sup> See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

<sup>79</sup> Convention on the Rights of the Child, art. 11.1.

<sup>80</sup> Ibid., art. 3.1.

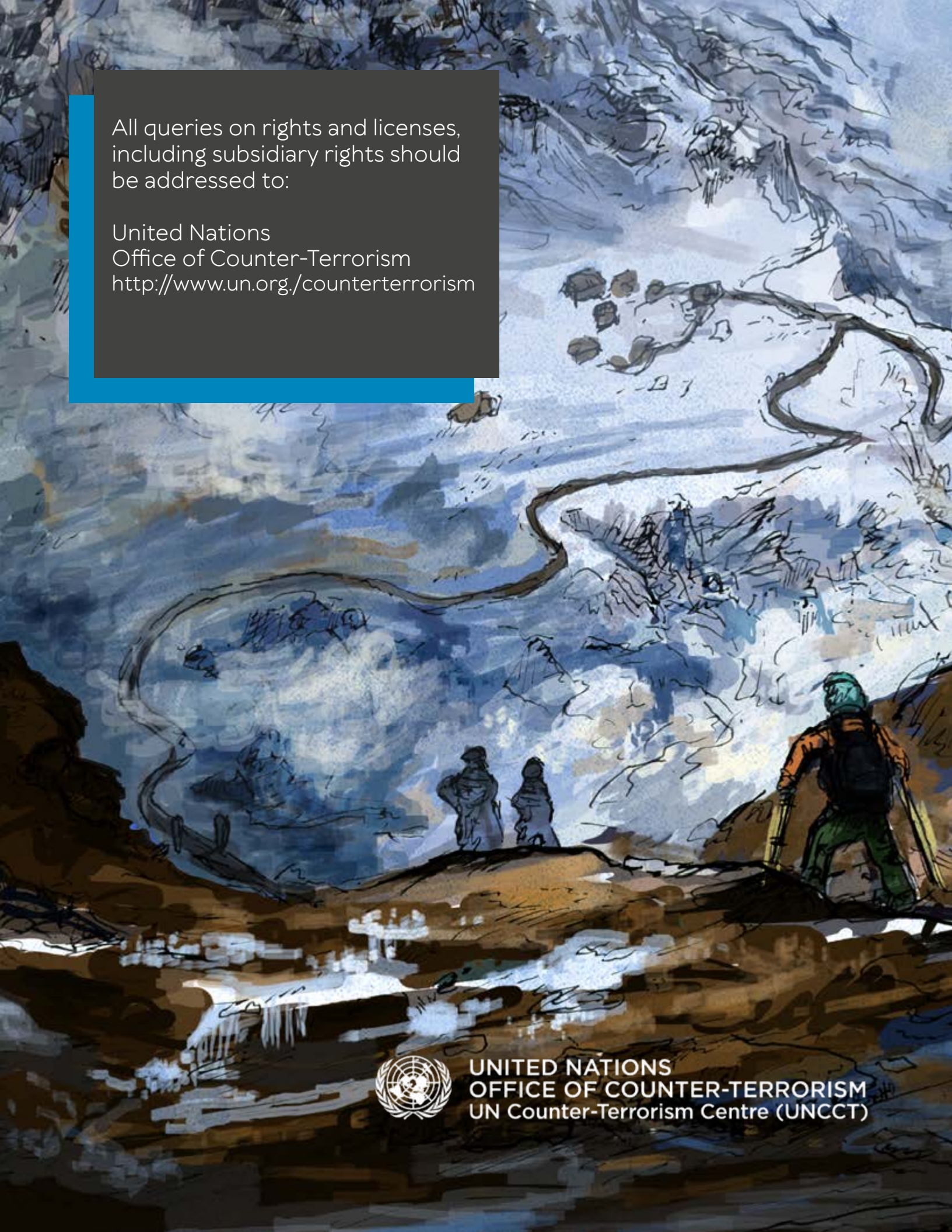
## V. CONCLUSION

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Security screening processes at international borders impact human rights in many different ways. The present handbook has highlighted some of the areas where international human rights standards are most relevant to border authorities in designing and delivering security screening measures as part of their wider border security and management. However, it is by no means exhaustive. Regional and domestic standards and legal frameworks may also vary significantly in practice from State to State. The principles and standards set out in this handbook do not reflect best practice, rather they underline the minimum standards that must be respected by all States in compliance with their international human rights obligations.

The challenges faced by border authorities worldwide depend very much on the local security situation, the type and scale of migration or international border traffic that they are managing, and the resources at their disposal. Ensuring security at borders and combating and preventing terrorism are key elements in the fulfilment of a State's obligation to protect the rights of everyone within its jurisdiction. The present handbook is intended to support border authorities in that task by outlining some of the international human rights law considerations they need to take into account.





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