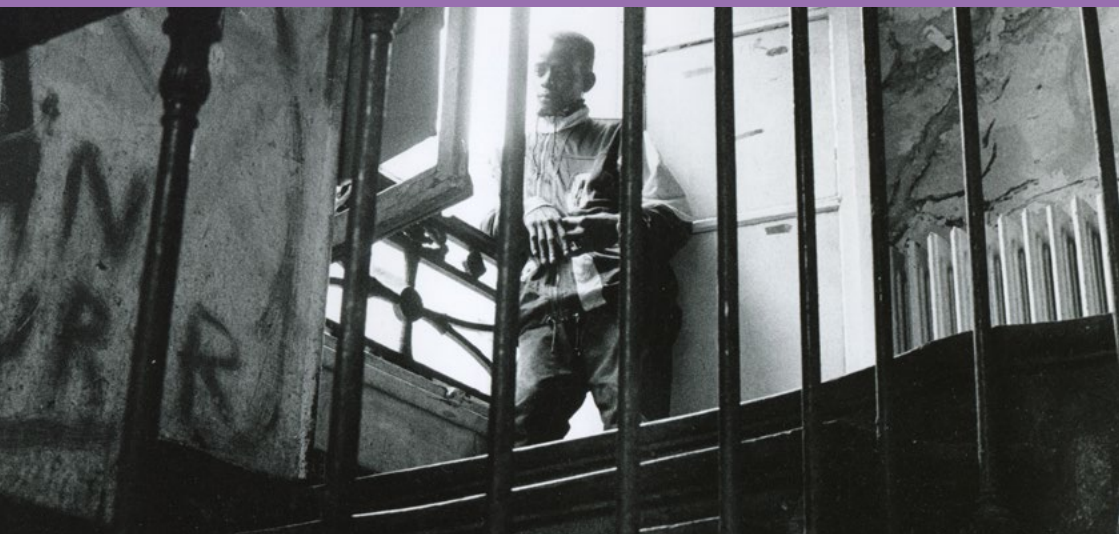


# PROTECTING MIGRANTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER



A handbook  
for legal practitioners  
(2nd edition)

**Yannis Ktistakis**

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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## Acronyms

### Legal instruments

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ESC	European Social Charter
ESC(r)	European Social Charter (revised)
EU Charter	Charter of Fundamental Rights of the European Union
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UDHR	Universal Declaration of Human Rights

### International bodies

CPT	European Committee for the Prevention of Torture
EComHR	European Commission of Human Rights

ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EU	European Union
ICJ	International Court of Justice
ILO	International Labour Organization
PACE	Parliamentary Assembly of the Council of Europe
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNPD	United Nations Population Division



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## Introduction

Migration to Europe is an ancient and wide phenomenon which has accelerated in speed and scale in recent times. Although migrants<sup>1</sup> are not expressly mentioned in the European Convention on Human Rights, they, as every human being, are entitled to human rights protection. Migrants are people who move from their country of usual residence or nationality to another country. A migrant may move for economic or educational reasons, to flee from natural disasters caused by climate change or to escape persecution, human rights abuses, threats to life or physical integrity, war and civil unrest. Usually the terms “migrants” and “aliens” are used synonymously, although there is a slight difference: an alien is “an individual who is not a national of the State in which he or she is present” (UNGA 1985, Article 1).

The reason of their displacement is directly linked to their international legal protection. If they flee their country to escape persecution in the sense of Article 1A of the 1951 Convention relating to the Status of Refugees (Geneva Convention), they are called asylum seekers or refugees and are entitled to the special – increased – protection guaranteed by the aforementioned international convention, which has been ratified by 145 states so far (April 2015). However, if they leave their country for any other reason, they are defined as migrants and do not enjoy special, only general, protection under international human rights law. In 2015, the total number of international migrants was estimated at 244 million people or 3.3% of the world's population (UN International Migration Report 2015, p. 21). Around 90% of them are composed of active economic migrants and members of their family, and only about 8% of refugees or asylum seekers (United Nations High Commissioner for Refugees 2015).

There are three main categories of migrants: (i) regular migrants, (ii) undocumented migrants and (iii) other migrants in need of protection.

Regular migrants are people who enter a country other than that of their usual residence or nationality, after having obtained authorisation to enter from the country of destination.

Undocumented migrants are those without a residence permit authorising them to stay in the country of destination. They have either entered illegally or with an entry permit that has now expired. It is to be noted that the UNGA has for some time now advocated

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1. “Aliens” are expressly mentioned in Article 16 of the ECHR, Protocols 4 and 7 to the ECHR.

the use of the term “non-documented or irregular” as opposed to “illegal” (UNGA 1975, paragraph 2) because only an act can be illegal whereas a person cannot be “illegal”.

Finally, there are various other categories of migrants, such as stateless persons, victims of trafficking, unaccompanied children and failed asylum seekers, who are also seeking protection under international law.

Yet the above distinctions are not strict and invariable: at the same time, a migrant may fall into two categories (for instance, asylum seeker and victim of trafficking) or change from one category to another (undocumented migrant in country A and asylum seeker in country B).

The European continent has in the last years faced an unprecedented increase in mixed migratory flows along the Mediterranean, leading to the so-called “refugee crisis”, which resulted in almost one million people arriving on European shores to seek asylum in 2015 alone. The vast majority of refugees are fleeing Syria, and while their exodus started at the beginning of the conflict in 2011, the flows grew exponentially, reaching a total number of registered Syrian refugees of 4.8 million by March 2016. The increase in irregular crosses of the Mediterranean to Italy and Greece has regrettably been correlated with an increase of deaths at sea. According to UNHCR’s figures for the year 2016, it was estimated that 241 263 refugees and migrants had arrived by sea to Europe (as of 18 July), while 2 951 were estimated to have died or had gone missing at sea over that same period of time. It should also be noted that UNHCR stated that up to 70% of those arriving may be considered refugees and qualify for international protection under the 1951 Geneva Convention relating to the Status of Refugees.

Yet, as characterised by the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, the unfolding crisis has “elicited a chaotic response”<sup>2</sup>. Indeed, 2016 saw many European states take unilateral action and national measures in their border and asylum policies in an attempt to limit the influx of refugees, by reducing the presumed pull-factors.

In this context, only a common European response based on respect of fundamental rights and human dignity, as well as on solidarity and shared responsibility may bring an urgently needed solution. This pressure has urged the Council of Europe, the continent’s leading human rights organisation, to act decisively for the protection of

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2. Opinion Article, *The New York Times*, 14 March 2016.

migrants. In particular, this prompted the Secretary General of the Council of Europe to provide guidance to the Council of Europe's 47 member states on the treatment of migrants and asylum seekers, including with regard to their reception and temporary living conditions, to ensure respect for their human rights; in January 2016, he further appointed a Special Representative of the Secretary General on Migration and Refugees.

Although the European legal order offers a high standard of human rights protection – having adopted, over the decades, the relevant instruments and developed effective mechanisms – the two European organisations have used and still use all legal tools, such as resolutions and recommendations, provided by their internal order. On many occasions, international, conventional or customary law is not necessarily invoked before European national courts, because the secondary law of both international organisations (recommendations, resolutions, directives and regulations) has already incorporated the fundamental rights of all persons, regardless of their migration status, into national legislation, such as:

- (i) the right to life, liberty and security of the person, the right to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;
- (ii) the right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status;
- (iii) the right to be protected from abuse and exploitation, the right to be free from slavery and involuntary servitude, and the right to be free from torture and from cruel, inhuman or degrading treatment or punishment;
- (iv) the right to a fair trial and legal redress; and
- (v) the right to protection of economic, social and cultural rights, including the right to health, adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work (for the list of rights, see Global Migration Group 2010).

This handbook is intended as a tool for legal practitioners (lawyers, judges, public officials, human rights defenders) to better understand the European human rights of migrants and the means to claim their respect or implementation at the national and international levels.

The handbook focuses on the Council of Europe's standards concerning migrants, which concern all 47 member states of the Organisation.



# I. The standards applicable to migrants

The international human rights standards applicable to migrants may be found in a variety of legal instruments. They include both general treaties establishing fundamental human rights, and more specialised texts addressing a specific issue relevant to migration, such as non-discrimination, or a category of persons, such as migrant workers. Migrants' rights have been recognised and developed at both international and regional levels.

## a. International human rights standards

At the global level, migrants – as do all human beings – enjoy the rights guaranteed by the ICCPR<sup>3</sup> and the ICESCR,<sup>4</sup> and are protected by the provisions of the CRC<sup>5</sup> and its protocols, the CAT,<sup>6</sup> and the CPED.<sup>7</sup>

In addition, there are international legal instruments specifically dealing with migrants' rights, notably the ICRMW<sup>8</sup> and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.<sup>9</sup>

## b. Council of Europe standards

Similarly, the Council of Europe instruments include both general and more specific documents. Non-nationals on the territory or, otherwise, under the jurisdiction of a state party will enjoy the protection of the rights of the ECHR.<sup>10</sup> Further, nationals of other contracting parties, and in some cases all migrants, may fall under the scope of the provisions

The principle of non-discrimination is enshrined in Article 2.1 UDHR; Articles 2.1 and 26 ICCPR; Article 2.2 ICESCR; Article 1 ICERD; Article 1 CEDAW; Article 2.1 CRC; Article 1.1 ICRMW; Article 4 CRPD; Article 14 ECHR and Article 1 of Protocol No. 12 ECHR; Article E, ESC(r); and Article 21 EU Charter

3. UNGA, International Covenant on Civil and Political Rights.

4. UNGA, International Covenant on Economic, Social and Cultural Rights.

5. UNGA, Convention on the Rights of the Child.

6. UNGA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7. UNGA, International Convention for the Protection of All Persons from Enforced Disappearance.

8. UNGA, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

9. UNGA, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

10. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms.

of the ESC(r).<sup>11</sup> The relevant provisions will be discussed below, in the corresponding chapters and sections.

In addition, the Council of Europe has adopted the European Convention on the Legal Status of Migrant Workers,<sup>12</sup> but other conventions are also of relevance to migrants, such as the Convention on Action against trafficking in Human Beings,<sup>13</sup> the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment,<sup>14</sup> the European Convention on Extradition,<sup>15</sup> the European Convention on the Suppression of Terrorism<sup>16</sup>, the European Code of Social Security,<sup>17</sup> and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).<sup>18</sup>

Moreover, it should be noted that the Committee of Ministers and the PACE have also issued a significant number of recommendations and resolutions concerning migrants, some of which will be referenced below, under the corresponding sections.<sup>19</sup>

### c. Standards on equality and non-discrimination

Standards on equality and non-discrimination are of particular significance for some or all migrants, depending on the group or category of people the provisions seek to protect. For this reason, these provisions are presented separately.

The legal entitlement to enjoy one's human rights on an equal basis and free from discrimination has been recognised to all human beings universally, including at the European level. It is widely accepted that persons should not be discriminated against on grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.

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11. Council of Europe, European Social Charter (revised).

12. This convention is concerned with the principal aspects of the legal situation of migrant workers, in particular recruitment, medical examinations, occupational tests, travel, residence permits, work permits, the reuniting of families, working conditions, the transfer of savings and social security, social and medical assistance, the expiry of work contracts, dismissal and re-employment. A Consultative Committee was instituted to examine the parties' reports on the application of the convention. On the basis of these documents, the Consultative Committee draws up reports for the attention of the Committee of Ministers.

13. Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings.

14. Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

15. Council of Europe, European Convention on Extradition.

16. Council of Europe, European Convention on the Suppression of Terrorism.

17. Council of Europe, European Code of Social Security.

18. Council of Europe, Convention on preventing and combating violence against women and domestic violence.

19. The recommendations and resolutions of the Committee of Ministers and of the PACE can be found on the website of the Council of Europe, at [www.coe.int/en/web/cm/documents](http://www.coe.int/en/web/cm/documents) and [http://website-pace.net/en\\_GB/web/apce/documents](http://website-pace.net/en_GB/web/apce/documents), respectively.

This principle is enshrined notably in Articles 2.1 and 26 ICCPR, Article 14 ECHR, Article 1 Protocol No. 12 ECHR, Article E ESC(r), Article 7 ICRMW, Article 4.3 of the Istanbul Convention. It should be noted that under EU law, Article 21 the EU Charter of Fundamental Rights expressly refers to additional grounds such as “ethnic origin”, “genetic features”, “disability”, “age”, and “sexual orientation”.<sup>20</sup> In terms of discrimination grounds, the ECtHR has interpreted the wording “other status” of Article 14 ECHR, extending the protection to a number of implied grounds such as age, disability, economic and social status, health situation, marital status, nationality, sexual orientation and gender identity.

**Examples:**

- ECtHR, *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999 (discrimination in relation to child custody based on sexual orientation);
- ECtHR, *Thlimmenos v. Greece*, 6 April 2000 (discrimination in employment on the basis of a previous criminal conviction which comprised of disobeying, due to his religious beliefs as a Jehovah’s Witness, an order to wear military uniform);
- ECtHR, *Sidabras and Dziautas v. Lithuania*, 27 July 2004 (discrimination in employment based on the fact the applicants had formerly worked for the KGB);
- ECtHR, *E.B. v. France* (GC), 22 January 2008 (discrimination in child adoption based on sexual orientation);
- ECtHR, *Fawsie v. Greece and Saoudin v. Greece*, 28 October 2010 (discrimination in the allowance paid to mothers of large families, officially recognised as political refugees, based on nationality);
- ECtHR, *Vrontou v. Cyprus*, 13 October 2015 (discrimination on the ground of sex in being granted a refugee card, entailing the denial to a range of benefits, including housing assistance, on the basis that she had been the child of a displaced woman rather than a displaced man).

In addition, when they belong to one of the groups concerned, migrants enjoy the rights guaranteed by the Istanbul Convention and CEDAW,<sup>21</sup> the ICERD<sup>22</sup> and the CRPD.<sup>23</sup>

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20. EU, Charter of Fundamental Rights of the European Union, OJ C 364, 18 December 2000, pp. 1-22.

21. UNGA, Convention on the Elimination of All Forms of Discrimination against Women.

22. UNGA, International Convention on the Elimination of All Forms of Racial Discrimination.

23. UNGA, Convention on the Rights of Persons with Disabilities.





## II. Seeking migration in a member state of the Council of Europe

### a. Immigration controls in conformity with human rights standards

The right to freedom of movement is guaranteed under Article 2 Protocol No. 4 ECHR, which states in its second paragraph that “everyone shall be free to leave any country, including his own”. In addition, Article 18.4 of the ESC(r) guarantees the right of nationals to leave their own country in order “to engage in a gainful occupation in the territories of the other Parties”. Nevertheless, as a general principle, the ECHR (or ESC(r)) does not guarantee the right of an alien to enter and remain on the territory of a member state; equally it does not guarantee a right to asylum.

#### Examples:

- ECtHR, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, paragraph 102: “Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols. This is borne out by several recommendations of the Assembly of the Council of Europe on the right of asylum (see Recommendation 293 (1961), Texts Adopted, 30th Ordinary Session, 21-28 September 1961, and Recommendation 434 (1965), Yearbook of the Convention, Vol. 8, pp. 56-57 [1965]) as well as a subsequent resolution and declaration of the Committee of Ministers (see Resolution 67 (14), Yearbook of the Convention, Vol. 10, pp. 104-105 [1967], and Declaration on Territorial Asylum, adopted on 18 November 1977, Collected Texts, 1987 edition, p. 202)”;
- ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 73.

However, in exercising control of their borders, member states must act in conformity with ECHR standards. In the case *East African Asians v. the United Kingdom*,<sup>24</sup> the EComHR held that racial discrimination in immigration control was incompatible with the ECHR. It found that the UK had exceeded its right and violated the ECHR by subjecting the residents of colonies of East Africa, who were of Asian origin, to immigration control while they were already citizens in the UK. The EComHR found that this differential treatment of a group of persons on the basis of “race” fell short of the principle of human dignity and constituted degrading treatment contrary to Article 3 ECHR. This approach has been confirmed by the ECtHR in the inter-state case *Cyprus v. Turkey*.<sup>25</sup>

24. EComHR, *East African Asians v. the United Kingdom*, Applications Nos. 4403/70-4419/70, Reports 14 December 1973.

25. ECtHR, *Cyprus v. Turkey* (GC), 10 May 2001, paragraphs 306-11.

Moreover, in certain specific categories of cases, member states may be required by the ECHR to permit a migrant to enter or to remain: where a migrant meets the criteria for protection of his/her life (Article 2 ECHR) or of his/her physical integrity (Article 3 ECHR); or where deportation or extradition of an alien who had strong family ties in the country concerned could violate the right to respect of his/her family life (Article 8 ECHR).<sup>26</sup>

**Examples:**

- ECtHR, *D. v. the United Kingdom*, 2 May 1997 (applicant suffering from advanced stages of a terminal HIV/Aids illness; expulsion to the country of origin, known for its lack of medical facilities and appropriate treatment in such cases, and where he would have no family or friends to care for him, would amount to inhuman treatment prohibited by Article 3; the ECtHR stressed the very exceptional circumstances of the case and the compelling humanitarian considerations at stake);
- ECtHR, *Moustaquim v. Belgium*, 18 February 1991, paragraph 43: “The Court does not in any way underestimate the Contracting States’ concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. However, in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8, they must be shown to be ‘necessary in a democratic society’, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”

In addition, under Article 39 of its Rules (“Interim measures”), the ECtHR has the competence to request the member states to stay an administrative and/or judicial measure concerning immigration control until a final decision is reached. According to the Strasbourg Court’s case law, interim measures are legally binding and predominantly granted in expulsion and extradition cases in order to prevent the removal of the migrant/applicant to a country where he/she may be subjected to an imminent risk of irreparable damage in relation to Articles 2 or 3 ECHR and, exceptionally, Article 8 ECHR. States have a duty to comply with any interim measures indicated to them, failing which, issues will arise under Article 34 ECHR as regards the applicant’s enjoyment of his/her right to an individual petition.

In the *Mamatkulov and Askarov v. Turkey case*, the Court specified that “[i]nterim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an

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26. See Chapter VI (a) (iii) of this handbook (“The principle of *non-refoulement* under the European Convention on Human Rights”).

imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings.”<sup>27</sup>

**Examples:**

*Risk of persecution for political, ethnic or religious reasons:*

- ECtHR, *F.H. v. Sweden*, 20 January 2009
- ECtHR, *Y.P. and L.P. v. France*, 1 September 2010
- ECtHR, *W.H. v. Sweden*, 8 April 2015 (GC)

*Risk of ill-treatment related to sexual orientation:*

- ECtHR, *M.E. v. Sweden*, 8 April 2015 (GC)

*Risk of being subjected to genital mutilation:*

- ECtHR, *Abraham Lunguli v. Sweden*, 1 July 2003 (strike-out decision)

*Expulsion cases with a health or medical element:*

- ECtHR, *D. v. the United Kingdom*, 2 May 1997

## b. State jurisdiction

Under international human rights law, states have an obligation to guarantee, ensure and protect the human rights of all persons within their jurisdiction, regardless of nationality. States must therefore protect the rights of migrants subject to their territorial jurisdiction. A migrant is considered to have entered the state when he/she is on its territory, and when the non-national is in the international zone of an airport for instance.

The obligation to protect all persons within a state's jurisdiction is recognised in Article 2.1 ICCPR; Article 2.1 CRC; Article 7 ICRMW; and Article 1 ECHR.

**Example:**

- ECtHR, *Amuur v. France*, 25 June 1996, paragraphs 52-53 (a group of Somali asylum seekers was kept for 20 days in the international transit zone of Paris-Orly Airport. The ECtHR said that “despite its name, the international zone does not have extraterritorial status”. The ECtHR found a breach of Article 5 ECHR, holding that the French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants’ right to liberty).

27. ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), 4 February 2005, paragraph 104.

In addition, the ECtHR has recognised that the responsibility of states extends and applies also to extraterritorial zones where they exercise effective control, which may include international waters. When a boat is intercepted, even on the high sea, the effective control exercised over the boat and all persons on-board entails a duty for the state agents to respect and protect the rights of the migrants on-board, and means that so-called “push-backs at sea” are in violation of the ECHR.

**Examples:**

- ECtHR, *Issa and Others v. Turkey*, 16 November 2004 (applicants were Iraqi nationals complaining about the ill-treatment and killing of their relatives by the Turkish army in northern Iraq. The ECtHR found that it did not appear that Turkey had exercised effective overall control of the entire area of northern Iraq, and therefore was not satisfied that the applicants’ relatives had been within the “jurisdiction” of the respondent state for the purposes of Article 1 ECHR);
- ECtHR, *Medvedyev and Others v. France* (GC), 29 March 2010, paragraphs 62-67 (the applicants had been deprived of their liberty between the boarding of their ship and its arrival in Brest. The ECtHR found a violation of Article 5.1 ECHR considering the detention to be unlawful, for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty);
- ECtHR, *Hirsi Jamaa and Others v. Italy* (GC), 23 February 2012 (the case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. The ECtHR found that it amounted to collective expulsions and held that there had been two violations of Article 3 ECHR because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea, a violation of Article 4 of Protocol No. 4 ECHR and a violation of Article 13 taken in conjunction with Articles 3 and 4 of Protocol No. 4 ECHR).

Further, migrants seeking entry to a member state of the Council of Europe must be protected from discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There should thus be no such discrimination in the process of immigration controls and in the decision of granting entry. All citizens of a third state entering the territory a Council of Europe member state, or falling under its jurisdiction, should be allowed to seek international protection in the state concerned, regardless of their visa regimes.

**Example:**

- ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Plenary), 24 May 1985, paragraphs 74-83 (the applicants, citizens of third states, claimed that their husbands were refused permission to remain with them or to join them in the UK. The ECtHR concludes that the applicants had been victims of discrimination on the ground of sex, in violation of

Article 14 taken together with Article 8 because, under the domestic law, it was easier for a man settled in the UK than for a woman so settled to obtain permission for his/her non-national spouse to enter or remain in the country for settlement).

## c. Rights of migrants during the entry process and reception

As already mentioned, states have an obligation to protect all human beings within their jurisdiction against violations of their rights by third parties or agents of the state, and this includes the entry process and reception of aliens. Hence, states must ensure that non-nationals will not be arbitrarily deprived of their life (Article 2 ECHR) or be subject to physical or mental ill-treatment amounting to torture or inhuman or degrading treatment or punishment (Article 3 ECHR). Accordingly, aliens in the entry process should be protected against excessive physical restraint or inappropriate and unnecessary body searches.

### Example:

- ECtHR, *Solomou and Others v. Turkey*, 24 June 2008 (on the prohibition of arbitrary deprivation of life by a state agent).

Further, when aliens are held in reception centres and deprived of their liberty for immigration control purposes, they should be guaranteed adequate conditions and access to health and adequate food.<sup>28</sup> They also have the right to be protected against discrimination, and this is applicable at all time, including during entry and reception of migrants.<sup>29</sup>

However, the ECtHR has held that Article 6.1 ECHR (right to a fair trial) does not apply to proceedings regulating a person's citizenship and/or the entry, stay and deportation of aliens, as such proceedings do not involve either the "determination of his civil rights and obligations or of any criminal charge against him" within the meaning of this article of the ECHR.

### Example:

- ECtHR, *G.R. v. the Netherlands*, 10 January 2012, paragraph 48: "Article 6 is not applicable to proceedings concerning the legality of an alien's residence, which pertain exclusively to public law; moreover, the fact that such proceedings incidentally have major repercussions on the private and family life or on the prospects of employment of the person concerned

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28. See Chapter III (c) (ii) of the handbook ("Conditions of detention").

29. See Chapter I (c) of the handbook ("Standards on equality and non-discrimination").

cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention”.

## d. Examination of asylum seekers' claims

Besides the obvious right to non-discrimination, the organs of the Council of Europe have recognised a series of procedural measures to protect asylum seekers, in order to ensure that the proceedings are fair, and that the examination is objective and carried out on an individual basis. The purpose of such safeguards is to prevent violation of the right to non-refoulement.<sup>30</sup> Hence, in its “Guidelines on human rights protection in the context of accelerated asylum procedures”,<sup>31</sup> the Committee of Ministers establishes a list of substantive rights and procedural safeguards aiming at ensuring the respect of these standards in so-called fast-track procedures. For instance, the guidelines provide for the right to information concerning the procedural steps to be taken (Guideline IV.1.c), but also for the right to legal advice, to translation and to have their interviews carried out by qualified staff (Guidelines IV, VIII and IX).

The ECtHR has also found that to protect asylum seekers against arbitrary removals and have their applications seriously examined, they should be provided with sufficient information regarding the procedures to be followed and their entitlements in a language they understand, and have access to a reliable communication system with the authorities. When necessary, they should be provided with interpreters during the interviews, which should be conducted by trained staff, and with legal aid. Further, the ECtHR has warned against excessively long proceedings and delays in communication of the decision. Finally, asylum seekers have a right to an effective remedy and should be given the possibility to challenge the decision. To this end, they should be given the reasons for the decision.

### Example:

- ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraphs 300-02.

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30. See Chapter VI (a) of the handbook (“Substantive rights of migrant”).

31. Committee of Ministers 2009.

### III. Detention of migrants

Migrants may be deprived of their liberty on various grounds and at different stages of their immigration. Hence, detention of migrants occurs when a person is refused entry to the country concerned, when a person has entered the country illegally and has subsequently been identified by the authorities, when a person's authorisation to stay in the country has expired, or when asylum seekers' detention is considered necessary by the authorities.<sup>32</sup> Under Article 5.1(f) ECHR:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

#### a. Restrictions on freedom of movement which amount to deprivation of liberty

The ECtHR recognises that certain measures involving restrictions on an alien's liberty or freedom of movement may be necessary and will not always amount to deprivation of liberty. This is the case, for instance, concerning so-called reception or accommodation centres, or points of entry to a country, such as international zones of airports. However, in both examples, the ECtHR has found that, depending on the intensity, the length, the nature or the accumulation of the restrictions imposed, they may amount to deprivation of liberty.

Relevant factors in the assessment of whether restrictions on liberty amount to deprivation of liberty (*Engel and Others v. the Netherlands*, 8 June 1976, paragraph 59): "account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question".

32. CPT 2011, p. 64.



### Examples:

- ECtHR, *Guzzardi v. Italy* (Plenary), 6 November 1980, paragraphs 92-93: "... In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends";
- ECtHR, *Amuur v. France*, 25 June 1996, paragraph 45 (the ECtHR found that the confinement of aliens in holding centres in international zones of an airport, under close police surveillance and for 20 days, amounted to deprivation of liberty);
- ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, paragraph 127 (the applicants had not been free to leave the police headquarters or the Foreigners' Admission and Accommodation Centre. Besides, they were only able to meet a lawyer if the latter could present to the authorities a notarised power of attorney. Furthermore, access by the UNHCR to the applicants was subject to the authorisation of the ministry of the interior. In the ECtHR's view, the applicants' placement in the aforementioned facilities amounted to a "deprivation of liberty" given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law).

The CPT has adopted a very similar position, recognising the existence of a "variety of custodial settings, ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres". It has in particular "always maintained that a stay in a transit or 'international' zone can, depending on the circumstances, amount to a deprivation of liberty within the meaning of Article 5.1(f) of the ECHR, and that consequently such zones fall within the Committee's mandate".<sup>33</sup>

## b. Rights of migrants during administrative detention

The Council of Europe instruments and organs guarantee a series of rights to all persons in detention. Safeguards are in place to protect them against arbitrary deprivation of liberty, while they enjoy substantial and procedural rights to ensure that they are held

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33. Ibid.

in conditions compatible with the standards of the ECHR, and that they have the effective means to challenge their detention.

## i. Lawfulness of detention

Under Article 5.1 ECHR, everyone has a right to liberty and security, which means that every person has the right to be protected against arbitrary detention. To this end, it is of paramount importance that deprivation of liberty is justified, and that it is decided and carried out in accordance with procedures prescribed by law (“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”). The principle of legal certainty is considered a crucial safeguard against arbitrariness, and requires that the law prescribing detention be clear, accessible and that its consequence be foreseeable. In *Medvedyev and Others v. France*, the Court stressed that:

where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.<sup>34</sup>

The ECtHR has therefore emphasised the requirement of quality of the national law and procedures in order to be considered effectively protective against arbitrariness, and has found that inaccessible or imprecise laws prescribing detention were in violation of Article 5 ECHR.

### Examples:

- ECtHR, *Amuur v. France*, 25 June 1996, paragraph 51 (legal vacuum regarding the procedure, no access to a lawyer);
- ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, paragraph 133 (lack of legal basis due to the impossibility to foresee the deprivation of liberty);
- ECtHR, *Tehrani and Others v. Turkey*, 13 April 2010 (need for a clear record regarding the arrest and bringing into custody of a person);
- ECtHR, *Mathloom v. Greece*, 24 April 2012 (the legislation governing the detention of persons whose expulsion had been ordered by the courts did not lay down a maximum period and therefore did not satisfy the requirement of foreseeability under Article 5.1 ECHR);

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34. ECtHR, *Medvedyev and Others v. France* (GC), 29 March 2010, paragraph 80.

- ECtHR, *M.A. v. Cyprus*, 23 July 2013 (violation of Article 5.1 ECHR due to the fact that the domestic authorities had not effected the applicant’s detention in accordance with a procedure prescribed by law).

In *Saadi v. the United Kingdom*, the ECtHR recalls that any deprivation of liberty must be “lawful”, and that the reference should essentially be the procedures provided by domestic legislation, while respecting the requirement of Article 5.1 ECHR to protect individuals from arbitrariness. The ECtHR follows by indicating what is expected from states in order to comply with the ECHR:

To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”<sup>35</sup>

The ECtHR therefore stresses the specificities of the detention of migrants and makes a distinction with the detention of individuals who have or are suspected to have committed criminal offences.<sup>36</sup> It requires authorities to carry out any detention of migrants in good faith, for the purpose of preventing persons to enter the territory illegally, and explains that the conditions of detention should fit this purpose taking into consideration the vulnerability of migrants. However, contrary to the requirements of further assessment of the necessity and the proportionality of the measure regarding individuals falling within the scope of Article 5.1(b), (d) and (e) ECHR, the detention of migrants does not need to be a measure of last resort. For instance, the ECtHR has accepted short-term detention in order to efficiently process the case of an asylum seeker.

### Examples:

- ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraph 72: “Similarly, where a person has been detained under Article 5.1(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained “with a view to deportation”, that is, as long as “action [was] being taken with a view to deportation”, there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing”;
- ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 113: “any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings

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35. ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraphs 67 and 74; See also, ECtHR, *Čonka v. Belgium*, 5 February 2002, paragraph 39, and ECtHR, *Dougoz v. Greece*, 6 March 2001, paragraph 57.

36. Article 5.1(a), (b), (c) ECHR.

are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”

Nevertheless, in the case of the detention of a person in order to prevent his unauthorised entry into the territory of a state, authorities must be able to justify that detention was reasonable. In the *Saadi v. the United Kingdom* case, the Court held that “the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant’s claim to asylum” and that therefore “his detention was closely connected to the purpose of preventing unauthorised entry”. It thus concluded that in light of the difficulties the United Kingdom was facing due to an escalating flow of numbers of asylum seekers, the measure was not incompatible with Article 5.1(f) ECHR.<sup>37</sup> This contrasts with the requirements for detention pending deportation, where the deprivation of liberty will be justified by the sole purpose of expulsion.<sup>38</sup>

Moreover, the length of detention of migrants should not exceed that reasonably required for the purpose pursued. According to the ECtHR, if the length of the detention of migrants is excessive, then the detention is not lawful within the meaning of Article 5.1(f) ECHR.<sup>39</sup>

More specifically, the ECtHR has established that detention pending deportation is justified, provided that the deportation is being pursued with due diligence. Hence, in the case *Chahal v. the United Kingdom*, the ECtHR explained that deprivation of liberty of a person awaiting expulsion will be justified as long as the proceedings are in progress, and that “[i]f such proceedings are not prosecuted with due diligence, the detention will cease to be permissible”.<sup>40</sup> In the recent case *M.S. v. Belgium*, the ECtHR found that the prolonged detention of an alien whose deportation could not be carried out in accordance with the principle of *non-refoulement* violated the right to liberty of Article 5.1 ECHR.<sup>41</sup>

Other examples regarding the lawfulness of detention:

- ECtHR, *A. and Others v. the United Kingdom* (GC), 19 February 2009, paragraph 164: “Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under

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37. ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraphs 77-80.

38. See Chapter III (c) (i) of the handbook (“Length and conditions of detention”).

39. See Chapter VI (c) of the handbook (“Collective expulsions”).

40. ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraphs 112-13.

41. ECtHR, *M.S. v. Belgium*, 31 January 2012, paragraph 155.

the second limb of Article 5 § 1(f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f)”;

- ECtHR, *Rahimi v. Greece*, 5 April 2011, paragraphs 104-06: “In principle, the length of his detention – two days – could not be said to have been unreasonable with a view to achieving that aim [deportation]. Nevertheless, the detention order in the present case appeared to have resulted from automatic application of the legislation in question. The national authorities had given no consideration to the best interests of the applicant as a minor or his individual situation as an unaccompanied minor. Furthermore, they had not examined whether it had been necessary as a measure of last resort to place the applicant in the detention centre or whether less drastic action might not have sufficed to secure his deportation. These factors gave cause to doubt the authorities’ good faith in executing the detention measure. This was all the more true since the conditions of detention in the centre, particularly with regard to the accommodation, hygiene and infrastructure, had been so severe as to undermine the very meaning of human dignity”;
- ECtHR, *Lokpo and Touré v. Hungary*, 20 September 2011 (the ECtHR was not persuaded that the applicants’ detention – which lasted five months purportedly with a view to their expulsion which never materialised – was a measure proportionate to the aim pursued by the alien administration policy. Additionally, the ECtHR noted that the applicants’ detention was prolonged because the refugee authority had not initiated their release. That authority’s inaction in this respect was, however, not incarnated by a decision, accompanied by a reasoning or susceptible to a remedy. Consequently, the applicants were deprived of their liberty by virtue of the mere silence of an authority. In the ECtHR’s view this “verges on arbitrariness”. The absence of elaborate reasoning for an applicant’s deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the ECHR);
- ECtHR, *Mokallal v. Ukraine*, 10 November 2011, paragraph 36: “The words ‘in accordance with a procedure prescribed by law’ do not merely refer back to domestic law; they also relate to the quality of this law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness”;
- ECtHR, *Longa Yonkeu v. Latvia*, 15 November 2011, paragraphs 120 and 134 (the applicant was a Cameroonian national who was returned to Cameroon after two unsuccessful asylum applications. The applicant complained that his detention in Latvia in a closed facility, between December 2008 and January 2010, violated his right to liberty and security, due to the long detention period and the lack of sufficient safeguards against arbitrariness. The ECtHR found that there had been a violation of the said right, but just in certain periods of his detention. During these specific periods no national legal basis supported the said detention

after a final decision on the asylum application had been taken. Furthermore, the ECtHR observed that before 14 July 2009, when new legal provisions came into force, the applicable law for detention with a view to return did not meet ECHR standards, as it was vague, it did not foresee clear specific procedures for failed asylum seekers, its applicability could not be anticipated and it led to administrative arbitrariness);

- ECtHR, *Yoh-Ekale Mwanje v. Belgium*, 20 December 2011, paragraphs 117-19 (the applicant, an HIV-positive Cameroonian national, was detained for almost four months in the “127 bis” closed transit centre with a view to her return to Cameroon. The Court found that the detention conditions were against the provisions of the ECHR, due to the fact that the authorities did not act with the required diligence to have her illness carefully treated while she was in detention. Furthermore, the right to an effective remedy was not granted, in order to challenge the medical report in which the decision was founded and which did not analyse carefully the individual health situation of the applicant. Finally, the detention measure itself was considered by the Court as not proportionate to the pursued aim. The Court stated that she could have received better treatment against HIV if she had not been detained. The Judges in Strasbourg also considered that her identity and fixed address were known, she had attended every appointment set by the authorities and presented the requested documents. Therefore, a less burdensome measure could have been adopted by Belgium);
- ECtHR, *Takush v. Greece*, 17 January 2012, paragraph 46 (the applicant was arrested by the police and immediately committed for trial before the Criminal Court on a charge of aiding and abetting the unlawful entry of aliens into Greece. He was acquitted. The ECtHR found his detention lawful according to the special provisions of the law for the entry of aliens).

## ii. Permissible grounds for the detention of migrants other than immigration control

These grounds for detention are regarded as the only lawful ones for reasons of immigration control. However, migrants, like any other person, may be taken into detention for reasons not related to immigration. Deprivation of liberty in such a case is related to criminal proceedings or the protection of public order or health, and is to be distinguished from administrative detention. These permissible grounds for non-administrative detention are restricted to those listed under Article 5.1(a), (b), (c), (d) and (e) ECHR. These types of detention are nonetheless subjected to similar requirements of further assessment of the necessity and the proportionality of the measure. Moreover, such detentions must respect the principle of non-discrimination, which prohibits discrimination on grounds of nationality save where the difference of treatment is justified and reasonable.

**Example:**

- ECtHR, *A. and Others v. the United Kingdom* (GC), 19 February 2009, paragraph 171: “The Court does not accept the Government’s argument that Article 5 § 1 permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court’s jurisprudence under sub-paragraph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.”

### iii. Right to information

Migrants in detention have a right to be informed promptly, in a language they understand, of the nature of their detention, the reasons for it, and the process for reviewing or challenging the decision to detain. Considering the requirement that the law prescribing detention is accessible, clear and foreseeable for the detention to be lawful, States have the obligation to ensure that migrants have effective access to that information, taking into account the languages they understand and their level of education. Where necessary, authorities must be able to provide migrants deprived of their liberty with legal advice.

**Examples:**

- ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraph 84: “The first time the applicant was told of the real reason for his detention was through his representative on 5 January 2001, when the applicant had already been in detention for 76 hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2 of the Convention, the [ECtHR] found that a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given ‘promptly’”;
- ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, paragraph 138: “In the absence of a reply from the Government and any document in the case file to show that the applicants were informed of the grounds for their continued detention, the Court is led to the conclusion that the reasons for the applicants’ detention from 23 June 2008 onwards were never communicated to them by the national authorities”.

The right to be informed of the reasons for detention is expressly provided for under Article 5.2 ECHR, which reads “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. The ECtHR has explained that a bare indication of the legal basis for the

detention was insufficient, and required the provision of factual elements justifying the measure taken against him.

**Example:**

- ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, paragraph 41: “On being taken into custody, Mr Fox, Ms Campbell and Mr Hartley were simply told by the arresting officer that they were being arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists (see paragraphs 9 and 13 above). This bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2, as the Government conceded. However, following their arrest all of the applicants were interrogated by the police about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations. There is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation.”

It has further interpreted the right to information of Article 5.2 ECHR as covering more generally any person in detention and therefore extending the obligations of states to all migrants deprived of their liberty. This interpretation is justified in light of Article 5.4 ECHR and the absence of distinction in the right to challenge between the detention and the arrest. Thus, in *Abdolkhani and Karimnia v. Turkey*, the ECtHR held that:

by virtue of Article 5 §2 any person arrested must be told, in simple, non-technical language that can be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 §4. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. The Court notes there is no call to exclude the applicants in the present case from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention.<sup>42</sup>

According to this interpretation and the connection made between the right to information and the right to challenge the detention order, states also have an obligation to provide information to migrants deprived of their liberty regarding their right to judicial review and the procedural steps.

**Example:**

- ECtHR, *Shamayev and Others v. Georgia and Russia*, 12 April 2005, paragraphs 413-14: “The Court reiterates that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This is a minimum

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42. ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, paragraph 136.



safeguard against arbitrary treatment. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed ‘promptly’, it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”

Regarding the requirement of promptness, the ECtHR has found that while it is not necessary to provide the information at the moment the migrant is taken into detention, it is nonetheless essential that it is provided within hours.

#### **Examples:**

- ECtHR, *Shamayev and Others v. Georgia and Russia*, 12 April 2005, paragraphs 413-16 (no obligation to provide information immediately but within hours);
- ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraphs 81-85 (violation of Article 5 ECHR because the reasons for the deprivation of liberty were communicated to the detainee only after 76 hours).

All these requirements and obligations developed through the jurisprudence of the ECtHR naturally apply to migrants who are asylum seekers subject to accelerated procedures. They have been enshrined in the Council of Europe’s “Guidelines on human rights protection in the context of accelerated asylum procedures”, which states that “[d]etained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies”.<sup>43</sup>

### **c. Length and conditions of detention**

In addition to the requirements related to the legality of the measure, detention is subjected to other safeguards protecting detainees, including migrants deprived of their liberty, from arbitrariness. These safeguards concern the treatment of detained migrants, and aim at preventing lengthy periods of detention and conditions of detentions falling short of international human rights standards. Disproportionate and unnecessary deprivation of liberty will amount to arbitrary detention in breach of the state’s obligation under Article 5 ECHR.

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43. Committee of Ministers 2009, Guideline XI.5.

## i. Length of detention

Detention is regarded as an exceptional measure and must last for the shortest possible period. In the case of administrative detention of migrants or detention pending deportation, and when the purpose is legitimate and lawful, authorities are required to ensure the protection of persons against disproportionate measures. Thus, even when a measure of deprivation of liberty has been deemed necessary, the ECtHR has held that “the length of the detention should not exceed that reasonably required for the purpose pursued”,<sup>44</sup> otherwise the detention is not lawful.<sup>45</sup> The ECtHR has further pointed out the absence of a provision prescribing maximum time-limits under Article 5 ECHR, and indicates that “the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case”.<sup>46</sup> Moreover, it is widely accepted that prolonged periods of detention or uncertainty as to the length of the detention may amount to inhuman or degrading treatment in violation of Article 3 ECHR.

### Example:

- ECtHR, *Charahili v. Turkey*, 13 April 2010, paragraph 77: “although immigration detainees may have to spend some time in ordinary police detention facilities, given that the conditions in such places may generally be inadequate for prolonged periods of detention, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum”.

Furthermore, the ECtHR has found that delays in the release of a detainee may be acceptable for reasons such as procedural formalities. However, such delays may not be justified for more than a few hours without taking the risk to their amounting to a violation of Article 5 and the right to be protected against arbitrary detention.

### Example:

- ECtHR, *Eminbeyli v. Russia*, 26 February 2009, paragraph 49: “The Court reiterates that some delay in implementing a decision to release a detainee is understandable and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep it to a minimum. The Court reiterates that administrative formalities connected with release cannot justify a delay of more than a few hours. It is for the Contracting States to organise

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44. ECtHR, *Kaja v. Greece*, 27 July 2006, paragraph 49. ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraph 4. ECtHR, *Efremidze v. Greece*, 21 June 2011, paragraph 56.

45. See Chapter III (b) (i) of the handbook (“Lawfulness of detention”).

46. ECtHR, *Auad v. Bulgaria*, 11 October 2011, paragraph 128.

their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty”.

- ECtHR, *Bubullima v. Greece*, 28 October 2010, paragraph 29 (inability of the Greek courts to adjudicate within a short time on the application for release of a minor of Albanian nationality who had been detained with a view to expulsion).

## ii. Conditions of detention

Migrants held in detention for the purposes of immigration control have a different legal status from that of convicted prisoners or persons in pre-trial detention and should be treated accordingly. This essential difference has been stressed by the ECtHR in *Saadi v. the United Kingdom*, where it insisted on the fact that “conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’”.<sup>47</sup> Hence, migrants deprived of their liberty should be held in adequate facilities, suited for their specific situation. The Committee of Ministers and the CPT have both expressed the necessity to accommodate detained migrants and asylum seekers in facilities – or centres if detention is prolonged – “specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel”.<sup>48</sup>

Detaining migrants under alien law in places and conditions inappropriate with regard to their situation and the purpose of their deprivation of liberty is likely to amount to a violation of Article 5 ECHR and the right to liberty. For instance, families in detention should be provided with separate accommodation in order to guarantee adequate privacy or the “detention” of a person as a mental health patient should be effected in a hospital, clinic or other appropriate institution.<sup>49</sup> The ECtHR has also stated that “there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the ‘detention’ of a person as a mental health patient will only be ‘lawful’ for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution.”<sup>50</sup> Moreover, the inappropriateness of places of detention combined with prolonged deprivation of liberty may also violate the prohibition of torture and inhuman or degrading treatment or punishment of Article 3 ECHR.

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47. ECtHR, *Saadi v. the United Kingdom* (GC), 29 January 2008, paragraph 74.

48. Committee of Ministers 2009, Guideline XI.7; CPT 2011, p. 65.

49. Committee of Ministers 2009, Guideline XI.7.

50. ECtHR, *Aerts v. Belgium*, 30 July 1998, paragraph 46.

### Example:

- ECtHR, *Charahili v. Turkey*, 13 April 2010 (violation of Article 3 ECHR for the detention of the applicant in poor conditions and for a prolonged period of time in the basement of a police station);
- ECtHR, *A.F. v. Greece*, 13 June 2013 (violation of Article 3 ECHR due to the cramped conditions in which the applicant had been held at the border police post, in particular severe lack of space);
- ECtHR, *Horshill v. Greece*, 1 August 2013 (violation of Article 3 ECHR for the detention of the applicant pending deportation in in two police stations, where suffered from conditions of overcrowding, the cells in one of the police stations being located in the basement and thus devoid of natural light. In both police stations, the cells did not have adjoining showers and the detainees had been unable to walk outside or to take part in physical activity.)

In addition to the requirements of adequate regime, length and specifically designed facilities for detention, a treatment of migrants compatible with Articles 3 and 5 ECHR implies the guarantee of sufficiently clean, safe, and healthy conditions of detention. The treatment of detained migrants must be in compliance with the fundamental principle of human dignity. The CPT has described the conditions migrants deprived of their liberty should enjoy in their place of detention, stating that:

such centres should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.<sup>51</sup>

Extreme lack of space and overcrowding, but also the combination of very poor conditions such as lack of light, ventilation, access to toilets and showers or outdoors activities may be considered to constitute inhuman or degrading treatment, irrespective of the intention or not of the authorities to humiliate and ill-treat the detainees. In *Orchowski v. Poland*, the ECtHR explained that:

The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were “degrading” from the point of view of Article 3 ... By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy

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51. CPT 2011, p. 65.

of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue – measuring in the range of 3 to 4 m<sup>2</sup> per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting...<sup>52</sup>

In *M.S.S. v. Belgium and Greece*, the Court describes the appalling conditions of detention of asylum seekers in holding centres, from detainees taking turns to sleep on the floor due to overcrowding to deprivation of outdoors exercise and filthy sanitary facilities, the accumulation of which had created a level of suffering clearly incompatible with the right to respect for human dignity. The ECtHR concluded:

that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.<sup>53</sup>

In *Rodič and Others v. Bosnia and Herzegovina*, the ECtHR found a violation of Article 3 ECHR due to the lack of protection of the detainees' physical well-being. In assessing the hardship endured by the applicants, the ECtHR considered not only the actual physical violence they were subjected to, but also the suffering engendered by the constant mental anxiety caused by the threat and anticipation of such violence. It found that it "must have exceeded the unavoidable level inherent in detention and finds that the resulting suffering went beyond the threshold of severity under Article 3 of the Convention".<sup>54</sup> Similarly, the ECtHR has further considered that in spite of the absence of obligation to release persons on health grounds, failing to provide detainees with the necessary medical care or drugs would amount to inhuman and degrading treatment in violation of the state's obligation to ensure the physical and mental well-being of persons deprived of their liberty.

### Examples:

- ECtHR, *Mouïsel v. France*, 14 November 2002, paragraph 40: "Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance ... The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the

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52. ECtHR, *Orchowski v. Poland*, 22 October 2009, paragraph 122.

53. ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraphs 230-33. ECtHR, *Efremidze v. Greece*, 21 June 2011, paragraph 41.

54. ECtHR, *Rodič and Others v. Bosnia and Herzegovina*, 27 May 2008, paragraph 73.

manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment ...”;

- ECtHR, *Yoh-Ekale Mwanje v. Belgium*, 20 December 2011, paragraph 91;
- ECtHR, *Sakir v. Greece*, 24 mars 2016 (violation of Article 3 ECHR due to the fact that the police had not sought to ascertain from the hospital whether the applicant’s state of health allowed him to be placed in detention, and that in spite of specific instructions from his doctors, there had been shortcomings in the manner in which his medical condition and state of vulnerability were taken into account).

The ECtHR also found that the lack of information about the existence of a reception centre in an airport transit zone, where migrants had been kept for several days without any sort of assistance or provision of means of subsistence or shelter, amounted to inhuman and degrading treatment. The ECtHR therefore considered that the authorities’ inaction and failure to ensure the basic needs of migrants deprived of their liberty was incompatible with their duties under the ECHR. In addition, the Court has affirmed the absolute character of Article 3 ECHR, explaining that no circumstances could absolve a state from its obligations under that provision, irrespective of the economic or social difficulties faced by the country.

### Examples:

- ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, paragraph 223: “The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin *Regulation* (see paragraphs 65-82 above). The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision”;
- ECtHR, *Riad and Idriab v. Belgium*, 24 January 2008, paragraphs 103-06: “The transit zone was not an appropriate place in which to detain the applicants. By its very nature it is a place designed to accommodate people for very short periods. With characteristics liable to give those detained there a feeling of solitude, with no access outside to take a walk or have physical exercise, without internal catering arrangements or contact with the outside world, the transit zone is wholly inappropriate to the needs of a stay of more than ten days ... The

Court considers it unacceptable that anyone might be detained in conditions in which there is a complete failure to take care of his or her essential needs. The fact that certain persons working in the transit zone provided for some of the applicants' needs does not in any way alter the wholly unacceptable situation which they had to endure.”

## d. Detention of children and vulnerable groups

The organs of the Council of Europe have established additional safeguards to protect particularly vulnerable groups of migrants in detention, ensuring them the specific attention they need. This particular consideration is required for children, detainees with mental or physical disabilities, and women.

### i. Detention of children

Detention of children is internationally perceived as a measure of last resort, limited to the exceptional situations where the deprivation of liberty of the minor would be in the best interest of the minor.<sup>55</sup> The principles applicable for the protection of migrant children have been enshrined in numerous human rights instruments. At the level of the Council of Europe, both the Committee of Ministers and the PACE have produced soft law addressing the delicate issue of the detention of children and unaccompanied minors in migration. Regarding asylum seekers, the Committee of Ministers has established that “[c]hildren, including unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance”.<sup>56</sup> The PACE has adopted Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return, and Recommendation 1985 (2011) on undocumented migrant children in an irregular situation: a real cause for concern, which deal exclusively with the status and the protection of migrant children and provide the following rules regarding their detention:

- a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first;
- if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;

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55. Notably, Articles 3 and 8 ECHR; Articles 4, 19 and 24 EU Charter; Articles 7, 17 and 24 ICCPR; Articles 3, 9, 10 and 22 CRC.

56. Committee of Ministers 2009, Guideline XI.2.

- if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;
- unaccompanied children should, however, never be detained;
- no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;
- where a doubt exists as to the age of the child, the benefit of the doubt should be given to that child.<sup>57</sup>

In 2014, PACE adopted Resolution 2020 (2014) and Recommendation 2056 (2014) on alternatives to the immigration detention of children, in which it stresses “that States which practise the immigration detention of children contravene the principle of the best interests of the child and violate children’s rights. They deprive children of their fundamental right to liberty and put them at risk of severe and lifelong physical, mental and developmental harm. They may also violate other fundamental child rights, such as the rights to family, health, education and play.”<sup>58</sup> It called on the member states, inter alia, to:

- introduce legislation prohibiting the detention of children for immigration reasons and ensure its full implementation in practice;
- refrain from placing unaccompanied or separated children in administrative detention;
- develop child-friendly age-assessment procedures for migrant children;
- adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved;
- raise the awareness of all public officials, including the police, prosecutors and judges on alternatives to detention;
- encourage collaboration between governments of member states, the Council of Europe, United Nations agencies, intergovernmental organisations and civil society organisations to end child immigration detention.<sup>59</sup>

In the context of the ECHR, the special protection of children and unaccompanied children in migration derive from Articles 3, 5 and 8 ECHR. In light of the absolute nature

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57. PACE 2011b, paragraphs 9.4.1-9.4.7.

58. PACE, Recommendation 2056 (2014) on alternatives to the immigration detention of children adopted by the Assembly on 3 October 2014, paragraph 2.

59. PACE, Resolution 2020 (2014) on alternatives to the immigration detention of children adopted by the Assembly on 3 October 2014, paragraph 9.



of Article 3 ECHR, the Court has stressed the positive obligation states have to protect and provide care for extremely vulnerable individuals, such as unaccompanied minors, regardless of their status as illegal migrants, nationality or statelessness.<sup>60</sup> According to the Court, the prime characteristic of positive obligation is that they require national authorities to take the necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect the right of an individual. The ECtHR recalls that the best interest of the child implies that states ensure as far as they can family unity and use detention only as a measure of last resort.

### Examples:

- ECtHR, *Rahimi v. Greece*, 5 April 2011, paragraph 87: “In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant’s status as an illegal immigrant. He therefore indisputably came within the class of highly vulnerable members of society to whom the Greek State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention”;
- ECtHR, *Kanagaratnam and Others v. Belgium*, 13 December 2011 (the case concerned minors detained with their mother in the same centre, a closed transit centre, which the Court had held to be inappropriate for the needs of children because of the conditions of detention, as described in various national and international reports);
- ECtHR, *Mohamad v. Greece*, 11 December 2014 (violation of Article 3 ECHR due to the applicant’s conditions of detention pending his removal at the Soufli border post; and a violation of Article 5 ECHR given the fact that the applicant had been arrested and detained in disregard of his status as unaccompanied minor and that the authorities had extended his detention without taking any steps with a view to his removal when the applicant had come of age).

Moreover, the ECtHR has found that when placing children in detention centres, authorities had wittingly neglected the fact that due to their personal story and to their particular vulnerability, they had suffered anguish and feelings of inferiority likely to hinder their development. It also posed a presumption of vulnerability of the children. The ECtHR considered that the detention of the children had exposed them to a level of suffering beyond the threshold of ill-treatment set by Article 3 ECHR.

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60. These principles have also been enshrined by the PACE (2011a, paragraphs 5.2 and 5.15).

**Example:**

- ECtHR, *Kanagaratnam and Others v. Belgium*, 13 December 2011, paragraphs 67-69 (presumption of vulnerability of children in detention and violation of Article 3 ECHR due to the feelings of anguish and inferiority they were exposed to, endangering their development);
- ECtHR, *A.B. and Others v. France*, 12 July 2016 (due to the child's age and the duration and conditions of his detention in the administrative detention centre, the authorities had subjected him to treatment which had exceeded the threshold of seriousness required by Article 3).

In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, a 5-year-old unaccompanied minor was detained for two months in a centre with adults and with no person assigned to take care of her. The ECtHR noted that “[n]o measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose”. Noting the inevitable distress and serious psychological effects that such conditions would necessarily have on the child, the ECtHR concluded that the authorities have “demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment”. In addition, the authorities failed to advise the child’s mother of her daughter’s deportation, which she found out only after the removal had been executed: “The Court has no doubt that this caused the first applicant deep anxiety. The disregard such conduct showed for her feelings and the evidence in the case file lead the Court to find that the requisite threshold of severity has been attained in the present case”.<sup>61</sup> Thus, in this case, the ECtHR held that the conditions of detention of the unaccompanied minor had led to two violations of the prohibition of inhuman and degrading treatment, regarding both the child and her parent.

Further, the ECtHR has enshrined the principle that the detention of children is a measure of last resort and limited to very exceptional circumstances where it would be justified by the best interest of the child. Should the authorities fail to demonstrate that this is the case and that they examined all alternatives to deprivation of liberty, the detention of the minor will amount to arbitrariness and violate the right liberty and security of Article 5 ECHR. It has also found that detaining a mother in a place manifestly inadequate for her children was unlawful and violated the protection against arbitrariness of Article 5.1(f) ECHR.

**Examples:**

- ECtHR, *Rahimi v. Greece*, 5 April 2011, paragraph 109 (on arbitrary detention of an unaccompanied minor);

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61. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, paragraphs 50, 58 and 70.

- ECtHR, *Kanagaratnam and Others v. Belgium*, 13 December 2011, paragraphs 94-95 (on detention of children with their mother in inadequate conditions for them);
- ECtHR, *Mahmundi and Others v. Greece*, 31 July 2012 (violation of Article 3 ECHR for the detention of an Afghan family, due in particular to the lack of specific supervision of the applicants despite their particular status as minors and a pregnant woman);
- ECtHR, *A.B. and Others v. France*, 12 July 2016, paragraphs 133-138 (the Court noted that the presence in administrative detention of a child who was accompanying his or her parents is only compatible with the Convention if the domestic authorities established that they had taken this measure of last resort only after having verified, in the specific circumstances, that no other less restrictive measure could be applied).

In this regard, the Court has further insisted on the importance to reduce to the maximum the situations where families with children are held in detention. Considering that it is crucial to preserve the family unit while avoiding to deprive minors of their liberty, the ECtHR found that, in the absence of reasons to suspect that the family would try to evade the authorities, the measure was disproportionate and violated the right to respect for family life guaranteed by Article 8 ECHR. Similarly, the Court found that the deportation of an unaccompanied foreign minor constituted a violation of Article 8 ECHR, due to the positive obligation the authorities had to facilitate family reunification and their failure to do so.

**Examples:**

- ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, paragraphs 85-90;
- ECtHR, *Popov v. France*, 19 January 2012, paragraphs 147-48.

Lastly, migrant children in detention enjoy the same right to education as children at liberty. This right should be implemented in accordance with the principle of non-discrimination, and is guaranteed by Article 2 Protocol No. 1 ECHR according to which:

[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

**ii. Detention of women**

For the purpose of detention of migrants, women are considered a vulnerable group in the light of the particular threats they are exposed to. They may be subject to gender-based violence, sexual violence and harassment, or simply face deprivation of health care and hygiene facilities needed by women, goods and services, as well as lack of childcare. The vulnerability of women detainees has been highlighted in the “CPT

standards”, which devote a chapter to women deprived of their liberty and to the principles ensuring their “safe and decent custodial environment”.<sup>62</sup> The ECtHR has developed case law establishing that a certain type of conduct or the lack of adequate conditions of detention taking into consideration the specific needs of women amounted to inhuman and degrading treatment.

**Example:**

- ECtHR, *Filiz Uyan v. Turkey*, 8 January 2009, paragraph 32: “the Court considers that the insistence on the use of handcuffs during an examination by a gynaecologist, and the presence of three male security officers in the examination room during consultation, even behind a folding screen, were disproportionate security measures, when there were other practical alternatives”;
- ECtHR, *Aden Ahmed v. Malta*, 23 July 2013 (violation of Article 3 ECHR due to the risk of exposure to cold conditions, the lack of female staff in the detention centre, a complete lack of access to open air and exercise for up to three months, an inadequate diet, and the particular vulnerability of the applicant due to her fragile health and personal emotional circumstances: she had previously suffered a miscarriage while in detention and was also separated from her young child).

### iii. Detention of mentally or physically disabled persons

Detainees, including migrants, who suffer from mental illnesses or physical disabilities, especially when caused by a traumatic experience, torture or ill-treatment, should be provided with appropriate conditions of detention and with the medicine required by their conditions. Failing to provide adequate mental health care or adequate conditions of detention with regard to the detainee’s level of disability would amount to inhuman or degrading treatment and be contrary to a state’s obligations under Article 3 ECHR. The assessment of the level of suffering and whether it exceeded the threshold of severity of Article 3 ECHR must take into account the person’s vulnerability and their potential lack of capacity to effectively complain about their situation.

**Examples:**

- ECtHR, *Musial v. Poland*, 20 January 2009, paragraph 96: “Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of that an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve

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62. CPT 2011, p. 90.

the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 ... the Court considers that the failure of the authorities to hold the applicant during most of his detention in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety”;

- ECtHR, *Price v. the United Kingdom*, 10 July 2001, paragraphs 29-30: “The Court considers that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention. It therefore finds a violation of this provision in the present case”;
- ECtHR, *Asalya v. Turkey*, 15 April 2014 (violation of Article 3 ECHR in the case of a paraplegic and wheel-chair bound Palestinian detained pending his deportation, principally because of the inadequate facilities – no lifts and squat toilets: the Court considered that the conditions where the applicant was denied some of the minimal necessities for a civilised life, such as sleeping on a bed and being able to use the toilet as often as required without having to rely on the help of strangers, was not compatible with his human dignity and exacerbated the mental anguish caused by the arbitrary nature of his detention).

These principles have been reiterated by the Council of Europe in Recommendation No. R (1998) 7 on the ethical and organisational aspects of health care in prison, which states that:

50. Prisoners with serious physical handicaps and those of advanced age should be accommodated in such a way as to allow as normal a life as possible and should not be segregated from the general prison population. Structural alterations should be effected to assist the wheelchair-bound and handicapped on lines similar to those in the outside environment.

55. Prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff ...<sup>63</sup>

Moreover, in order to provide survivors of torture with the treatment, facilities, services or care they need, the Committee of Ministers has recommended that detainees be screened so as to identify victims of torture. In Recommendation No. R (1998) 7, it is stated that “asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them”.

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63. Committee of Ministers 1998.

## e. Judicial review and compensation

The right to judicial review is expressly guaranteed by Article 5.4 ECHR, according to which “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. The right to judicial review ensures the protection of the procedural and the substantive rights of the detainee and should allow him/her to challenge the grounds and legality of detention as well as the conditions of detention.

### Examples:

- ECtHR, *Kurt v. Turkey*, 25 May 1998, paragraph 123: “[w]hat is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection”;
- ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002, paragraph 92: “[t]he Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security”;
- ECtHR, *A. and Others v. the United Kingdom* (GC), 19 February 2009, paragraph 202: “Article 5 §4 ... entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the ‘lawfulness’ of his or her deprivation of liberty”;
- ECtHR, *M. and Others v. Bulgaria*, 26 July 2011, paragraph 83: “[t]he Court reiterates that the Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness”;
- ECtHR, *Suso Musa v. Malta*, 23 July 2013 (violation of Article 5.4 ECHR due to the lack of a speedy review of the lawfulness of the applicant’s detention; the Court requested the Maltese authorities to establish a mechanism to allow individuals seeking a review of the lawfulness of their immigration detention to obtain a determination of their claim within a reasonable time-limit);
- ECtHR, *Kim v. Russia*, 17 July 2014 (violations of Article 5.1 and 5.4 ECHR due to lack of procedure available to challenge the applicant’s detention, and to the impossibility to enforce the order for his expulsion)

The Court has interpreted the provision of Article 5.4 ECHR, indicating the requirements it entailed. It has established that the lawfulness of the deprivation of liberty must be sufficiently clear and certain, and should be assessed in light of the domestic law as well as of the principles embodied in the ECHR.

**Examples:**

- ECtHR, *A. and Others v. the United Kingdom* (GC), 19 February 2009, paragraph 202: “The notion of ‘lawfulness’ under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the ‘lawfulness’ of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 §1”;
- ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 127: “The scope of the obligations under Article 5 paragraph 4 is not identical for every kind of deprivation of liberty; this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5 paragraph 4 does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5 paragraph 1.”

The right to the judicial review must be real and effective, in law as well as in practice. It therefore needs to be effectively accessible, which means that practical obstacles, such as the lack of understanding of the language or of the proceedings, should not impede detained migrants in exercising their right. Thus, in order to ensure the concrete possibility for the migrant to challenge the detention, he/she should be provided with translation and legal assistance where necessary. The need for accessibility is also emphasised by the Committee of Ministers, which states that “detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance”.<sup>64</sup> Regarding children, it is also necessary to ensure that a guardian is appointed to assist unaccompanied minors.

**Examples:**

- ECtHR, *Nasrulloev v. Russia*, 11 October 2007, paragraph 86: “The existence of the remedy required by Article 5 §4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily

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64. Committee of Ministers 2009, Guideline XI.6.

created by the authorities must be such as to afford applicants a realistic possibility of using the remedy”;

- ECtHR, *Rahimi v. Greece*, 5 April 2011, paragraphs 120-21 (no access to judicial review because the leaflet was not provided in a language the applicant could understand; he could not in practice contact a lawyer, as he was an unaccompanied minor and no guardian had been appointed);
- ECtHR, *A.M. v. France*, 12 July 2016 (lack of sufficient and effective protection against arbitrary treatment; the Court noted that the French administrative court was unable to assess the original acts for which the victim risked detention, and held that there had been a violation of Article 5.4 ECHR due to the insufficiency of the domestic legal remedy allowing the assessment of not only the lawfulness but also the expediency of the detention).

Moreover, the judicial review should be carried out by an independent and impartial judicial body, and should be capable of leading to the release of the person concerned where appropriate. Their legal representative or the detainees themselves should be allowed to be heard before the court or tribunal. The ECtHR has further indicated that the proceedings should have an adversarial character and provide the guarantees of due process, such as equality of arms. In addition, judicial review must be available promptly during detention.

#### **Examples:**

- ECtHR, *De Wilde, Ooms and Versyp v. Belgium* (Plenary), 18 June 1971, paragraph 79 (on the judicial character of proceedings and the fact that the procedure applicable provided guarantees significantly inferior to those existing in criminal matters in the member states of the Council of Europe);
- ECtHR, *Bouamar v. Belgium*, 29 February 1988 (on the judicial character of the judicial review and the necessity of legal assistance);
- ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002, paragraph 92: “the person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation”;
- ECtHR, *Nasrulloev v. Russia*, 11 October 2007, paragraph 86: “[a] remedy must be made available during a person’s detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release”.

Once deprivation of liberty is ended, the right to challenge the lawfulness of the detention will fall within the scope of the right to an effective remedy under Article 13 ECHR. In addition, the right to challenge the conditions of detention falls within the scope of Article 3 ECHR.



**Example:**

- ECtHR, *Slivenko v. Latvia* (GC), 9 October 2003, paragraph 158: “Article 5 §4 deals only with those remedies which must be made available during a person’s detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The provision does not deal with other remedies which may serve to review the lawfulness of a period of detention which has already ended, including, in particular, a short-term detention such as in the present case.”

Moreover, national authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved. In the *Chahal v. the United Kingdom* case, the Court found that even if confidential material concerning national security was used, the authorities were not free from effective judicial control of detentions.<sup>65</sup> In another case, the ECtHR noted that there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.<sup>66</sup>

**Example:**

- ECtHR, *A. and Others v. the United Kingdom* (GC), 19 February 2009, paragraph 223: “in each case the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either applicant. In these circumstances, the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5§4 in respect of the first and tenth applicants.”

Finally, pursuant to Article 5.5 ECHR, “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”. The ECtHR has explained that for the right to reparation for unlawful detention to apply, it had to be in breach of the ECHR. In *Brogan and Others v. the United Kingdom*, the ECtHR stated that “in the instant case, the applicants were arrested and detained lawfully under domestic law but in breach of paragraph 3 of Article 5. This violation could not give rise, either before or after the findings made by the European Court in the present judgment, to an enforceable claim for compensation by the victims before the domestic courts.”<sup>67</sup>

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65. ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 131.

66. ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002, paragraph 97.

67. ECtHR, *Brogan and Others v. the United Kingdom* (Plenary), 29 November 1988, paragraph 67.

## IV. Living conditions and economic, social and cultural rights

The ECSR has also recognised a series of economic, social and cultural rights for migrants living on the territory of a contracting state. The ECtHR itself recently stated that, in light of the vulnerable situation of asylum seekers, states' failure to take any measures to alleviate their suffering from extremely poor living conditions could amount to inhuman or degrading treatment. In addition, the ECSR held that non-nationals should be guaranteed the right to adequate housing, health, education and work. The jurisprudence of these organs has therefore contributed, in some respects, to improve the rights of migrants to minimum standards of living.

### Personal scope of the Charter

In 2015, following significant developments in its case law regarding the personal scope of the Charter,<sup>68</sup> the ECSR issued a *Statement of interpretation on the rights of refugees under the European Social Charter*,<sup>69</sup> in which it clarifies and summarises its position. It thus starts by emphasising the “urgent and unconditional need to treat with solidarity and dignity the men, women and children who arrive on European territory, and who have a right under international law” to the protection of European states as refugees, in accordance with the 1951 Geneva Convention on the Status of Refugees. It further stresses that everyone should be treated with dignity and without discrimination and that “the social and economic integration of every individual is an essential part of their right to lead a dignified life”. As such, the ECSR states that “the rights guaranteed by the Charter are to be enjoyed to the fullest extent possible by refugees.”

In the same spirit, the Committee recalls that certain rights guaranteed by the Charter apply, beyond refugees, to “other vulnerable groups”, such as undocumented migrants or stateless persons. Those rights, which are considered prerequisites to the preservation of the persons' human dignity, include Article 13 – right to social and medical

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68. The Committee interpreted the protection of certain provisions of the Charter, notably in relation to right to health and social and medical care, right to shelter and the protection against extreme poverty and social exclusion, as extending to undocumented foreign minors, accompanied or not, and to undocumented adult migrants. See for instances *Defence for Children International (DCI) v. Belgium*, Collective Complaint No. 69/2011, 23 October 2012; ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, 1 July 2014; ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, 2 July 2014.

69. ECSR, *Statement of interpretation on the rights of refugees under the European Social Charter*, 5 October 2015 (elaborated during the 280th session of the European Committee of Social Rights, 7-11 September 2015)

assistance,<sup>70</sup> Article 17 – right of children and young persons to social, legal and economic protection,<sup>71</sup> and Article 31 – right to housing.<sup>72</sup>

In the case *Defence for Children International (DCI) v. Belgium*, when explaining its reasoning for interpreting the Charter as extending the protection of Article 11 on the right to access to health to foreign minors, the Committee reiterated that “the purpose of the Charter, as a living instrument dedicated to the values of dignity, equality and solidarity, is to give life and meaning in Europe to the fundamental social rights of all human beings.” It then argued that: “it is precisely in the light of that finding that the Committee considers [...] that a teleological approach should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties’ obligations to the greatest possible degree.”<sup>73</sup>

## a. Extreme poverty and respect for human dignity

While no specific standards of living can be inferred from the rights guaranteed by the ECHR, the Court has found that, in certain cases, conditions of extreme poverty of vulnerable individuals, such as asylum seekers, may amount to a violation of Article 3 ECHR. In the landmark case *M.S.S. v. Belgium and Greece*, the ECtHR held that the living conditions of the applicant in Greece during the examination of his claim, combined with his vulnerability and the inaction of the state, amounted to inhuman and degrading treatment. The ECtHR took note of the fact that the applicant had been living in the street for several months “with no resources or access to sanitary facilities, and without any means of providing for his essential needs”, that he had been a “victim of humiliating treatment showing a lack of respect for his dignity”, that he was undoubtedly subject to “fear, anguish or inferiority capable of inducing desperation”<sup>74</sup> and also that the state could have reduced this suffering by a prompt examination of the applicant’s asylum claim.<sup>75</sup> These elements, combined with the prolonged uncertainty of an improvement of his situation, led to the conclusion that the living conditions in which the asylum seeker had found himself were in breach of the ECHR.

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70. ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, 1 July 2014.

71. ECSR, *Defence for Children International (DCI) v. Belgium*, Collective Complaint No. 69/2011, 23 October 2012

72. ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, 2 July 2014.

73. ECSR, *Defence for Children International (DCI) v. Belgium*, Collective Complaint No. 69/2011, 23 October 2012, paragraph 30.

74. ECtHR, *M.S.S. v. Belgium and Greece* (GC), op. cit., paragraph 263.

75. Ibid., paragraph 262.

The ECtHR thus affirms the obligation for states to protect asylum seekers living on their territory, and who are not held in reception centres or in administrative detention, against extreme material poverty by providing adequate standards of living, in accordance with international and EU standards.<sup>76</sup>

In addition, the ECSR has considered that certain economic, social and cultural rights guaranteed by the ESC(r) should be applied to all persons present on the territory of a contracting state, considering that their application was closely related to the right to life and therefore fundamental:

As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.<sup>77</sup>

Similarly, in its 2014 case, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, concerning adult migrants in an irregular situation and without adequate resources, the ECSR found that the “legislation and policy concerning the access to emergency shelter [had] brought about a situation where homeless persons in need of shelter [were] not offered shelter regardless of genuine need.” Accordingly, the Committee considered that there was a violation of Article 30 of the Charter on account of the failure to prevent poverty and social exclusion.<sup>78</sup>

## b. Right to housing

### i. Protection of the right to housing under the European Social Charter (revised)

The ESC(r) guarantees the right to housing in three provisions: in Article 16, Article 19.4 and Article 31. According to the appendix to the ESC(r), the right to housing is granted

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76. *Ibid.*, paragraph 251. Regarding the asylum seekers who are in reception centres or in administrative detention, see Chapter III (c) (ii) of the handbook (“Conditions of detention”).

77. ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 3 November 2004, paragraph 30.

78. ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, 2 July 2014, paragraphs 219 and 220.

only to migrants lawfully resident and nationals of another contracting state.<sup>79</sup> Nevertheless, the ECSR has ruled that the part of the population that does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r).<sup>80</sup>

The right to housing of families is provided under Article 16 of the ESC(r). The states undertake to promote the economic, legal and social protection of family life by, *inter alia*, provision of family housing. In order to satisfy Article 16, states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The notion of adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction.<sup>81</sup>

**Examples:**

- ECSR, *European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint No. 31/2005, merits, 18 October 2006 (the situation concerning the inadequate housing of Roma families, the lack of proper amenities, the lack of legal security of tenure and the non-respect of the conditions accompanying eviction of Roma families from dwellings unlawfully occupied by them constitute a violation of Article 16 taken together with Article E (prohibition of discrimination));
- ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, merits, 19 October 2009, paragraph 88: “the Committee considers that the population concerned by this collective complaint [Travellers] unquestionably includes families. In view of the scope it has constantly attributed to Article 16 as regards housing of the family, the findings of a violation of Article 31 or Article E in conjunction with Article 31 amount to a finding that there has also been a breach of Article 16, and of Article E in conjunction with Article 16.”

Moreover, the right of equal treatment for migrant workers in terms of social housing is expressly provided for under Article 19.4(c) of the ESC(r). Under this provision states undertake to eliminate all legal and *de facto* discrimination concerning access to public

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79. Appendix to the European Social Charter (revised) (Scope, paragraph 1): “the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19”.

80. ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010, paragraph 33.

81. ECSR, *ERRC v. Greece*, Complaint No. 15/2003, merits, 8 December 2004, paragraph 24.

and private housing. There must be no legal or *de facto* restrictions on home-buying,<sup>82</sup> access to subsidised housing or housing aids, such as loans or other allowances.<sup>83</sup> Moreover, according to the ECSR, Articles 19.4(c) and 31 overlap with respect to several aspects of the right to housing.

**Example:**

- ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, merits, 19 October 2009, paragraph 112: “the Committee has already ruled on the housing rights situation of Travellers in this decision under Article 31. Its findings in this regard also apply to Roma migrants residing legally in France. It consequently considers that the findings of a violation of Article 31 amount to a finding that there has also been a breach of Article 19§4c.”

Finally, the right to housing is expressly provided for under Article 31 ESC(r) and ensures that states take the necessary measures:

- to promote access to housing of an adequate standard;
- to prevent and reduce homelessness with a view to its gradual elimination;
- to make the price of housing accessible to those without adequate resources.

According to the interpretation that the ECSR has given to Article 31, states enjoy “a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources”.<sup>84</sup> Further, in the case *International Movement ATD Fourth World v. France*,<sup>85</sup> the ECSR explained that although states were not bound by an obligation of results, the right to housing under Article 31 ESC(r) creates the obligation for states to:

- adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
- maintain meaningful statistics on needs, resources and results;
- undertake regular reviews of the impact of the strategies adopted;
- establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
- pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

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82. ECSR, “Conclusions 2004”, Norway.

83. ECSR, “Conclusions 2003”, Italy.

84. ECSR, *ERRC v. Bulgaria*, Complaint No. 31/2005, merits, 18 October 2006, paragraph 35.

85. ECSR, *International Movement ATD Fourth World v. France*, Complaint No. 33/2006, merits, 5 December 2007, paragraph 59.

Regarding the access to adequate housing provided for under Article 31.1, the explanatory report of the ECR(r) explains that “[b]y housing of an ‘adequate standard’ is meant housing which is of an acceptable standard with regard to health requirements”. The ECSR has further specified that the notion of “adequate housing” should be defined by a domestic law and should ensure that it is:

1. a dwelling which is safe from a sanitary and health point of view, i.e. that possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity, etc. and where specific dangers such as the presence of lead or asbestos are under control;
2. a dwelling which is not over-crowded, that the size of the dwelling must be suitable in light of the number of persons and the composition of the household in residence;
3. a dwelling with secure tenure supported by the law. This issue is covered by Article 31§2.<sup>86</sup>

The ECSR has further insisted on the necessity for authorities to take into consideration the impact of their policies on vulnerable groups, individuals and families facing exclusion and poverty,<sup>87</sup> and to ensure equal treatment for “low-income persons, unemployed persons, single parent households, young persons, persons with disabilities including those with mental health problems”.<sup>88</sup>

Pursuant to Article 31.2 ESC(r), states are also required to take measures to protect vulnerable persons from homelessness. This raises the issue of forced evictions, which have been defined as the deprivation of housing for insolvency or wrongful occupation.<sup>89</sup> In order to prevent homelessness, forced evictions must be governed by specific rules and are subject to certain safeguards and restrictions, such as the prohibition of carrying out forced eviction at night or during winter. In addition, states have the obligation to give reasonable notice to the person concerned, as well as to consult him/her in order to find alternatives to eviction. In any case, where the eviction takes place, authorities must ensure the respect of the person evicted and adopt measures to assist the person financially or in finding another housing situation. Further, supplying temporary shelter has not been considered satisfactory and states are expected to take measures preventing the return to homelessness.<sup>90</sup>

Moreover, the ECSR has ruled that the right to shelter (Article 31.2 ESC(r)) is to be granted to all migrants, regardless of their status.<sup>91</sup> It requires the contracting state to

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86. ECSR, “Conclusions 2003”, France; ECSR, *ERRC v. Bulgaria*, Complaint No. 31/2005, merits, 18 October 2006, paragraph 34.

87. ECSR 2008, conformity with Article 31, p. 170.

88. ECSR, “Conclusions 2003”, Italy.

89. ECSR, “Conclusions 2003”, Sweden.

90. ECSR, “Conclusions 2003”, Italy.

91. ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009, paragraphs 46–48.

provide shelter as long as the undocumented migrants are under its jurisdiction and unable to provide housing for themselves. The shelter does not imply the same level of privacy, family life or suitability as the “adequate housing” standard, but it must “fulfil the demands for safety, health and hygiene, including basic amenities, i.e. clean water, sufficient lighting and heating. The basic requirements of temporary housing also include security of the immediate surroundings.”<sup>92</sup>

In the case *Conference of European Churches (CEC) v. the Netherlands*,<sup>93</sup> the ECSR noted that the large majority of undocumented adult migrants without resources who have not been returned were generally not provided with accommodation and were denied medical assistance in legislation and practice. Reiterating “that the right to shelter is closely connected to the human dignity of every person regardless of their residence status”,<sup>94</sup> the Committee found the situation not to be in conformity with Article 13§4 (right to social and medical assistance) and with Article 31§2 (right to housing). It stated that States Parties to the Charter shall provide appropriate short-term assistance to persons in a situation of immediate and urgent need, and explaining that this criterion must not be interpreted too narrowly, introducing undue requirements for the enjoyment of such right such as the length of presence on the territory of a state or the status of a person.<sup>95</sup>

Similarly, in 2014, the Committee found that the Netherlands disproportionately denied the right to emergency assistance to migrants (both in regular and irregular situations) by using restrictive criteria to target ‘vulnerable groups’, where in fact, all people in the jurisdiction of the state have rights to emergency shelter. It recalled that “the right to emergency shelter and to other emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human

**Scope of the right to housing under the ESC(r)**

- In principle, the right to housing applies only to migrants lawfully resident and nationals of another state party (Article 31).
- All migrant workers and their families have a right to equal treatment in respect of social housing (Article 19).
- All children, including those unlawfully present on the territory of a state party, have a right to shelter (Article 31.2).
- All people have a right to temporary shelter in light of the right to human dignity (Article 31.2).

92. Ibid., paragraph 62.

93. ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, 1 July 2014.

94. Ibid., paragraph 144.

95. Ibid., paragraph 105.



dignity.”<sup>96</sup> The Committee thus found that there had been a violation of Article 31.2 ESC(r) on the right to shelter.

Finally, the right to shelter is to be granted to all unaccompanied (undocumented) children because, as the ECSR stated by reference to Articles 31.2 and 17.1(c) ESC(r),<sup>97</sup> “the right to shelter is closely connected to the right to life and is crucial for the respect of every person’s human dignity. The Committee observes that if all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. It therefore considers that children would adversely be affected by a denial of the right to shelter”.<sup>98</sup>

In the 2012 case, *Defence for Children International (DCI) v. Belgium*,<sup>99</sup> the complainant organisation alleged that foreign children living accompanied or not, either as illegal residents or asylum seekers in Belgium, were excluded from social assistance in breach of different provisions of the ESC. Noting the “persistent failure to accommodate these minors”, the Committee found that the Government had not “taken the necessary and appropriate measures to guarantee the minors in question the care and assistance they need and to protect them from negligence, violence or exploitation, thereby posing a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity.” It therefore concluded that there was a violation of Article 17, of Article 7.10 and 11.1 and 3 of the ESC(r).<sup>100</sup>

### Other examples:

- ECSR, *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2002, merits, 5 December 2007 (violation of Article 31.1 (insufficient progress as regards the eradication of sub-standard housing and lack of proper amenities of a large number of households) and Article 31.2 (unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families and measures currently in place to reduce the number of homeless are insufficient, both in quantitative and qualitative terms));

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96. ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, 2 July 2014, paragraphs 169

97. Article 17.1(c) ESC(r) provides that the states “undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed ... (c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support”.

98. ECSR, *Defence for Children International (DCI) v. the Netherlands*, op. cit., paragraphs 47–48.

99. ECSR, *Defence for Children International (DCI) v. Belgium*, Collective Complaint No. 69/2011, 23 October 2012.

100. Ibid., paragraphs 82, 97 and 117.

- ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, merits, 19 October 2009 (violation of Article 31.1 (failure to create a sufficient number of stopping places, poor living conditions and operational failures at these sites and lack of access to housing for settled Travellers) and Article 31.2 (eviction procedure and other penalties)).

Finally, according to Article 31.3 ESC(r), housing must be accessible for those without adequate resources, meaning those who do not have the resources needed to live a decent life and meet basic needs in an adequate manner.<sup>101</sup> More specifically, the ECSR explained that “housing is affordable if the household can afford to pay initial costs (deposit, advance rent), current rent and/or other housing-related costs (e.g. utility, maintenance and management charges) on a long-term basis while still being able to maintain a minimum standard of living, according to the standards defined by the society in which the household is located”.<sup>102</sup> Moreover, states must take measures to provide social housing, especially for the most disadvantaged, and housing benefits for individuals and households with low incomes, but also ensure that waiting periods are not excessive and that legal or non-legal remedies are available in case of refusal of housing benefits or of excessive delays. These rights should be applied in a non-discriminatory manner.

**Examples:**

- ECSR, *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2002, merits, 5 December 2007 (violation of Article 31.3 (insufficient supply of social housing accessible to low-income groups and malfunctioning of the social housing allocation system, and the related remedies) in conjunction with Article E (prohibition of discrimination – deficient implementation of legislation on stopping places for Travellers));
- ECSR, *European Roma Rights Centre (ERRC) v. Greece*, Complaint No. 15/2003, merits, 8 December 2004 (violation of the right to adequate housing, even though this is a right of progressive realisation, because the state could not satisfy even its minimum standards with regard to Roma);
- ECSR, *European Roma Rights Centre (ERRC) v. Italy*, Complaint No. 27/2004, merits, 7 December 2005 (violation of the right to adequate housing (inadequacy and insufficiency of camping sites, forced evictions and sanctions, and lack of permanent dwellings) in conjunction with the prohibition of discrimination).

To sum up, the right to housing under the ESC(r) is guaranteed by three provisions (Articles 16, 19.4(c) and 31) that partially offer the same protection. The ECSR considers that

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101. ECSR 2008, interpretation of Article 13, p. 102.

102. ECSR, “Conclusions 2003”, Sweden.

Articles 16 and 31, though different in personal and material scope, and Articles 19.4(c) and 31 partially overlap with respect to several aspects of the right to housing.<sup>103</sup>

**Example:**

- ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, merits, 19 October 2009, paragraph 88: “the Committee considers that the population concerned by this collective complaint [Travellers] unquestionably includes families. In view of the scope it has constantly attributed to Article 16 as regards housing of the family, the findings of a violation of Article 31 or Article E in conjunction with Article 31 amount to a finding that there has also been a breach of Article 16, and of Article E in conjunction with Article 16.”

## ii. Protection of the right to housing under the European Convention on Human Rights

The right to housing of the ESC(r) has a material understanding and differs in this from the more theoretical meaning of the right to respect for one’s home in Article 8 ECHR, which does not guarantee standard living conditions but instead ensures respect for the home. As emphasised by the ECtHR, Article 8 ECHR does not guarantee the right to be provided with a home either. As for the right to property of Article 1 Protocol No. 1 ECHR, its application requires ownership and property rights over the home in issue.

**Examples:**

- ECtHR, *Chapman v. the United Kingdom* (GC), 18 January 2001, paragraph 99 (no right to be provided with a home can be inferred from Article 8 ECHR);
- ECtHR, *Dogan and Others v. Turkey*, 29 June 2004, paragraphs 138-39.

However, the rights of the ECHR are not irrelevant to migrants and their right to housing as the Strasbourg Court has applied the right of Article 8 ECHR to afford protection from forced evictions and from destruction of homes. The ECtHR held that such measures are subject to the principle of proportionality and should therefore be provided for by law, pursue a legitimate aim, and be proportionate and necessary in a democratic society.<sup>104</sup> It has given examples of criteria to be taken into consideration in the assessment of this proportionality, such as the unlawful establishment of the home or the existence of alternative accommodation.

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103. ECSR, *ERRC v. Bulgaria*, Complaint No. 31/2003, merits, 16 October 2006, paragraph 17.

104. See Chapter VI (b) of the handbook (“Substantive rights of migrants”).

### Examples:

- ECtHR, *Akdivar and Others v. Turkey* (GC), 16 September 1996 (protection against destruction of a home under Article 8 ECHR);
- ECtHR, *Mentes v. Turkey* (GC), 28 November 1997 (protection against forced eviction under Article 8 ECHR);
- ECtHR, *Chapman v. the United Kingdom* (GC), 18 January 2001, paragraph 102 (proportionality test and relevance of the fact that the home was established unlawfully) and paragraph 103 (alternative accommodation);
- ECtHR, *Connors v. the United Kingdom*, 27 May 2004, paragraph 83 (procedural safeguards for a fair decision process).

## c. Right to health and to social and medical assistance

The right to protection of health is expressly guaranteed by Article 11 ESC(r), which states that:

... The Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

The right to protection of health of the ESC(r) is “inextricably linked”<sup>105</sup> to the right to life and the prohibition of torture and inhuman or degrading treatment or punishment of Articles 2 and 3 ECHR. This protection is connected in that it derives from the fundamental value of human dignity, which is at the core of positive European human rights law.

In *FIDH v. France*, the ECSR stressed this connection and affirmed that the protection of health is a “prerequisite for the preservation of human dignity”.<sup>106</sup>

The interpretation that the ECSR has given of Article 11.1 ESC(r) concerning the obligation to remove as far as possible the causes of ill-health establishes certain rights: the right to the highest possible standard of health and the right to access to health care. The highest possible standard of health is to be understood as the best possible state of health for the population according to existing knowledge, regarding both physical and

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105. ECSR 2008, interpretation of Article 11 ESC(r), p. 83.

106. ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, op. cit., paragraph 31.

mental well-being. Accordingly, states have an obligation to take action to prevent all avoidable risks, including environmental threats. In addition, the ECSR has established a series of indicators to assess the overall health care system of a country, such as life expectancy, the principal causes of death, and infant and maternal mortality.

**Examples:**

- ECSR, “Conclusions XV-2”, Denmark, pp. 126-29 (on health risks that can be controlled by human action);
- ECSR, “Conclusions 2005”, Lithuania, pp. 336-38 (indicators);
- ECSR, “Conclusions 2003”, Romania, p. 390 (infant and maternal mortality as indicators).

The second consequence of the obligation to remove the causes of ill-health as far as possible is the right to access to health care. Effective access to health care for all and without discrimination has been recognised as a criterion for successful health care systems. On this issue, the ECSR has clarified that the limited scope of the ESC(r) in terms of persons concerned, which is presented in the appendix to the ESC(r), should not affect disadvantaged groups and that in light of other international treaties ratified by all parties, in particular the ECHR, the rights of the ESC(r) should be extended to non-nationals without distinction. The ECSR explained that:

the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention on Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.<sup>107</sup>

The right to access to health care has been interpreted as requiring that the cost of health care should not constitute an excessive financial burden for individuals, especially the most disadvantaged ones, and that the community should bear at least part of it. Measures should be taken to avoid unnecessary delays in the provision of health care and to ensure that an adequate number of professionals and equipment is available to provide satisfactory conditions compatible with human dignity.<sup>108</sup> The ECSR systematically inquires about the full accessibility of the health care system to the entire population of a state party<sup>109</sup> and asks the states parties to keep them informed of the most important measures taken to improve access to health care for the most disadvantaged

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107. ECSR, “Conclusions 2004”, “General introduction”, p. 10.

108. ECSR 2008, interpretation of Article 11, p. 83.

109. ECSR, “Conclusions 2009”, Malta.

groups, including migrants.<sup>110</sup> It also checks whether access to health care is guaranteed equally to nationals of the state party and nationals of other states parties, lawfully resident or regularly working in the territory.<sup>111</sup>

Pursuant to Article 11.2 ESC(r), states parties have the obligation to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health, which implies an obligation to raise awareness through education, information and participation of the public. It further requires states to carry out screening and provide counselling, through the possibility of free and regular consultations and medical checks.<sup>112</sup>

As for the third obligation that the ESC(r) imposes in terms of the right to protection of health, which is to prevent as far as possible epidemic, endemic and other diseases, as well as accidents, the ECSR has also established a series of measures that parties are required to take. According to the conclusions of the ECSR, states should take steps to ensure a healthy environment, to restrict the supply of tobacco, alcohol and drugs, to operate widely accessible immunisation programmes and ensure epidemiological monitoring, as well as to prevent, to the extent possible, accidents (at work, school, home, on the roads, etc.).<sup>113</sup> The ECSR also checks whether specific awareness activities concern migrants.<sup>114</sup>

As mentioned previously, the right to health is also protected by Articles 2 and 3 ECHR. The ECtHR has therefore found on many occasions that considering states' obligation to make health care available to the whole population, their acts and omissions regarding health care policy engage their responsibility. For instance, putting an individual's life at risk by denying him/her access to health care may amount to a violation of Article 2 ECHR. States also have a duty to ensure that hospitals adopt appropriate measures to protect patients' lives and to guarantee a healthy environment. In addition, the ECtHR has found that insufficient funding for health treatment could raise an issue under Article 8 and the right to respect of private and family life.

### **Examples:**

On sufficient funding – Article 8 ECHR:

- ECtHR, *Sentges v. the Netherlands*, Application No. 27677/02, decision, 8 July 2003;

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110. ECSR, "Conclusions XVII-2", Germany. ECSR, "Conclusions 2009", United Kingdom.

111. ECSR, "Conclusions 2009", Germany and Denmark.

112. *Ibid.*, pp. 84-85.

113. *Ibid.*, pp. 85-88.

114. ECSR, "Conclusions 2007", Ireland.

- ECtHR, *Pentiacova and Others v. Moldova*, Application No. 14462/03, decision, 4 January 2005.

On denial of health care – Article 2 ECHR:

- ECtHR, *Cyprus v. Turkey* (GC), 10 May 2001, paragraph 219;
- ECtHR, *Powell v. the United Kingdom*, Application No. 45305/99, decision, 4 May 2000;
- ECtHR, *Nitecki v. Poland*, Application No. 65653/01, decision, 21 March 2002.

On hospital regulations and the protection of patients' lives:

- ECtHR, *Calvelli and Ciglio v. Italy* (GC), 17 January 2002, paragraph 49;
- ECtHR, *Erikson v. Italy*, Application No. 37900/97, decision, 26 October 1999;
- ECtHR, *Nitecki v. Poland*, Application No. 65653/01, decision, 21 March 2002.

On the right to a healthy environment under Articles 2 and 8 ECHR:

- ECtHR, *López Ostra v. Spain*, 9 December 1994, paragraphs 51-58 (Article 8 ECHR);
- ECtHR, *Öneryıldız v. Turkey* (GC), 30 November 2004, paragraphs 71, 90, 94-96 (Article 2 ECHR).

The ESC(r) draws a distinction between the right to social security and the right to social and medical assistance. These separate rights and the obligations they create are provided for under Articles 12 and 13 ESC(r) respectively.<sup>115</sup>

The wording of the ESC(r) itself contains no specific indications as to the scope of the two concepts (“social security” and “social assistance”).<sup>116</sup> Whilst taking into consideration the views of the state concerned as to whether a particular benefit should be seen as social assistance or as social security, the ESC(r) pays most attention to the purpose of, and the conditions attached to, the benefit in question. It thus considers as social assistance, benefits for which individual need is the main criterion for eligibility, without any requirement of affiliation to a social security scheme aimed to cover a particular risk, or any requirement of professional activity or payment of contributions. Moreover, as Article 13.1 ESC(r) demonstrates, assistance is given when no social security benefit ensures that the person concerned has sufficient resources or the means to meet the cost of treatment necessary in his/her state of health. Social security (Article 12 ESC(r)), which includes universal schemes as well as professional ones, is seen by the ESC as including contributory, non-contributory and combined allowances related to certain risks (sickness, disablement, maternity, family, unemployment, old age, death, widowhood,

115. See, also, Chapter IV (c) of the handbook (“Right to health and to social and medical assistance”).

116. According to the appendix to the ESC(r) (Scope, paragraph 1), the right to social security and the right to social and medical assistance are granted only to migrants lawfully resident and nationals of another contracting state. Nevertheless, the ECSR has ruled that the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r) (ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010, paragraph 33). See, also, Chapter IV (b) of the handbook (“Right to housing”).

vocational accidents and illnesses). These are benefits granted in the event of risks which arise, but they are not intended to compensate for a potential state of need which could result from the risk itself.<sup>117</sup>

While the Committee has, through its jurisprudence, provided an evolving interpretation of the appendix to the ESC(r) on the personal scope of the rights guaranteed by the Charter, and clarified in particular its applicability with regard to refugees<sup>118</sup>, it is on the right to health and to social and medical assistance that the Committee's interpretation has been most extensive. Indeed, following the *FIDH v. France* case from 2004, where the Committee had found no violation of Article 13 (the right to medical assistance), since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for “emergencies and life threatening conditions”, the Committee issued as of 2012 a series of decisions progressively extending the protection of Articles 11 ESC(r) to foreign children, accompanied or not, and 13 ESC(r) to undocumented adult migrants.

#### Examples:

- ECSR, *Defence for Children International (DCI) v. Belgium*, 23 October 2012, paragraph 117: “With regard to Article 11.3, [...] the Committee considers nonetheless that the lasting incapacity of the reception facilities and the fact that, consequently, a number of the minors in question (particularly those accompanied by their families) have been consistently forced into life on the streets exposes these minors to increased threats to their health and their physical integrity, which are the result in particular of a lack of housing or foster homes. In this connection, the Committee considers that providing foreign minors with housing and foster homes is a minimum prerequisite for attempting to remove the causes of ill health among these minors (including epidemic, endemic or other diseases) and that the State therefore has felt to meet its obligations as far as the adoption of this minimum prerequisite is concerned;
- ECSR, *Conference of European Churches (CEC) v. the Netherlands*, 1 July 2014: The Committee found that the situation where a majority of undocumented adult migrants without resources who had not been returned were denied medical assistance in legislation and practice was in conformity with Article 13§4 (right to social and medical assistance) and argued that access to sufficient health care is a prerequisite for the preservation of human dignity and this should be granted within the minimum protection provided to migrants;

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117. ECSR 2008, interpretation of Article 13.1, p. 108.

118. ECSR, *Statement of interpretation on the rights of refugees under the European Social Charter*, 5 October 2015.



- ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, 2 July 2014, paragraphs 169-172: the Committee “finds that the practical and legal measures denying the right to emergency assistance accordingly restrict the right of adult migrants in an irregular situation and without adequate resources in the Netherlands in a disproportionate manner. [...] As concerns the access to emergency medical care of migrants in an irregular situation, the Committee recalls that the emergency medical care made available to those who are not lawfully present in the country fulfils the requirements of Article 13§4 of the Charter (Conclusions 2009, the Netherlands).”

Medical assistance means free or subsidised health care or payment to allow a person who does not have the adequate resources to afford the treatment and care required by their state of health. While the ECSR has not defined or limited the material scope of the care or payment provided, it has nonetheless specified that the seriousness of the illness cannot be a factor justifying refusal to grant medical assistance.

**Examples:**

- ECSR, “Conclusions XIII-4”, statement of interpretation concerning Article 13, pp. 54-57;
- ECSR, “Conclusions XIII-2”, Greece, p. 181, and “Conclusions XIII-4”, pp. 180-81.

“Adequate resources” within the meaning of the ESC(r) is to be understood as the resources necessary to live a decent life and which would allow a person to meet his/her basic needs, with reference to the poverty threshold in the country concerned. For the protection of Article 13 ESC(r) to be triggered, it is also required that the person is unable provide for himself, neither by his/her personal efforts nor by other means such as benefits under social security schemes. Consequently, the ECSR considers that reducing or suspending social assistance benefits will constitute a violation of the ESC(r) if it deprives the recipients of their means of subsistence. However, the ECSR has specified that family solidarity is not included in the types of sources that would preclude the exercise of the right to social and medical assistance.

**Examples:**

- ECSR, “Conclusions XIV-1”, statement of interpretation concerning Article 13.1, pp. 52-55;
- ECSR, “Conclusions 2006”, Estonia, p. 208;
- ECSR, “Conclusions XIII-2”, Greece, p. 129 (on family solidarity).

## d. Right to education

The right to education is expressly guaranteed both by Article 17 ESC(r) and Article 2 Protocol No. 1 ECHR.

According to Article 17 ESC(r), states must ensure an “effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities”. To this end, the parties have an obligation to take measures regarding education:

- to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; (Article 17.1(a) ESC(r)) ...
- to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools. (Article 17.2 ESC(r))

The appendix to the ESC(r) further explains that the provision applies to all persons, including migrants,<sup>119</sup> below the age of 18 years unless according to the law applicable, the age of majority is attained earlier. It is also specified that the provisions of Article 17 ESC(r) do not prejudice more specific provisions, referring in particular to Article 7 ESC(r) on the right of children and young persons to protection and the age limits set for admission to employment for instance. Finally, the appendix to the ESC(r) adds that there is no obligation to provide compulsory education up to 18 years of age.<sup>120</sup>

The jurisprudence of the ECSR has provided interpretation of the nature of states’ obligations in order to satisfy the requirements of accessibility and effectiveness of the right to education. The ECSR has established that the scope of the right to education in terms of persons concerned, under paragraphs 1 and 2, is wide and protects all children. Moreover, access should be guaranteed on an equal basis and without discrimination, when necessary through special measures for disadvantaged children. Therefore, the ECSR has stressed the necessity to pay particular attention to children belonging to vulnerable groups and minorities, such as children seeking asylum, refugee children, children in hospital or children deprived of their liberty, etc.<sup>121</sup> Measures should be taken to ensure that these children are integrated into mainstream education facilities and have access to ordinary education schemes.<sup>122</sup>

The ECSR has also provided a series of prerequisites in order to guide states in the establishment of a system of education compatible with the requirements of accessibility

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119. According to the appendix to the ESC(r) (Scope, paragraph 1), the right to education is granted only to migrants lawfully resident and nationals of another contracting state. Nevertheless, the ECSR has ruled that the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r) (ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010, paragraph 33). See, also, Chapter IV (b) of the handbook (“Right to housing”).

120. Appendix to the ESC(r), Part II, Article 17.

121. ECSR 2008, interpretation of Article 17.1, p. 120.

122. *Ibid.*

and effectiveness of the ESC(r). Hence, a functioning system of primary and secondary education should, *inter alia*:<sup>123</sup>

- include an adequate number of schools;
- ensure a fair geographical distribution, especially between rural and urban areas;
- aim at enrolling 100% of children of the relevant age;
- aim at reaching a reasonable teacher-pupil ratio and adequate class sizes;
- establish a monitoring mechanism to ensure the quality of education and of teaching;
- ensure that education is compulsory until the minimum age for admission to employment.

In addition, pursuant to Article 17.2 ESC(r), primary and secondary education must be free of charge. The ECSR explained that this requirement concerns only the basic education system. However, it highlighted the existence of hidden costs related to education, such as books or uniforms, which could impede vulnerable groups' access to education. Accordingly, the ECSR held that states should take measures to limit the impact of hidden costs by maintaining them at a reasonable level and by providing financial assistance where necessary.<sup>124</sup>

Under the ECHR, the right to education is guaranteed by Article 2 Protocol No. 1 ECHR. It states that “[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. The ECtHR has raised the right to education to one of the “most fundamental values of the democratic societies making up the Council of Europe”,<sup>125</sup> and, as such, constitutes a right to which every person is entitled. It insisted on the fact that such a fundamental right cannot be interpreted restrictively, and affirmed the universality of the right to education by holding that the exclusion of children because their parents were not regularly registered migrants violated the ECHR and the right to education. In line with the provisions of the ESC(r) and the case law of the ECSR, the ECtHR has established that states ought to take the necessary measures to ensure the accessibility of primary, secondary and, lastly, tertiary education, which comprises college and university.

### Examples:

- ECtHR, *Leyla Sahin v. Turkey* (GC), 15 November 2005, paragraph 141: “it is clear that any institutions of higher education existing at a given time come within the scope of the first

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123. ECSR, “Conclusions 2003”, conclusions concerning Article 17, p. 174.

124. ECSR 2008, interpretation of Article 17.2, p. 122.

125. ECtHR, *Timishev v. Russia*, 13 December 2005, paragraph 64.

sentence of Article 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the right set out in that provision”;

- ECtHR, *Timishev v. Russia*, 13 December 2005, paragraphs 65-66: “the Court observes that the applicant’s children were refused admission to the school which they had attended for the previous two years. The Government did not contest the applicant’s submission that the true reason for the refusal had been that the applicant had surrendered his migrant’s card and had thereby forfeited his registration as a resident in the town of Nalchik. As noted above, the Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents’ residence. It follows that the applicant’s children were denied the right to education provided for by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No. 1”.

## e. Right to work and protection of migrant workers

The right to work entails a series of obligations for states, ranging from efforts to create and provide jobs to guaranteeing the protection of persons against forced labour, servitude and slavery. As members of vulnerable groups, migrants are particularly likely to face risks of trafficking and forced labour, or to be subject to discrimination when looking for a job or in their place of work. The requirements imposed on states pursuant to the right to work are therefore of great significance to migrants.

There are several provisions in Council of Europe instruments relevant to employment and the rights and protection of workers; however, the right to work per se is expressly provided for under Article 1 ESC(r). It states that in order to achieve an effective exercise of the right to work, parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation.

The interpretation of this article provided by the case law of the ECSR details the obligations to which states have agreed to be bound. According to Article 1.1 ESC(r), they have undertaken to pursue a policy of full employment, which implies that they adopt an economic policy conducive to creating and preserving jobs, and that they take adequate measures to assist unemployed persons in finding or qualifying for

a job.<sup>126</sup> The actions of authorities in fulfilling these goals will be assessed in relation to the economic situation of the state and the level of unemployment. Since the requirements under Article 1.1 are not obligations as regards results but rather means, the failure to achieve full employment will not automatically lead to a breach of the ESC(r).

In its evaluation, the ECSR assesses the level of transformation of economic growth into employment, including assistance to unemployed people, by examining the national economic situation – based on the country’s GDP and employment growth, inflation, etc., in comparison to the employment rates. Special attention is paid to the unemployment of vulnerable groups, such as members of ethnic minorities.<sup>127</sup> The ECSR also examines the efforts carried out to implement the measures taken pursuant to its policy of employment, the amount of resources allocated to these measures and the concrete effects of the measures on employment growth.<sup>128</sup> It found for instance that the lack of a declared commitment to a full employment policy, or insufficient measures to tackle extremely high and long-term unemployment, amounted to violations of states’ obligations under the ESC(r).<sup>129</sup>

Article 1.2 ESC(r), which guarantees effective protection of a worker’s right to earn his/her living in an occupation freely entered upon, has been interpreted as implying the prohibition of all forms of discrimination in employment.<sup>130</sup> According to the appendix to the ESC(r), the right to work is granted only to migrants lawfully resident and nationals of other contracting states.<sup>131</sup> Nevertheless, by referring to Article G ESC(r), the ECSR has ruled that these categories of foreigners cannot claim their right to work in jobs that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.<sup>132</sup>

Further, Article 18 ESC(r) is of interest to migrant workers from one of the contracting parties, as it guarantees the right to engage in a gainful occupation in the territory of another party. It expressly recognises the “the right of their nationals to leave the

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126. ECSR 2008, interpretation of Article 1, p. 20.

127. ECSR, “Conclusions XVI-1”, conformity with Article 1.1, p. 9.

128. ECSR 2008, interpretation of Article 1, p. 20.

129. ECSR, “Conclusions XVI-1”, Netherlands (Netherlands Antilles and Aruba); ECSR, “Conclusions 2004”, Bulgaria.

130. ECSR, “Conclusions II”, conformity with Article 1.2, p. 4; ECSR, “Conclusions XVI-1”, conformity with Article 1.2, p. 9.

131. There is one exception: as the ECSR has ruled, that part of the population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r) (ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010, paragraph 33). See, also, Chapter IV (b) of the handbook.

132. ECSR, “Conclusions 2008”, Albania; ECSR, “Conclusions 2006”, Albania.

country to engage in a gainful occupation in the territories of the other Parties”,<sup>133</sup> while it requires states to simplify the formalities and liberalise the employment of foreign workers.

## i. Prohibition of discrimination

In accordance with Article E ESC(r), which prohibits discrimination, the ECSR has stressed the necessity to have legislation in place preventing all forms of discrimination, whether direct or indirect, in employment, based on sex, race, ethnic origin, religion, disability, age, sexual orientation, politic opinion, etc. It concerns both the recruitment procedure and the general conditions of employment, including remuneration, promotion, training, transfer and dismissal.<sup>134</sup>

According to the ESC(r), “difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds”.<sup>135</sup> Discrimination may arise from measures applied uniformly, without taking into consideration relevant differences and the disproportionate impact they may have on certain groups or persons such as ethnic minorities. Discrimination may also arise as a consequence of a lack of action to ensure effective accessibility of rights and advantages to all workers. The ECSR has also established that the onus does not lie with the plaintiff in cases of discrimination.

### Examples:

- ECSR, *Association Internationale Autisme-Europe (AIAE) v. France*, Complaint No. 13/2002, merits, 4 November 2003, paragraph 52 (on collective advantages genuinely accessible to all);
- ECSR, *Syndicat Sud Travail et Affaires Sociales v. France*, Complaint No. 24/2004, merits, 16 November 2005, paragraph 33 (on the alleviation of the burden of proof in favour of the plaintiff).

The ECSR has further identified a series of measures that contribute to fighting discrimination, such as:

- recognising the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals;

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133. Article 18.4 ESC(r).

134. See Chapter I (c) of the handbook (“Standards on equality and non-discrimination”).

135. ECSR, *Syndicat national des professions du tourisme v. France*, Complaint No. 6/1999, merits, 10 October 2000, paragraph 25.

- granting groups with an interest in obtaining a ruling that the prohibition of discrimination has violated the right to take collective action;
- setting up a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to bring proceedings.<sup>136</sup>

The legitimate aims that can justify restrictions to the prohibition of discrimination and allow a difference in treatment between persons in comparable situations are listed under Article G of the ESC(r). These are “the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”, provided that the measures taken are proportionate and necessary in a democratic society. States may therefore legitimately restrict the right to work of non-nationals or certain categories of persons, such as asylum seekers, as long as this limitation is justifiable and not simply based on grounds of ethnicity, race, sex, etc. For instance, the prohibition of all forms of discrimination in employment does not forbid states from restricting foreigners’ access to employment on their territory to non-nationals in possession of a work permit. A general ban of nationals of other states parties from accessing employment, for reasons other than those listed under Article G of the ESC(r), would on the other hand violate the right to non-discrimination guaranteed by the ESC(r).

In addition, pursuant to Article 15.3 of the EU Charter, “[n]ationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union”.

At the international level, Article 17.1 of the Geneva Convention states that “Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment”.

## ii. Prohibition of slavery and forced labour

While the prohibition of forced labour is inferred from Article 1.2 ESC(r) and the right to earn a living in an occupation freely entered upon, it is expressly provided for in the ECHR, under Article 4 on the prohibition of slavery and forced labour.

Slavery and servitude are widely established as criminal offences and are prohibited under numerous international legal instruments. The prohibition of slavery is

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136. ECSR 2008, interpretation of Article 1.2, p. 22.

recognised as *jus cogens* by international law. The ECtHR has, however, posed a series of prerequisites for a situation to fall within the scope of slavery and servitude. In *Rantsev v. Cyprus and Russia*, the ECtHR held that:

considering the scope of “slavery” under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object”. With regard to the concept of “servitude”, the Court has held that what is prohibited is a “particularly serious form of denial of freedom”. The concept of “servitude” entails an obligation, under coercion, to provide one’s services, and is linked with the concept of “slavery”.<sup>137</sup>

Similarly, the prohibition of forced labour has become *jus cogens* and universally recognised as a right that does not stand derogation.<sup>138</sup>

According to the jurisprudence of the ECtHR, forced and compulsory labour refers to “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”, which is the definition established by the ILO.<sup>139</sup>

Forced labour is recognised as a form of exploitation falling within the scope of trafficking in human beings. It is expressly prohibited under Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings and under Article 3 of the Palermo Protocol supplementing the UN Convention against Transnational Organized Crime.

### Example:

- ECtHR, *Van der Musselle v. Belgium* (Plenary), 23 November 1983, paragraph 32 (definition of forced and compulsory labour identical to the ILO definition).

In *Rantsev v. Cyprus and Russia*, the Court also completed the definition by providing conditions to the qualification of forced and compulsory labour, stating that:

For “forced or compulsory labour” to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person’s will.<sup>140</sup>

The ECSR has also contributed to developing the definition of forced labour by deriving its prohibition from the right to earn a living in an occupation entered upon freely. The correlative consequence of this right is the freedom to freely terminate employment.

137. ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010, paragraph 276.

138. ECtHR, *Siliadin v. France*, 26 July 2005, paragraph 82: the ECtHR affirmed that, together with Articles 2 and 3 ECHR, the prohibition of forced or compulsory labour, just like slavery and servitude, “enshrines one of the basic values of the democratic societies making up the Council of Europe. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation”.

139. ILO, Forced Labour Convention, Article 2.

140. ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010, paragraph 276.



Therefore, pursuant to the interpretation of Article 1.2 ESC(r), the prohibition of forced or compulsory labour is linked to the freedom to choose one's job, and implies the freedom to terminate it.

**Example:**

- ECSR, *International Federation of Human Rights Leagues (FIDH) v. Greece*, Complaint No. 7/2000, merits, 5 December 2000, paragraph 17.

Finally, the prohibition of slavery, servitude and forced and compulsory labour entail action from states to prevent and investigate those crimes. The ECtHR has established through its jurisprudence that states have a duty to protect individuals from forced and compulsory labour, where they knew or should have known of the risks faced by a person of being trafficked or exploited and subjected to forced and compulsory labour.

In this regard, the case *Siliadin v. France* is extremely important. The ECtHR examined the application lodged by a Togolese national who was a minor and in an irregular situation at the material time, and who worked for several years from 1994 onwards as an unpaid servant for a couple who made her work seven days a week and had confiscated her passport. The Court held that Article 4 ECHR gave rise to positive obligations for states to adopt and effectively implement criminal-law provisions making the practices condemned by this article a punishable offence. In the present case, the Court found that the applicant, subjected to treatment contrary to Article 4 and held in servitude, could not have the perpetrators of the acts convicted under criminal law. Thus, the criminal-law provisions then in force did not afford the applicant, a migrant minor, victim of trafficking, specific and effective protection against the acts of which she was a victim.<sup>141</sup>

Finally, the ECtHR stated that the duty to investigate allegations of forced labour does not depend on a complaint by the victim, and that as soon as authorities become aware of facts that could constitute forced and compulsory labour, they must take action *ex officio*. It is, however, an obligation of means and not of results. The ECtHR provided the requirements of an effective investigation, explaining that:

it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken

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141. ECtHR, *Siliadin v. France*, 26 July 2005.

as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>142</sup>

### iii. Work conditions

The ESC(r) contains a series of provisions regulating the work conditions and protecting workers from unfair, abusive or unhealthy conditions of work. However, the rights contained in Articles 2 to 4 and 24 to 27 ESC(r) are subject to the restrictive scope *ratione personae* indicated in the appendix to the ESC(r), which limits the protection of those rights to nationals from other states parties lawfully resident, or those in possession of a work permit, on the territory of the party in question.

Nonetheless, paragraphs 2 and 3 of the appendix under the scope of the ESC(r) in terms of persons concerned recall that states remain bound by their obligations pursuant to the Geneva Convention<sup>143</sup> and the Convention on the Status of Stateless Persons<sup>144</sup> to grant to refugees and stateless persons “lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the party under the said instrument and under any other existing international instruments applicable to those stateless persons”.<sup>145</sup>

Rights of workers under the European Social Charter (revised) regarding their conditions of work:

- the right to just conditions of work (Article 2);
- the right to safe and healthy working conditions (Article 3);
- the right to fair remuneration (Article 4);
- the right to protection in cases of termination of employment (Article 24);
- the right of workers to the protection of their claims in the event of insolvency of their employer (Article 25);
- the right to dignity at work (Article 26);
- the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27).

In addition, the ESC(r) specifically and expressly provides for rights of migrant workers, ensuring them and their families protection and assistance. All states parties that have accepted the provisions of Article 19 ESC(r) are therefore obliged to, *inter alia*:

4. [to] secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
  - a. remuneration and other employment and working conditions;
  - b. membership of trade unions and enjoyment of the benefits of collective bargaining;

142. ECtHR, *Rantsev v. Cyprus and Russia*, op. cit., paragraph 288.

143. UNGA, Convention Relating to the Status of Refugees.

144. UNGA, Convention Relating to the Status of Stateless Persons.

145. Appendix to the ESC(r) (Scope, paragraphs 2 and 3).

c. accommodation;

5. [to] secure for such workers lawfully within their territories treatment no less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons[.]

Article 19 ESC(r) further guarantees equal treatment in legal proceedings, family reunification, appropriate services for health, medical attention and good hygienic conditions during the departure, journey and reception of migrants, protection against expulsion, etc.

#### iv. Right to social security

Pursuant to Article 12.4(a) of the ESC(r), migrant workers and their families are entitled, just like all workers on the territory of a contracting party, to social security. In particular, states have the obligation to:

take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties.

Regarding the scope *personae materiae*, the appendix explains that the provisions of the ESC(r) may apply to non-nationals provided that they come from another contracting party and that they reside lawfully or work regularly on the territory of the state concerned, with the exception to Article 12.4 ESC(r). The scope of the right to social security in terms of persons concerned is therefore wider than the general scope of the ESC(r) and includes foreigners from other states parties who no longer live or work on the territory of the state in question, but also persons who do not necessarily come from another party, such as refugees and stateless persons. The ECSR has also recognised the extension of the application of the right to social security to self-employed workers.

#### Example:

– ECSR, “Conclusions XIV-1”, Turkey (on the right to social security of self-employed workers).

The ECSR has further established that the right to equal treatment poses an obligation on states to remove all discriminatory provisions from their domestic laws on social security, in order to guarantee the effective exercise of the right to social security to foreigners who come from other states parties. This requirement protects against both direct and indirect discrimination and means that social security benefits cannot be limited to nationals, or be subject to restrictive conditions or to eligibility criteria that foreigners would find much harder to meet. However, the ECSR found that, as long as

they remained reasonable, the prerequisite of the completion of a certain period of residence before having access to non-contributory benefits was compatible with the ECS(r). Similarly, the ECSR has also accepted the condition that child benefits be only granted when the child is residing on the territory of the state concerned, as is compatible with Article 12.4 ESC(r).

**Examples:**

- ECSR, “Conclusions XIII-4”, statement of interpretation of Article 12, p. 43 (on conditions that would render access to social benefits harder for foreigners and affect them to a greater degree);
- ECSR, “Conclusions XIII-4”, statement of interpretation of Article 12, p. 44; and ECSR, “Conclusions 2004”, Lithuania, p. 370 (on the condition of a reasonable period of residence);
- ECSR, “Conclusions 2006”, statement of interpretation of Article 12.4, p. 13 (on the condition of residency regarding child benefits).

The right to social security also exists in the sphere of civil and political rights. The ECtHR has stated that the right to benefits, which is a pecuniary right, is linked to the right to property under Article 1 Protocol No. 1 ECHR. That protection applies when a person residing in the country has paid contributions to the pension scheme. The ECtHR, however, specified that the restriction of rights under Article 1 Protocol No. 1 will not automatically amount to arbitrary discrimination where the person claiming the benefits is neither a national nor residing in the state in question.

**Examples:**

- ECtHR, *Müller v. Austria*, Application No. 5849/72, decision, 16 December 1974 (on protection triggered once the person has paid contributions to the pension scheme);
- ECtHR, *X. v. Federal Republic of Germany*, Application No. 6572/74, decision, 4 March 1976 (the suspension of payment of a pension to a foreigner residing abroad is justified by reasons of general interest).

In *Gaygusuz v. Austria*, the ECtHR further explained that the protection would apply irrespective of the existence of a “link between entitlement to emergency assistance and the obligation to pay taxes or other contributions”. It found that refusing to provide a migrant worker lawfully resident with non-contributory social schemes solely on the grounds of his/her foreign nationality violated Article 14 ECHR and the person’s right to be protected against discrimination.

**Examples:**

- ECtHR, *Gaygusuz v. Austria*, 16 September 1996, paragraphs 41, 46-52 (on emergency assistance and non-discrimination);

- ECtHR, *Poirrez v. France*, 30 September 2003, paragraphs 37-50 (on non-contributory social schemes and non-discrimination).

In addition, the ECtHR decided that maternity benefits and child benefits derived also from Article 8 ECHR and the right to respect for private and family life. It held that limiting the grant of child benefits to non-nationals possessing a permit while refusing it to other foreigners amounted to arbitrary discrimination and violated Article 8 in conjunction with Article 14 ECHR.

**Examples:**

- ECtHR, *Niedzwiecki v. Germany* and *Okpisz v. Germany*, 25 October 2005 (discrimination in child benefits, based on a stable residence permit);
- ECtHR, *Fawsie v. Greece* and *Saoudin v. Greece*, 28 October 2010 (discrimination in an allowance paid to mothers of large families, officially recognised as political refugees, based on nationality).

The ESC(r) distinguishes between social security and social assistance, which are guaranteed under Articles 12 and 13 ESC(r) respectively.<sup>146</sup>

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146. See Chapter IV (c) of the handbook ("Right to health and to social and medical assistance").

## V. The right to family reunification

The principle of protection of family enshrined in Article 16.3 UDHR, which defines family as “the natural and fundamental group unit of society”, has led to the recognition of a series of rights such as the right to respect for private and family life and the right to family reunification by numerous international and regional instruments.<sup>147</sup>

### a. European standards on family reunification

Several instruments of the Council of Europe deal with family rights, and more particularly with the rights of migrants and their families to protection and assistance. Under Article 16 ESC(r), the family is regarded as “a fundamental unit of society” in reference to the definition given by the UDHR, and enjoys particular protection. Pursuant to the same article, parties that have accepted the provision have undertaken to ensure the full development of the family, through the promotion of “the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means”.

In addition, Article 19 ESC(r) guarantees the right of migrant workers and their families to protection and assistance, and obliges states, *inter alia*, “to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory”.<sup>148</sup> These provisions must, however, be read in light of the appendix on the personal scope of the ESC(r), which establishes that the rights of the ESC(r) are to be applied to migrants who are nationals of other states parties lawfully resident or regularly working on their territory, as well as to refugees and stateless persons insofar as states are bound under the Geneva Convention and the Convention on the Status of Stateless Persons.<sup>149</sup> Accordingly, the protection of Article 19 ESC(r), which extends to families, covers only the family members of migrant workers, nationals of other contracting parties, legally established in their territory.

The right to family reunification (Article 19 ESC(r)) applies to migrant nationals of other states parties lawfully resident or regularly working on their territory, as well as to refugees and stateless persons insofar as states are bound under the Geneva Convention and the Convention on the Status of Stateless Persons.

#### Examples:

- ECSR, “Conclusions XIV-1”, Greece, p. 366 (on prevention of misleading propaganda relating to emigration and immigration);

147. Notably Articles 17, 23 and 24 ICCPR; Articles 3, 9, 10 CRC; Article 8 ECHR; Article 16 ESC(r); Articles 7 and 24 EU Charter.

148. Article 19.6 ESC(r) on the right of migrant workers and their families to protection and assistance.

149. Appendix to the ESC(r) (Scope, paragraphs 2 and 3).

- ECSR, “Conclusions VII”, United Kingdom, p. 103 (on exclusion from access to vocational training based on discrimination against foreign workers);
- ECSR, “Conclusions IV”, Norway, p. 121 (on the indirect discrimination between Norwegians and foreigners in respect of the purchase of real estate);
- ECSR, “Conclusions XIV-1”, Greece, p. 316 (on the conformity of Greek law on immigration, which stipulates that only contagious diseases listed in the World Health Organization’s health regulations can be an obstacle to the granting of an application for family reunification).

The Committee of Ministers has affirmed the duty of states to ensure respect for family life. In its Recommendation No. R (1999) 23, the Committee stated that “[t]he rights and entitlements to be granted by member states to joining family members should in principle be the same as those accorded to their family member who is a refugee or another person in need of international protection, respectively”.<sup>150</sup> In this document, the Committee of Ministers further recommends that applications for family reunification made by refugees or persons in need of international protection be dealt with in a “positive, humane and expeditious manner” and that independent and impartial review of a rejection of the application is available.<sup>151</sup> Finally, the Committee of Ministers has indicated in Recommendation Rec(2002)4 that the family member who has been allowed on the territory of a state following family reunification should receive “an establishment permit, a renewable residence permit of the same duration as that held by the principal”.<sup>152</sup>

In accordance with the right to respect for family life of Article 8 ECHR, the ECtHR states that, under certain circumstances, members of a migrant’s family should be granted entrance and residence permits in the host country, irrespective of refugee or other status. The circumstances in which this will be the case have been considered most comprehensively by the ECtHR, applying the right to respect for family life. The obligation arises only in limited circumstances and the ECtHR has emphasised that Article 8 does not require states to respect choice of matrimonial residence or authorise family reunification in their territory.

**Examples:**

- ECtHR, *Gül v. Switzerland*, 19 February 1996, paragraph 38: “the present case concerns not only family life but also immigration, and the extent of a State’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances

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150. Committee of Ministers 1999, paragraph 3.

151. *Ibid.*, paragraph 4.

152. Committee of Ministers 2002, paragraph II.1 on the residence status of family members.

of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered”;

- ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, 1 December 2005, paragraph 42: “the Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective “respect” for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.”

However, in light of the right to respect of family life and family reunification, States have an obligation to facilitate the reunification of families, where a migrant already residing on the territory of a Council of Europe member state faces an insurmountable objective obstacle to develop his family life in his country of origin.

#### **Examples:**

- ECtHR, *Mugenzi v. France*, 10 July 2014 and *Tanda-Muzinga v. France*, 10 July 2014 where the Court highlighted in particular:
  - the critical need to assess visas requests swiftly, rigorously and with a particular attention to the refugee background of the applicants (para. 52, *Mugenzi* and para. 75 *Tanda-Muzinga*);
  - the State's obligation to implement a procedure taking into account the refugee background of the applicant and its disruptive impact on the family life (para. 52, *Mugenzi*);
  - the family unity as an essential right of refugees enabling them to resume a normal life, with a supportive reference to UNHCR mandate (para. 75 *Tanda-Muzinga*)
  - the international and European consensus about the necessity for refugees to benefit from a more favourable family reunification procedure compared to other foreigners, drawing from UNHCR mandate and the family reunification Directive (para.75 *Tanda-Muzinga*)
- ECtHR, *Bajsultanov v. Austria*, 12 June 2012, paragraph 90: “the applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age. The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable



interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there”;

- ECtHR, *Benamar and Others v. the Netherlands*, Application No. 43786/04, decision, 5 April 2005: “[a]lthough the Court appreciates that the applicants would now prefer to maintain and intensify their family life in the Netherlands, Article 8, as noted above, does not guarantee a right to choose the most suitable place to develop family life. Moreover, the Court has found no indication of any insurmountable objective obstacle for the applicants to develop this family life in Morocco. In this connection the Court considers that it has not been established that it would be impossible for the mother and her present husband, both being Moroccan nationals, to return to Morocco to settle with the children.”

Moreover, conditions for family reunification will violate the right to respect for family life where they can be shown to be unreasonable. The ECtHR recognised that requiring the demonstration of sufficient regular income and therefore the capacity to provide for the basic needs and costs of subsistence of the family was not unreasonable.<sup>153</sup>

**Example:**

- ECtHR, *Haydarie and Others v. the Netherlands*, Application No. 8876/04, decision, 20 October 2005: “in principle, the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that the applicant has in fact actively sought gainful employment after 10 October 2000 when she became entitled to work in the Netherlands. Although it is true that her Netherlands language and sewing courses may have been helpful in this respect, there is no indication in the case-file that she has in fact applied for any jobs.”

The ECtHR has found that discrimination, such as that based on the gender of the migrants already within the jurisdiction of the destination country, would result in a violation of the right to family life of Article 8 ECHR in conjunction with the right to non-discrimination of Article 14 ECHR.

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153. Also previously held by the Committee of Ministers (1978, Preamble).

### Example:

- ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Plenary), 24 April 1985, paragraph 82: “there remains a more general argument advanced by the Government, namely that the United Kingdom was not in violation of Article 14 by reason of the fact that it acted more generously in some respects – that is, as regards the admission of non-national wives and fiancées of men settled in the country – than the Convention required. The Court cannot accept this argument. It would point out that Article 14 is concerned with the avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.”
- ECtHR, *Hode and Abdi v. the United Kingdom*, 6 February 2013: The Court concluded that the applicants had been in a situation analogous to that of refugees who had married before leaving their country and had obtained a limited period of leave to remain in the UK, the only difference being the time of their marriage. They were also in an analogous situation to students and workers enjoying a limited period of leave to remain in the UK. The Court found that the different treatment accorded to refugees with respect to the reunification of post-flight spouses lacked objective and reasonable justification, and concluded that there had been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

## b. Notion of family

In order to determine who is entitled to the right to family reunification, the different organs of the Council of Europe have provided definitions of the notion of family. Within the meaning of the ESC(r), the appendix explains that “the term ‘family of a foreign worker’ is understood to mean at least the worker’s spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker”.<sup>154</sup>

The ECtHR has a broad definition, which has evolved throughout time, in accordance with the changes of perceptions and attitudes towards the notion of family in European societies. It has established that both *de jure* and *de facto* families should be taken into consideration. The ECtHR puts the emphasis on the ties within the family, irrespective of the marital status, the sexual orientation or gender identity. The ECtHR’s definition of the migrant’s family for the purpose of reunification includes parents, children, siblings,

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154. Appendix to the ESC(r) (Part II, Article 19.6).

direct ascendants. It has also established that young adults still depending on their parents fell within the scope of the protection of family life.

**Examples:**

- ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, paragraph 93 (on evolution of societal attitudes towards same-sex couples);
- ECtHR, *Osman v. Denmark*, 14 June 2011, paragraph 55 (concerning young adults who had not yet founded a family of their own, their relationship with their parents and other close family members also constituted “family life”).

In *Onur v. the United Kingdom*, the ECtHR affirms that family ties between the children and the parents exist “*ipso jure* from the moment of birth”, whether the parents are a married couple or a cohabiting couple. It adds that the absence of cohabitation does not exclude family ties, since “other factors may serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties”, such as “the nature and duration of the parents’ relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child’s care and upbringing; and the quality and regularity of contact”.<sup>155</sup> In *Ciliz v. the Netherlands*, the ECtHR explains that the natural bond characteristic of family ties that exists between the parents and their child born in wedlock is not “terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents”.<sup>156</sup>

In addition, regarding same-sex couples, the ECtHR held that “a child born out of such a relationship is *ipso jure* part of that ‘family’ unit from the moment and by the very fact of his birth”.<sup>157</sup> In the *Schalk and Kopf v. Austria* case, it decided that the evolution of societal attitudes towards same-sex couples in European countries meant it was “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8 ECHR. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would”.<sup>158</sup>

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155. ECtHR, *Onur v. the United Kingdom*, 27 February 2009, paragraphs 43-44.

156. ECtHR, *Ciliz v. the Netherlands*, 11 July 2000, paragraph 59.

157. ECtHR, *Keegan v. Ireland*, 26 May 1994, paragraph 44. ECtHR, *Kroon and Others v. the Netherlands*, 27 October 1994, paragraph 30.

158. ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, paragraphs 91 and 94.

The position of the PACE is expressed in Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, reiterated in Recommendation 1686 (2004) on human mobility and the right to family reunion, and is in line with the interpretation of the ECtHR. It urges “member states to interpret the concept of asylum seekers’ families as including de facto family members (natural family), for example an asylum seeker’s partner or natural children as well as elderly, infirm or otherwise dependent relations”.<sup>159</sup> Further, in Recommendation 1686 (2004) on human mobility and the right to family reunion, the PACE recommends a broad interpretation of the concept of family, taking into account the developments of the jurisprudence of the ECtHR, therefore recognising as members of the natural family, “non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents”.<sup>160</sup> Moreover, acknowledging the suffering of same-sex couples in bi-national partnerships and often forced to live in separate countries, the PACE has indicated that it considers that “immigration rules applying to couples should not differentiate between homosexual and heterosexual partnerships. Consequently, proof of partnership other than a marriage certificate should be allowed as a condition of eligibility for residence rights in the case of homosexual couples”.<sup>161</sup>

Finally, regarding reunification with a child or unaccompanied minor, it is widely accepted that decisions must be driven by the paramount principle of the best interest of the child. Conversely, the Committee of Ministers has for instance indicated that when deciding “on the length of the residence permit granted to children who are family members, member states should give primary consideration to the best interest and the well-being of these children”.<sup>162</sup> Regarding the verification of family ties, the Committee of Ministers has further recommended that member states “primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way. The absence of such documents should not per se be considered as an impediment to the application and member states may request the applicants to provide evidence of existing family links in other ways.”<sup>163</sup>

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159. PACE 1997 and 2004 (paragraph 8).

160. PACE 2004, paragraph 12.iii.a.

161. PACE 2000b, paragraph 6.

162. Committee of Ministers 2002, paragraph II.1.

163. Committee of Ministers 1999, paragraph 4. Similar principles can be found in Council of the European Union 2003b.



## VI. Expulsion of migrants

Article 1 Protocol No. 7 of the ECHR<sup>164</sup> provides several safeguards relating to expulsion of aliens. According to its explanatory report, the term “expulsion” comprises all forms of involuntary transfer of an individual from a territory:

The concept of expulsion is used in a generic sense as meaning any measure compelling the departure of an alien from the territory but does not include extradition. Expulsion in this sense is an autonomous concept which is independent of any definition contained in domestic legislation. Nevertheless, ... it does not apply to the refoulement of aliens who have entered the territory unlawfully, unless their position has been subsequently regularised.<sup>165</sup>

In the case of *Nolan and K. v. Russia*, the ECtHR stated, also, that the concept of expulsion is autonomous and independent of the definitions provided by domestic legislation. The ECtHR explained that “[w]ith the exception of extradition, any measure compelling an alien’s departure from the territory where he was lawfully resident constitutes an ‘expulsion’”.<sup>166</sup>

Expulsion includes: rejection at the border, transfer, deportation, removal, exclusion, return and withdrawal of the visa of lawful residents seeking re-entry to their country of residence.

While the protection of substantive human rights of migrants in expulsion is universally established and consistent between international and regional human rights systems, there are significant differences in the procedural protection in expulsion guaranteed by the various human rights treaties.

### a. Substantive rights of migrants

In parallel to procedural protection, a set of substantive rights has been established by international refugee law and by international standards on extradition to protect migrants potentially subject to expulsion. These rights interfere with the principle of territorial sovereignty as they limit states’ control over the entry of non-nationals into their territory, and restricts their discretion regarding expulsions from their territory, where removal risks causing human rights violations.

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164. Council of Europe, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

165. Council of Europe 1984, paragraph 10.

166. ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 112.

## i. Principle of *non-refoulement*

Substantive rights of migrants in expulsion derive essentially from the principle of *non-refoulement*, enshrined in Article 33 Geneva Convention,<sup>167</sup> which prohibits the expulsion or return of a refugee “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. It was first established in 1933 by the League of Nations’ Convention relating to the International Status of Refugees<sup>168</sup> and it is further expressly provided for under Article 3 CAT, which prohibits the expulsion, return or extradition of a person “where there are substantial grounds for believing that he would be in danger of being subjected to torture”. The principle of *non-refoulement* is now recognised as a principle of customary international law binding on all states, tied to the obligation to recognise, ensure and protect the human rights of all persons within their jurisdiction.<sup>169</sup> It is an absolute principle that cannot be subject to derogations.<sup>170</sup>

As mentioned previously, the principle of *non-refoulement* is applicable to all forms of transfer, including extradition. Article 3 of the European Convention on Extradition<sup>171</sup> and Article 5 of the European Convention on the Suppression of Terrorism<sup>172</sup> assert the principle by excluding the granting of extradition where there are grounds to believe that the request was made for “the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons”.

## ii. Scope of the protection of the principle of *non-refoulement* under the Geneva Convention

### Persons benefiting from the protection

Pursuant to Article 33.1 of the Geneva Convention, the protection against *refoulement* covers not only migrants present on the territory, but also those at the border.<sup>173</sup> It further applies to both refugees and asylum seekers, whether they are undergoing the determination process or are intending to.

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167. UNGA, Convention relating to the Status of Refugees.

168. League of Nations, Convention relating to the International Status of Refugees, Article 3.

169. ECtHR, *Soering v. the United Kingdom* (Plenary), 7 July 1989, paragraph 87.

170. UNGA 1997, paragraph 3.

171. Council of Europe, European Convention on Extradition.

172. Council of Europe, European Convention on the Suppression of Terrorism.

173. UNHCR 1977a, paragraph (c). See also, UNHCR 1980, paragraph (b).

## States concerned

The risks to be considered are not limited to those existing in the country of origin or habitual residence of the non-national. The definition of those risks is much broader and extends to indirect *refoulement*. The protection is to be understood as taking into consideration the risks arising in any country where the migrant might be sent, including states themselves susceptible of transferring the individual to an unsafe country: “the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution”.<sup>174</sup>

## Restrictions to the principle of *non-refoulement*

In a similar fashion to the procedural protection of migrants in expulsion, the principle of *non-refoulement* is subject to a restriction. Under Article 33.2 of the Geneva Convention, where the state has reasonable grounds for regarding a refugee “as a danger to security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. Within the meaning of the convention, the danger has to concern the country of refuge and to threaten either the security or the community of the state in question.

### iii. The principle of *non-refoulement* under the European Convention on Human Rights

The ECHR does not explicitly provide for the principle of *non-refoulement*. However, the ECtHR has recognised the principle through its jurisprudence, by deriving from Article 1 ECHR an implicit obligation of states parties to protect migrants against *refoulement*. It found that the obligation to “secure to everyone within their jurisdiction the rights and freedoms”<sup>175</sup> guaranteed by the ECHR, combined with the requirement that such rights be practical and effective, creates an obligation for states to abstain from deporting or extraditing non-nationals facing a risk of violation of their rights in the destination country.

#### Example:

- ECtHR, *Soering v. the United Kingdom* (Plenary), 7 July 1989, paragraphs 87 and 90: “the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to

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174. UNHCR, 1977b, paragraph 4.

175. ECtHR, *Saadi v. Italy* (GC), 28 February 2008, paragraph 127; ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 79.



maintain and promote the ideals and values of a democratic society'. ... It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.”

According to the Court, the principle of *non-refoulement* aims at protecting “the fundamental values of democratic societies”. The contracting states’ obligation to respect and ensure ECHR rights for all persons in their territory and all persons under their control entails a commitment not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 2 and 3 ECHR, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the ECHR obligations in such matters.

#### **Examples:**

- ECtHR, *Bader and Kanbor v. Sweden*, 8 November 2005, paragraph 48 (deportation of the applicant to face execution would violate Article 2 ECHR as well as Article 3 ECHR);
- ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, decision, 20 February 2007, paragraphs 100-02 and 107 (no substantial grounds for believing that the applicant, a terrorist suspect, would suffer a flagrant denial of a fair trial by being extradited to the US and being subsequently detained without access to a lawyer and to the ordinary US criminal courts);
- ECtHR, *N. v. Sweden*, 20 July 2010, paragraphs 55 and 62 (case of an Afghan woman; the ECtHR found that women are a group particularly at risk of ill-treatment in Afghanistan).

The ECtHR has further specified that the principle of *non-refoulement* applies where the expulsion or return would create a real and personal risk for the non-national. This means that the consequences of the removal must be foreseeable and that the risk should be faced by the person claiming the protection. It stated that “[i]n order to determine whether there is a risk of ill-treatment, the ECtHR must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances”.<sup>176</sup>

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176. ECtHR, *Saadi v. Italy* (GC), op. cit., paragraph 130.

### Examples:

- ECtHR, *Saadi v. Italy* (GC), 28 February 2008, paragraph 125: “expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country”;
- ECtHR, *Nnyanzi v. the United Kingdom*, 8 April 2008, paragraph 51;
- ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraphs 109 and 113.

Moreover, the Court has emphasised that when the human right at stake is an absolute one (such as the prohibition of torture), the principle of *non-refoulement* becomes absolute and is not subject to any exceptions, whether in law or in practice. This rule applies to all expulsions, regardless of considerations of national security, or other strong public interests, economic pressures or heightened influxes of migrants.

### Examples:

- ECtHR, *Saadi v. Italy* (GC), 28 February 2008, paragraph 138: “[a]ccordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule”;
- ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraphs 223-24: “[t]he Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation. The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision. That being so, the Court does not accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant’s complaints under Article 3.”

Finally, the ECtHR has repeatedly held that diplomatic assurances<sup>177</sup> are highly unlikely to be sufficient to allow a transfer to countries where there are reliable reports that the national authorities tolerate torture.

**Examples:**

- ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraph 354: “[t]he Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice”.
- ECtHR, *Soldatenko v. Ukraine*, 23 October 2008, paragraph 73: “[t]he Court further notes that in his letter of 19 April 2007 the First Deputy Prosecutor General of Turkmenistan wrote that the requirements of Article 3 of the Convention on Human Rights and Fundamental Freedoms would be fulfilled in respect of the applicant and he would not be subjected to torture, inhuman or degrading treatment or punishment after extradition. The Court observes, however, that it is not at all established that the First Deputy Prosecutor General or the institution which he represented was empowered to provide such assurances on behalf of the State. Furthermore, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected. Finally, the Court notes that the international human rights reports also showed serious problems as regards the international cooperation of the Turkmen authorities in the field of human rights and categorical denials of human rights violations despite the consistent information from both intergovernmental and non-governmental sources.”

**Assessing the risk of human rights violation in case of expulsion or return**

The ECtHR has repeatedly accepted that the source of the risk did not necessarily have to be state agents and applied the protection of the principle of *non-refoulement* to threats of human rights violations by non-state actors, such as family members or armed groups. It also applied when the state was incapable or unwilling to protect the

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177. Diplomatic assurances are written guaranties by the authorities of the destination state to the expelling state that the person to be sent will not be subject to torture or to other violations of human rights.

person at risk. The PACE has urged states to recognise that “persecution may not only originate from the authorities of the country of origin of an asylum seeker, but also from entities with no link to the state and over which it exercises no control”.<sup>178</sup>

**Examples:**

- ECtHR, *H.L.R. v. France* (GC), 19 February 1998, paragraph 40: “[o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection”;
- ECtHR, *N. v. Finland*, 26 July 2005, paragraphs 164–65: “The current applicant’s case differs from *H.L.R. v. France* in that the overall evidence before the Court supports his own account of his having worked in the DSP, having formed part of President Mobutu’s inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution. In these circumstances there is reason to believe that the applicant’s situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him against the threats referred to. Neither can it be excluded that the publicity surrounding the applicant’s asylum claim and appeals in Finland might engender feelings of revenge in relatives of dissidents possibly affected by the applicant’s actions in the service of President Mobutu.”

Like international refugee law, the definition of risk within the meaning of the jurisprudence of the ECtHR requires that the consequences of the removal or return be real and concern personally the individual claiming the protection of *non-refoulement*. The ECtHR has asserted that there must be substantial grounds to believe that the risk is present, and not merely suspicions.

**Examples:**

- ECtHR, *Soering v. the United Kingdom* (Plenary), 7 July 1989, paragraphs 85–91 (risk of “death row phenomenon”);
- ECtHR, *Cruz Varas and Others v. Sweden* (Plenary), 20 March 1991, paragraph 69 (risk of torture);
- ECtHR, *Chahal v. the United Kingdom* (GC), 15 November 1996, paragraph 74 (risk of treatment contrary to Article 3 ECHR);
- ECtHR, *Muminov v. Russia*, 11 December 2008, paragraph 130 (risk of a flagrant denial of a fair trial in the requesting country);

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178. PACE 2000a, paragraph 6.

- ECtHR, *Z and T v. the United Kingdom*, Application No. 27034/05, decision, 28 February 2006 (risk of a flagrant denial of freedom of religion).

As for the requirement of a personal risk, it presupposes that the non-national subject to the expulsion or return can demonstrate that he/she would be directly exposed to a violation of his/her human rights. However, the ECtHR has held that the risk can be personal even when the person is not individually targeted, but simply belongs to a group or is in a similar situation to persons whose rights are violated in the destination country. The non-national invoking the principle of *non-refoulement* will in that case have to demonstrate that it is a general or widespread practice and that he or she would be identified as falling within the category subject to the abuses. The ECtHR has explained that:

In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the ECtHR considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the ECtHR examines the case, the relevant time will be that of the proceedings before the ECtHR ... Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.<sup>179</sup>

Example of groups or individuals in situations triggering the protection of the principle of *non-refoulement*:

- ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraphs 296-97: “[t]he situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces”;
- ECtHR, *Salah Sheekh v. the Netherlands*, 11 January 2007, paragraph 148 (the applicant was a member of a minority hailing from the south of Somalia, and it was most unlikely that he would be able to obtain protection from a clan in the “relatively safe” areas. The ECtHR noted that the three most vulnerable groups in Somalia were said to be internally displaced persons, minorities and returnees from exile. If expelled to the “relatively safe” areas, the applicant would fall into all three categories);
- ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraphs 116-17 (senior members of an opposition political party);

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179. ECtHR, *Saadi v. Italy* (GC), op. cit., paragraphs 132-33.

- ECtHR, *Khodzhayev v. Russia*, 12 May 2010 (person accused and detained for criminal offences);
- ECtHR, *S.H. v. the United Kingdom*, 15 June 2010 (this case concerns the risk that the applicant, a Bhutanese national of ethnic Nepalese origin, might be subjected to torture or degrading or inhuman treatment in his country of origin, Bhutan, if the removal directions against him were to be enforced);
- ECtHR, *Isakov v. Russia*, 8 July 2010, paragraph 109 (applicants were on a wanted list for suspected involvement in extremist movements, and would be at real risk of politically motivated persecution, torture and ill-treatment);
- ECtHR, *Yuldashev v. Russia*, 8 July 2010, paragraph 83 (detainees);
- ECtHR, *Kolesnik v. Russia*, 17 July 2010, paragraph 72 (person facing a prison sentence).

In exceptional cases, the ECtHR has even recognised the existence of a real risk entailing the application of the principle of *non-refoulement* where the general climate of violence in the country of reception was such that the person subject to the transfer would necessarily be exposed to the violence.

**Example:**

- ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraphs 113-15.

Further, it should be noted that the Council of Europe has recognised that gender and sexual orientation may, concerning some countries, be sufficient grounds to require the protection of *non-refoulement*. In the case *N. v. Sweden*,<sup>180</sup> the Court has indeed found that women could be a group at risk, and that the expulsion of an Afghan woman to her country would violate the principle of *non-refoulement*. In addition, the Committee of Ministers, in its recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, stated that states “should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law”.<sup>181</sup>

In the *M.E. v. Sweden case*,<sup>182</sup> which concerned an asylum seeker’s threatened expulsion from Sweden to Libya, where he alleged he would be at risk of persecution and ill-treatment because he is a homosexual, the Court relied on Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment) and decided to indicate to the Swedish Government, under Rule 39 of its Rules of Court (interim measures), not to expel the

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180. ECtHR, *N. v. Sweden*, 20 July 2010, paragraph 55.

181. Committee of Ministers 2010, paragraph 42.

182. ECtHR, *M.E. v. Sweden*, 8 April 2015.

applicant to Libya until further notice. By the time the case was examined by the Grand Chamber, the applicant had been granted a residence permit in Sweden and thus the Court decided to strike the case out of its list of cases. This case raised the issue of the risk faced by a person due to his or her sexual orientation, to the extent that he or she could conceal it. While the Grand Chamber did not in the end issue its decision on this matter, third-party interveners and other sources cited in the chamber judgment,<sup>183</sup> such as the UNHCR's *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, all stress the fact that even if an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, it is not a valid reason to deny refugee status.

### **Examples of relevant factors or circumstances**

The assessment of the risk should be made based on the information the contracting state had or should have had at the time of the person's removal. In the cases where a complaint is being examined by the ECtHR while the non-national subject to the expulsion has not yet been transferred, the risk should be estimated in light of the information available at that time. The ECtHR has further specified that all relevant circumstances and factors, whether concerning the personal situation of the migrant or the general climate of violence, should be taken into account in the assessment of the existence of a real risk. To this end, the information provided by the authorities of the state in question should be completed with reports from other reliable sources, such as other state parties, international organisations and NGOs.

In addition, in its jurisprudence, the ECtHR has found that the absence of ratification or signature of international human rights instruments, the wide publicity of an expulsion or the practice of the death penalty and death row in the destination country are factors that can corroborate the existence of a risk of violation of human rights. It has explained that:

Despite this conclusion, the ECtHR emphasises that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to

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183. ECtHR, *M.E. v. Sweden*, 26 June 2014, paragraphs 49, 50.

the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case.<sup>184</sup>

### Examples:

- ECtHR, *Cruz Varas and Others v. Sweden* (Plenary), 20 March 1991, paragraph 76 (expulsion to Chile);
- ECtHR, *Saadi v. Italy* (GC), 28 February 2008, paragraphs 133 and 147 (deportation to Tunisia);
- ECtHR, *N. v. Finland*, 26 July 2005, paragraph 165 (expulsion to the Democratic Republic of the Congo);
- ECtHR, *Salah Sheekh v. the Netherlands*, 11 January 2007, paragraph 136 (expulsion to Somalia);
- ECtHR, *Nyanzi v. the United Kingdom*, 8 April 2008, paragraph 56 (removal to Uganda);
- ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraphs 112 and 119-22 (deportation of Tamil asylum seeker to Sri Lanka);
- ECtHR, *Muminov v. Russia*, 11 December 2008, paragraph 96 (extradition to Uzbekistan);
- ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, paragraph 137 (transfer of the applicant to the Iraqi authorities);
- ECtHR, *M.B. and Others v. Turkey*, 15 June 2010, paragraphs 32-33 (deportation to Iran);
- ECtHR, *Dbouba v. Turkey*, 13 July 2010, paragraphs 42-43 (extradition to Tunisia);
- ECtHR, *J.K. and Others v. Sweden*, 23 August 2016, paragraphs 87-90 (deportation to Iraq).

The burden of proof is on the applicant, unless the evidence submitted by him/her could have been verified by the authorities. In this case, the onus is on the state to explain why the protection of *non-refoulement* was not granted.

### Examples:

- ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraphs 110-11: “The assessment of the existence of a real risk must necessarily be a rigorous one. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it.”
- ECtHR, *J.K. and Others v. Sweden*, 23 August 2016, paragraph 92: “The Court, however, acknowledges the fact that with regard to applications for recognition of refugee status, it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or

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184. ECtHR, *Na v. the United Kingdom*, 17 July 2008, paragraph 130.



she claims to have fled. The lack of direct documentary evidence thus cannot be decisive per se”.

## **Indirect *refoulement* under the European Convention on Human Rights and the Dublin Regulation**

The ECtHR also recognises and protects individuals against indirect *refoulement*. Transfers are prohibited not only to states presenting a risk of human rights violation of the deported person, but also to states susceptible of transferring the person to a third country where he/she is at risk. The question was raised in the *M.S.S. v. Belgium and Greece* case, questioning the obligations of EU member states under the Dublin Regulation.<sup>185</sup> The ECtHR, in a landmark decision, decided that states could not carry out automatic transfers under the EU regulation without risking breaching their obligations under the ECHR and the principle of *non-refoulement*. It held that where such a risk exists, states should apply the sovereignty clause of Article 3.2 of the Dublin Regulation and refrain from executing the transfer.<sup>186</sup> This decision was then re-enforced by a judgment of the Court of Justice of the European Union, which stated that an asylum seeker cannot be transferred to a member state of the EU where there is a risk of being subjected to inhuman treatment.<sup>187</sup>

In 2014, in the *Sharifi and Others v. Italy and Greece*, which concerned the automatic return of Afghan, Sudanese and Eritrean nationals entered illegally in Italy to Greece, the Court reiterated that the “Dublin” system must be applied in a manner compatible with the Convention: no form of collective and indiscriminate returns could be based on the implementation of the Dublin regulations. The Court establishes that it is the responsibility of the state carrying out the return to ensure that the destination country offered sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. The Court held that there had been a violation by Greece of Article 13 combined with Article 3 of the Convention on account of the lack of access to the asylum procedure for them and the risk of deportation to Afghanistan, where they were likely to be subjected to ill-treatment. But most importantly, and in line with its *M.S.S.* jurisprudence, the Court found a violation by Italy of Article 4 of Protocol No. 4 ECHR, which prohibits collective expulsion of aliens, as well as a violation by Italy of Article 3, stressing

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185. See Council of the European Union 2003a.

186. ECtHR, *M.S.S. v. Belgium and Greece* (GC), op. cit., paragraphs 339-40 and 342.

187. ECJ (GC), *Joined Cases N.S. (C-411/10) v. Secretary of State for the Home Department and M.E. (C-493/10) and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

that the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings in that country's asylum procedure. Finally, the Court found a violation by Italy of Article 13 combined with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention on account of the lack of access to the asylum procedure or to any other remedy in the port of Ancona.

### Examples:

- ECtHR, *Tarakhel v. Switzerland*, 4 November 2014 (GC), paragraph 122: According to the Court, in view of the situation at the time regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, 'were the applicants to be returned to Italy [under the Dublin Regulation] without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention.';
- ECtHR, *A.M.E. v. the Netherlands*, 13 January 2015 (admissibility): the Court took note of the fact that the applicant was an able young man with no dependents and that the current situation in Italy for asylum seekers could in no way be compared to the situations in *M.S.S. v. Belgium and Greece* or *Tarakhel v. Switzerland*, and therefore found that the applicant's complaint was inadmissible, having not established that his future prospects, if returned to Italy, whether taken from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3;
- ECtHR, *A.S. v. Switzerland*, 30 June 2015 (no violation of Article 3 ECHR; the Court noted that the applicant was not critically ill and found that there was no indication that he would not receive appropriate psychological treatment if removed to Italy).

## Risks in the destination country triggering the protection of the *non-refoulement* principle

In the jurisprudence of the ECtHR, the list of human rights protected by the principle of *non-refoulement* is not restrictive and continues to develop. The principle has already been applied to a wide range of rights and in numerous situations, the most established ones being the risk of violation of the prohibition of torture and inhuman or degrading treatment or punishment, of the right to life, the right to a fair trial and even, in some cases, the right to freedom of religion or belief.

### • Torture and ill-treatment (Article 3)

In terms of torture and ill-treatment, the ECtHR has found that not only physical pain and harm falls within the scope of Article 3 ECHR, but also acts that cause mental suffering, such as fear, anguish or humiliation. Thus, whenever the person is facing a risk of being

exposed to any of those treatments protected by the prohibition of Article 3, states have an obligation to apply the principle of *non-refoulement*.

Whether a certain conduct will amount to a violation of Article 3 ECHR will also depend on the vulnerability of the victim, based on his age, sex and health condition, etc.

**Example:**

- ECtHR, *Saadi v. Italy* (GC), 28 February 2008, paragraph 134: “[a]ccording to the ECtHR’s settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.”

Non-exhaustive list of acts and conduct found to amount to a violation of Article 3 ECHR:

physical ill-treatment while under arrest or during interrogation (ECtHR, *Ribitsch v. Austria*, 4 December 1995); corporal punishment (ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978); rape and other acts of sexual violence (ECtHR, *M.C. v. Bulgaria*, 4 December 2003); unnecessary prolonged and repeated solitary confinement (ECtHR, *Kuznetsov v. Ukraine*, 29 April 2003); poor conditions of detention or lack of medical care (ECtHR, *Ilascu and Others v. Russia and Moldova* (GC), 8 July 2004); repeated or unnecessary intrusive strip searches (ECtHR, *Van der Ven v. the Netherlands*, 4 February 2003); domestic violence (ECtHR, *Z. and Others v. the United Kingdom* (GC), 10 May 2001); severe forms of race discrimination (ECtHR, *Cyprus v. Turkey* (GC), 10 May 2001) and prolonged time on death row (ECtHR, *Soering v. the United Kingdom*, 7 July 1989).

The above list is not exhaustive. For example, the ECtHR has held in the landmark case *D. v. the United Kingdom* that the expulsion of a non-national in a terminal phase of Aids would have amounted to inhuman treatment, as he would not have had access to the medical treatment available in the United Kingdom in the receiving country. The ECtHR has cautioned that such cases should be viewed as exceptional.<sup>188</sup> Nevertheless, in the recent case *N. v. the United Kingdom*, the ECtHR (Grand Chamber) has held that, although the application was concerned with the expulsion of a person with an HIV and Aids-related condition, “the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant’s country of origin or which may be available only at substantial cost”.<sup>189</sup>

188. ECtHR, *D. v. the United Kingdom*, 2 May 1997, paragraphs 49-54.

189. ECtHR, *N. v. the United Kingdom* (GC), 27 May 2008, paragraph 45.

In the case *M.S.S. v. Belgium and Greece*, the ECtHR even derived a violation of Article 3 ECHR from the inaction of the state regarding the very poor living conditions of asylum seekers in Greece. The ECtHR considered that the failure of the authorities to alleviate the suffering of the applicant – a member of a vulnerable group – and extricate him from a situation of extreme material poverty, reached a level of severity that amounted to inhuman or degrading treatment, contrary to the standards of the ECHR. Subsequently, the ECtHR held that the state transferring non-nationals to a country where their living conditions would be incompatible with Article 3 ECHR violated its obligations pursuant to the principle of *non-refoulement*.<sup>190</sup>

#### • Risk of death penalty (Article 2)

The right to life is at stake in expulsion when the non-national subject to the transfer might face the death penalty in the destination country. In such cases, the jurisprudence of the ECtHR has found violations relying on Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment or punishment), as well as Article 1 Protocol No. 13 ECHR (concerning the abolition of the death penalty in all circumstances).

First of all, the ECtHR has found that pursuant to Article 2, states have an obligation to apply the principle of *non-refoulement* to persons facing a risk of being found guilty of an offence punished by the death penalty. Furthermore, when the outcome of an extradition is almost certain to involve capital punishment, the sending state would be found responsible for intentional deprivation of liberty.

#### **Example:**

– ECtHR, *Kaboulov v. Ukraine*, 19 November 2009, paragraph 99.

Moreover, on the basis of the large number of ratifications of Protocol No. 13<sup>191</sup> and a generalised practice of contracting states regarding capital punishment, the ECtHR has established that Article 2 is to be understood as prohibiting the death penalty. It thus raises Article 1 Protocol No. 13 ECHR to the rank of fundamental rights.

#### **Example:**

– ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, paragraphs 118 and 120.

Violations of Article 3 in relation to capital punishment concern the conditions of detention pending execution, ill-treatment while awaiting execution, the way in which the

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190. ECtHR, *M.S.S. v. Belgium and Greece* (GC), op. cit., paragraphs 263 and 366-67.

191. Forty-three states parties to the ECHR have ratified Protocol No. 13 (as at 23 October 2012).

death sentence is executed, the personal circumstances of the person and the practice of death row.

### Examples:

- ECtHR, *Shamayev and Others v. Georgia and Russia*, 12 April 2005, paragraph 333: “[a] Contracting State which has not ratified Protocol No. 6 and has not acceded to Protocol No. 13 is authorised to apply the death penalty under certain conditions, in accordance with Article 2 § 2 of the Convention. In such cases, the Court seeks to ascertain whether the death penalty itself amounts to ill-treatment as prohibited by Article 3 of the Convention. It has already established that Article 3 cannot be interpreted as generally prohibiting the death penalty, since that would nullify the clear wording of Article 2 § 1. That does not, however, mean that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention while awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Attitudes in the Contracting States to capital punishment are relevant for assessing whether the acceptable threshold of suffering or degradation has been exceeded. The Court has also found that, as a general principle, the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence”;
- ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, paragraph 137: “Protocol No. 13 came into force in respect of the United Kingdom on 1 February 2004. The Court considers that, from that date at the latest, the respondent State’s obligations under Article 2 of the Convention and Article 1 of Protocol No. 13 dictated that it should not enter into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed. Moreover, it considers that the applicants’ well-founded fear of being executed by the Iraqi authorities during the period May 2006 to July 2009 must have given rise to a significant degree of mental suffering and that to subject them to such suffering constituted inhuman treatment within the meaning of Article 3 of the Convention.”

### • Risk of flagrant denial of justice (Article 6)

In the recent case *Othman v. the United Kingdom*, the ECtHR found that there would be a violation of Article 6 ECHR and the right to a fair trial should the applicant be deported to Jordan. After having established in its jurisprudence that a risk of violation of Article 6 ECHR could, under exceptional circumstances, require protection under the

principle of *non-refoulement*,<sup>192</sup> the ECtHR has for the first time found a risk of flagrant denial of justice in an extradition case, contrary to the right to a fair trial under Article 6. The charges against the applicant are based on incriminating statements most likely obtained by torture. The ECtHR therefore concluded that, if the applicant were extradited, there was a real risk of admission of torture evidence and this would constitute a flagrant denial of justice, in violation of Article 6 ECHR. It explained that:

In the present case, the situation is different. Extensive evidence was presented by the parties in respect of the applicant's re-trial in Jordan and thoroughly examined by the domestic courts. Moreover, in the course of the proceedings before this ECtHR, the applicant has presented further concrete and compelling evidence that his co-defendants were tortured into providing the case against him. He has also shown that the Jordanian State Security Court has proved itself to be incapable of properly investigating allegations of torture and excluding torture evidence, as Article 15 of UNCAT requires it to do. His is not the general and unspecific complaint that was made in *Mamatkulov and Askarov*; instead, it is a sustained and well-founded attack on a State Security Court system that will try him in breach of one of the most fundamental norms of international criminal justice, the prohibition on the use of evidence obtained by torture. In those circumstances, and contrary to the applicants in *Mamatkulov and Askarov*, the present applicant has met the burden of proof required to demonstrate a real risk of a flagrant denial of justice if he were deported to Jordan.<sup>193</sup>

#### • Risk of arbitrary detention (Article 5)

The ECtHR had further held that the risk of being detained arbitrarily in the requesting country or destination country constituted sufficient grounds to enjoy the protection afforded by the principle of *non-refoulement*.

#### Examples:

- ECtHR, *Tomic v. the United Kingdom*, Application No. 17387/03, decision, 14 October 2003 (about Articles 5 and 6 ECHR);
- ECtHR, *Z and T v. the United Kingdom*, Application No. 27034/05, decision, 28 February 2006: “[n]onetheless the ECtHR has not excluded that issues may also arise ... under Article 5, if the prospect of arbitrary detention was sufficiently flagrant”.

### Rights subject to a limited protection

The rights of freedom of religion and of respect for private and family life of Articles 8 and 9 ECHR may be subject to limitations. The risk of violation of the right to freedom of religion and belief and the right to private and family life will not automatically trigger

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192. See for instance, ECtHR, *Muminov v. Russia*, 11 December 2008, paragraph 130, and ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), 4 February 2005, paragraph 90.

193. ECtHR, *Othman v. the United Kingdom*, 17 January 2012, paragraph 285.

Restrictions in the protection afforded by Articles 8 and 9:

The measure must:

- be taken in accordance with the law;
- pursue a legitimate aim;
- be proportionate to the aim pursued;
- be necessary in a democratic society;
- be non-discriminatory.

the protection of *non-refoulement*. Such rights will be protected by the principle of *non-refoulement* where the deportation would result in an unjustified interference with the person's enjoyment of their right to respect for his/her private or family life, or of freedom of religion. In this case, the deportation will only be possible in situations of emergency under the conditions of legality, proportionality and necessity established by the jurisprudence of the ECtHR.

### • What do these conditions imply?

According to the well-established jurisprudence of the ECtHR, in order to be in accordance with law, a measure which interferes with the rights guaranteed by the ECHR must be prescribed by a domestic law and satisfy the requirements of accessibility, clarity and foreseeability.

#### Example:

- ECtHR, *Perry v. Latvia*, 8 November 2007, paragraph 62 (refusal by the Latvian authorities to renew the applicant's – a foreign evangelical pastor – temporary residence permit).

The requirement that a legitimate aim be pursued in cases of expulsions interfering with the rights of settled migrants to respect for their private and family lives has been found to be satisfied in cases concerning immigration control, national security and public order. However, the ECtHR has stated that it should, nonetheless, be proved that the measure effectively contributes and is necessary to reach that aim.

#### Examples:

- ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Plenary), 24 April 1985, paragraph 78;
- ECtHR, *Nnyanzi v. the United Kingdom*, 8 April 2008, paragraph 76.

The requirements of necessity and proportionality imply that the measure should respond to a pressing social need and that there are sufficient and relevant grounds for it, while no less restrictive measure is available to adequately reach the aim. Deportation has been considered disproportionate in cases where maintaining a family life would be “*de facto* impossible” for the expelled migrant.

#### Examples:

- ECtHR, *Amrollahi v. Denmark*, 11 July 2002, paragraphs 36-44;
- ECtHR, *Sezen v. the Netherlands*, 31 January 2006.

## • The right to respect for private and family life (Article 8)

In assessing whether the deportation of a migrant would amount to an unjustified interference with his/her right to respect for private and family life pursuant to Article 8 ECHR, it is important to determine what notions of “private life” and “family”<sup>194</sup> are comprised of within the meaning of the ECHR. The Court has provided a rather broad interpretation of those notions, covering very diverse situations. Moreover, should the definition of “family” not apply to the situation of a migrant, the circumstances of his/her private life alone may justify the protection of *non-refoulement*. The ECtHR has recognised that “the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of ‘private life’ within the meaning of Article 8”.<sup>195</sup>

### Examples:

- ECtHR, *Slivenko v. Latvia* (GC), 9 October 2003, paragraph 95;
- ECtHR, *Onur v. the United Kingdom*, 27 February 2009, paragraph 46;
- ECtHR, *A.W. Khan v. the United Kingdom*, 12 January 2010, paragraph 31.

This gives significant flexibility in the applicability of the principle of *non-refoulement* on grounds of respect for private and family life of settled migrants. The ECtHR has provided numerous criteria to take into consideration in the evaluation of the social ties of the migrant in the expelling country and the degree of interference with his/her rights under Article 8 ECHR, including the migrant’s family situation, the best interest of the children, the time spent in the expelling country, the seriousness of the offence, the level of social and cultural ties in the expelling country, etc.

### Examples:

- ECtHR, *Üner v. the Netherlands* (GC), 18 October 2006, paragraph 58 (length of stay in host country);
- ECtHR, *Nasri v. France*, 13 July 1995, paragraphs 41 and 46 (the non-national was brought up and educated in France);
- ECtHR, *Ciliz v. the Netherlands*, 11 July 2000 (the combined effect of custody and expulsion had prevented the applicant from developing family ties);
- ECtHR, *Boultif v. Switzerland*, 2 August 2001, paragraph 48: “[t]he ECtHR has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other’s country of origin. It is therefore called upon to establish guiding principles

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194. See Chapter V of the handbook (“Right to family reunification”).

195. ECtHR, *Üner v. the Netherlands* (GC), 18 October 2006, paragraph 59.



in order to examine whether the measure in question was necessary in a democratic society. In assessing the relevant criteria in such a case, the ECtHR will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the ECtHR will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion";

- ECtHR, *Konstadinov v. the Netherlands*, 26 April 2007, paragraph 49 (length of stay in host country).

### • The right to freedom of religion (Article 9)

The right to freedom of thought, conscience and religion is guaranteed pursuant to Article 9 ECHR and includes the right to manifest such religion or belief. While the right to a religion is absolute, the right to manifest one's religion or belief is not, and can therefore be subject to limitations. These are possible when they are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9.2 ECHR). However, in the case of the right to religion, it is important to highlight that no limitations are accepted on grounds of national security.

#### Example:

- ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 73.

Further, considering the fact that the deportation of a person can lead to an interference with the right to freedom of religion he/she enjoys in the sending country, the protection afforded by *non-refoulement* may apply in two distinct situations. The assessment of the risk of violation of the right to freedom of religion in case of expulsion should therefore be carried out not only in the destination country but also in the sending state.

#### Risk of persecution in the destination country

As mentioned above, the right to freedom of religion or belief is absolute and will therefore automatically benefit from the protection of *non-refoulement*. Regarding the right to manifest one's religion, the ECtHR has established that there are two situations in which the principle of *non-refoulement* would apply: first of all when there are

substantial reasons to believe that if deported, the non-national will face persecution, death, ill-treatment or violations of his right to a fair trial on religious grounds or based on his religion; second, where there is a flagrant violation of freedom of religion in the destination country.

**Example:**

- ECtHR, *Z and T v. the United Kingdom*, Application No. 27034/05, decision, 28 February 2006.

**Expulsion for religious or political reasons**

A violation of the right to freedom of religion or belief in the sending country implies that the expulsion itself, as opposed to the consequences of that measure, interferes with the rights of the non-national. Deportation will violate Article 9 if the measure was specifically taken to restrict the person's freedom of thought, religion or belief.

**Examples:**

- ECtHR, *Women on Waves and Others v. Portugal*, 3 February 2009 (the Portuguese authorities decided to prohibit the ship *Borndiep*, which had been chartered with a view to staging activities promoting the decriminalisation of abortion, from entering Portuguese territorial waters);
- ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 62: “[t]he gist of the applicant’s complaint was not that he was not allowed to stay or live in Russia but rather that his religious beliefs and/or activities had prompted the Russian authorities to ban his re-entry. The ECtHR reiterates in this connection that, whereas the right of a foreigner to enter or remain in a country is not as such guaranteed by the Convention, immigration controls have to be exercised consistently with Convention obligations ... As regards specifically Article 9, it emphasises that ‘deportation does not ... as such constitute an interference with the rights guaranteed by Article 9, unless it can be established that the measure was designed to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers’”;
- ECtHR, *Cox v. Turkey*, 20 May 2010 (ban on re-entering Turkey imposed on the applicant on account of her previous conversations with students and colleagues concerning Kurdish and Armenian issues).

## **b. Procedural rights of migrants**

### **i. Procedural rights of non-nationals lawfully resident**

The ECHR does not provide for a general right to a fair hearing in expulsion proceedings, and limits the applicability of specific procedural guarantees to non-nationals present lawfully in the territory of a contracting state. Such guarantees do therefore not apply to undocumented migrants, who remain unprotected in expulsion procedures.

The ECtHR has expressly rejected the full applicability of the right to a fair trial to expulsion procedures. However, Article 1 Protocol No. 7 recognises the rights of non-nationals “lawfully resident” in the territory of a contracting state. Within the meaning of the ECtHR’s jurisprudence, lawful residence is to be understood as dependent on “the existence of sufficient and continuous links with a specific place” and is not limited to physical presence. According to the Court, a person whose visa was withdrawn arbitrarily and was refused entry to his country of residence was not considered to be an unlawful resident.<sup>196</sup>

**Examples:**

- ECtHR, *Maaouia v. France* (GC), 5 October 2000, paragraphs 39-40;
- ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), 4 February 2005, paragraph 82;
- ECtHR, *Bolat v. Russia*, 5 October 2006, paragraphs 76-80;
- ECtHR, *Muminov v. Russia*, 11 December 2008, paragraph 126;
- ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 110.

Procedural rights under the ECHR in expulsion cases: everyone is guaranteed the right to a legal decision on expulsion, the right to challenge the expulsion order and to appeal it before an independent authority, the right to representation, and the right to non-discrimination.

Pursuant to Article 1 Protocol No. 7 ECHR, non-nationals lawfully resident in the territory of a contracting state may be expelled only under certain conditions. The article provides for a list of procedural safeguards and two exceptions in relation to the expulsion of aliens lawfully resident in the territory of a state party.

First, Article 1.1 Protocol No. 7 ECHR requires that the decision of expulsion of a non-national lawfully resident be “reached in accordance with law”. This prerequisite is the reflection of the internationally recognised principle of legality, which has been interpreted by the ECtHR as imposing the pre-existence of a law providing for measures of expulsion at the domestic level, the accessibility and foreseeability of such a law, as well as protection against arbitrary action by the state’s authorities. In addition, the Court held that the measure should be implemented in compliance with both the substantive and procedural aspects of the law, and that it should be applied in good faith.

**Examples:**

- ECtHR, *Lupsa v. Romania*, 8 June 2006, paragraphs 55-61;
- ECtHR, *Bolat v. Russia*, 5 October 2006, paragraph 81;
- ECtHR, *Kaya v. Romania*, 12 October 2006, paragraphs 55-61;
- ECtHR, *C.G. and Others v. Bulgaria*, 24 April 2008, paragraph 73.

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196. See also, Council of Europe 1984, paragraph 9.

Following the decision of expulsion, the alien must be given the possibility to “submit reasons against his expulsion” (Article 1.1(a) Protocol No. 7 ECHR). Correlatively, this right requires that the alien subject to the expulsion order be communicated the decision and informed of his/her right to challenge it, in a manner that guarantees the effective and practical implementation of his/her right under the ECHR.

To this end, the Committee of Ministers has recommended that “the removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative [and] shall indicate the legal and factual grounds on which it is based [and] the remedies available, whether or not they have suspensive effect, and the deadlines within which such remedies can be exercised”.<sup>197</sup>

Accordingly, the ECtHR has interpreted the right to submit reasons against one’s expulsion as necessarily entailing the requirement for the decision to be communicated to the alien, to be sufficiently motivated and specific regarding the grounds for his/her expulsion, and to provide clear indications and information on the hearing of the person’s case. The Court has held that insufficient information about one’s case, or even insufficient time to prepare submissions, would constitute a practical impediment to the effective implementation of the right to submit reasons against, and violate Article 1 Protocol No. 7 ECHR.

**Examples:**

- ECtHR, *Lupsa v. Romania*, 8 June 2006, paragraphs 59-60;
- ECtHR, *Kaya v. Romania*, 12 October 2006, paragraphs 59-60;
- ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 115.

Furthermore, the alien lawfully resident and subject to expulsion is, under Article 1.1(b) and (c) Protocol No. 7 ECHR, entitled to “have his case reviewed, and to be represented for these purposes before the competent authority or a person or persons designated by that authority”. The explanatory report further considers that:

This does not necessarily require a two-stage procedure before different authorities, but only that the competent authority should review the case in the light of the reasons against expulsion submitted by the person concerned. Subject to this and to sub-paragraph c, the form which the review should take is left to domestic law. In some States, an alien has the possibility of introducing an appeal against the decision taken following the review of his case. The present article does not relate to that stage of proceedings and does not therefore require that the person concerned should be permitted to remain in the territory of the State pending the outcome of the appeal introduced against the decision taken following the review of his case.<sup>198</sup>

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197. Committee of Ministers 2005, Guideline 4.1.

198. Council of Europe 1984, paragraph 13.2.

This right to challenge the decision is considered by the Committee of Ministers as equivalent to the right to an effective remedy. Consequently, the competent authority should be “composed of members who are impartial and who enjoy safeguards of independence”, and should “have the power to review the removal order, including the possibility of temporarily suspending its execution”.<sup>199</sup> Moreover, the remedy must be accessible and the time limits to exercise it should not be unreasonably short.<sup>200</sup>

In addition, the right to an effective remedy includes the right to be granted legal aid or legal representation before the competent authority: according to the Committee of Ministers, “where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid”.<sup>201</sup> The ECtHR has also stressed the importance of this right by taking into consideration the fact that the alien had not been allowed to have his case reviewed with the participation of his counsel in order to find a violation of Protocol No. 7 ECHR.<sup>202</sup>

Lastly, non-nationals lawfully resident must be protected against discrimination, both in law and in practice. Targeting specific ethnic groups or particular categories of non-nationals and applying procedures to them in a discriminatory manner would violate Article 14 ECHR, read together with Article 1 Protocol No. 7 ECHR and Article 1 Protocol No. 12 ECHR.<sup>203</sup>

Grounds for exceptions to procedural protection:  
– public order;  
– national security.

In certain circumstances, however, the contracting state is exempted from an obligation to provide the procedural protection of Article 1.1 Protocol No. 7 prior to expulsion. These exceptions are contained in

Article 1.2 of the same protocol and are exclusively applicable when “considered necessary in the interest of public order or where reasons of national security are invoked”. The state will have to demonstrate the necessity of the measure in cases where the expulsion is ordered on grounds of public order, while in the case of an expulsion for reasons of national security, however, “this in itself should be accepted as sufficient justification”.<sup>204</sup> However, the measure should in both cases respect the principle of proportionality in

199. Committee of Ministers 2005, Guideline 5.1.

200. Ibid., Guideline 5.2.

201. Ibid.

202. ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 115.

203. See Chapter I (c) of the handbook (“Standards on equality and non-discrimination”).

204. Council of Europe 1984, paragraph 15.

accordance with the jurisprudence of the ECtHR and the rights provided under Article 1.1 of the protocol should be ensured after the expulsion of the person concerned.

### Examples:

- ECtHR, *C.G. and Others v. Bulgaria*, 24 April 2008, paragraphs 43 and 78: “[t]he Court first observes that, while the decision to expel the first applicant stated that the measure was being taken because he posed a threat to national security, in the ensuing judicial review proceedings it emerged that the only fact serving as a basis for this assessment – with which both levels of court fully agreed – was his alleged involvement in the unlawful trafficking of narcotic drugs in concert with a number of Bulgarian nationals ... It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant – as grave as they may be, regard being had to the devastating effects drugs have on people’s lives – were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future ... As regards the second limb of the exception, the Court notes that the explanatory report to Protocol No. 7 says that a ‘State relying on public order to expel an alien before the exercise of [his or her rights under paragraph 1 of Article 1 thereof] must be able to show that this exceptional measure was necessary in the particular case or category of cases’. The assessment whether this is warranted is to be made ‘taking into account the principle of proportionality as defined in the [Court’s] case-law’. In the instant case, the Government have not put forward any arguments capable of convincing the Court that this was so. Nor is there anything in the file to suggest that it was truly necessary to expel the first applicant before he was able to challenge the measure”;
- ECtHR, *Nolan and K. v. Russia*, 12 February 2009, paragraph 115: “[t]he Government invoked the exception mentioned in paragraph 2 of Article 1 of Protocol No. 7 to justify the course of action adopted by the Russian authorities against the applicant. However, as the Court has found above, they did not submit any material or evidence capable of corroborating their claim that the interests of national security or public order had been at stake. Accordingly, the exception set out in paragraph 2 cannot be held to apply in the instant case and the normal procedure described in paragraph 1 must have been followed.”

Principle of proportionality: the state must demonstrate that the measure:

- is prescribed by law;
- pursues a legitimate aim;
- is necessary in a democratic society and proportionate to the aim pursued.

Moreover, under Article 19.8 ESC(r), states are prohibited by law from expelling migrant workers lawfully residing within their territories unless they endanger national security or offend against public interest or morality. Migrants, also, have the right to appeal to a court or other independent body against the expulsion decision, even in cases where national security, public order or morality are at stake.

### Examples:

- ECSR, “Conclusions V”, United Kingdom, pp. 129-30 (on the inability to appeal to an independent body against a decision to deport a worker);
- ECSR, “Conclusions XVI-1”, Netherlands, pp. 460-61 (the expulsion of a migrant worker entails the automatic expulsion of his family members; previously they had been admitted to the Netherlands as a measure of family reunification).

## ii. Procedural rights of other categories of non-nationals

Migrants subject to expulsion have a right to challenge the deportation order in accordance with the right to an effective remedy guaranteed by Article 13 ECHR. According to the Committee of Ministers:

In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.<sup>205</sup>

In *M.S.S. v. Belgium and Greece*, the ECtHR also affirmed that in the context of deportation and in light of the principle of *non-refoulement*, the right to an effective remedy “imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect”.<sup>206</sup> The suspensive effect of the remedy is essential in order to guarantee the rights under Article 3 ECHR. It aims at allowing the national authorities to thoroughly examine the claim and the compatibility of the measure with the rights guaranteed by the ECHR, and as such constitutes a prerequisite to an effective remedy. Should the appeal of an order of deportation not automatically suspend the execution of the deportation, the person would face the risks of torture or cruel, inhuman and degrading treatment or punishment faced in the destination country, which, if realised, would have irreversible consequences for the person and violate the ECHR and the principle of *non-refoulement*.

### Examples:

- ECtHR, *Hirsi Jamaa and Others v. Italy* (GC), 23 February 2012, paragraph 200: “[I]n view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the Court has ruled that the suspensive effect should also apply to cases in which a State Party

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205. Committee of Ministers 2005, Guideline 5.1.

206. ECtHR, *M.S.S. v. Belgium and Greece* (GC), op. cit., paragraphs 293 and 387.

decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature”;

- ECtHR, *Čonka v. Belgium*, 5 February 2002, paragraphs 79: “The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision ....”

Moreover, the ECtHR has recalled that the remedy must be prompt, accessible, effective in practice as well as in law, and must not be hindered by the acts of state authorities. However, while the ECtHR recognises the importance of speedy proceedings, it stressed that promptness should not prevail over effectiveness, which protects against arbitrary expulsions. In the *I.M. v. France* case, the Court held that accelerated proceedings had led to a superficial examination of the applicant’s claim, and deprived him of a fair and reasonable opportunity to challenge the decision. While the remedy was available, the ECtHR considered that it was not accessible in practice.

**Examples:**

- ECtHR, *M.S.S. v. Belgium and Greece* (GC), 21 January 2011, paragraph 290;
- ECtHR, *Muminov v. Russia*, 11 December 2008, paragraph 100: “[a]s to the merits of the complaint, the ECtHR reiterates that the remedy required by Article 13 must be effective both in law and in practice, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”;
- ECtHR, *R.U. v. Greece*, 7 June 2011, paragraphs 82-83;
- ECtHR, *I.M. v. France*, 2 February 2012, paragraphs 130, 147-48 and 154.

In *M.S.S. v. Belgium and Greece*, the ECtHR stressed the importance of the accessibility of the remedy in practice when assessing its effectiveness, noting that the communication between the Greek authorities and the asylum seeker, as well the malfunctions of the notification procedure, “[made] it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit”.<sup>207</sup> The ECtHR also considered that undue delay in the appeal proceedings could violate the right to an effective remedy in light of the seriousness of the situation and the matters at issue.<sup>208</sup>

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207. *Ibid.*, paragraph 318.

208. *Ibid.*, paragraph 320.



It is further established that a person threatened with expulsion must have access to relevant documents and accessible information on the legal procedures to be followed in his/her case. In addition, translated material and interpretation should be provided where necessary, as well as effective access to legal advice, and legal aid. The right to an effective remedy also implies that the right to participate in adversarial proceedings should be ensured, and therefore that the person should be communicated the reasons for the decision to expel and be given a fair and reasonable opportunity to dispute the factual basis for the expulsion, even when the grounds for expulsion are national security.

**Example:**

- ECtHR, *Sharifi and Others v. Italy and Greece*, 21 October 2014 (the Court held that there had been a violation by Greece of Article 13 combined with Article 3 on account of the lack of access to the asylum procedure for them and the risk of deportation to Afghanistan, where they were likely to be subjected to ill-treatment,<sup>209</sup> and a violation by Italy of Article 3, as the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings in that country's asylum procedure);
- ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002, paragraph 137: "... [w]hile procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term 'national security' .... Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined."

### c. Collective expulsions

The absolute prohibition of collective expulsions derives from customary international law. In Council of Europe instruments, the prohibition of collective expulsions is affirmed

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209. ECtHR, *Sharifi and Others v. Italy and Greece*, 21 October 2014, Paragraphs 173-181.

under Article 4 Protocol No. 4 ECHR, and reiterated under Guideline 3 of the “Twenty guidelines on forced return”, according to which 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”.<sup>210</sup>

The underlying principle of the prohibition of collective expulsions is the requirement that each claim be examined on an individual basis, in a fair and objective manner. The ECtHR has found that unless the personal circumstances of each alien subject to expulsion have been genuinely and individually considered, the procedure may be in breach of Article 4 Protocol No. 4 ECHR. Accordingly, when there is not sufficient reference to the particular circumstances of each asylum seeker of a group of aliens in a similar situation justifying his/her expulsion, or when it seems that the members of a group of aliens have been the subjects of expulsion under the same procedure and at the same time, the ECtHR is likely to hold that there has been a collective expulsion and find a violation of the ECHR.

In the 2014 case of *Sharifi and Others v. Italy and Greece*,<sup>211</sup> the Court stressed the need to verify the existence of guarantees that examination of claims are carried out on an individual base in order to avoid a violation of Article 4 Protocol No. 4 ECHR. The case concerned 32 Afghan nationals, two Sudanese nationals and one Eritrean national, who alleged having entered Italy illegally from Greece and been returned to that country immediately, thus being deprived of any procedural and substantive rights. The applicants also raised the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment.

Effective remedy for a migrant subject to expulsion:

- the decision to expel must be subject to detailed, rigorous and independent scrutiny;
- the remedy must be prompt and accessible in practice and in law;
- the remedy should be provided by a judicial body or an independent and impartial body capable of reviewing and overturning the decision to expel;
- the migrant must be informed of the reasons for the deportation decision, and be given a fair and reasonable opportunity to dispute them in adversarial proceedings;
- when necessary, the migrant should be provided with translated documents, interpretation, legal advice and/or legal aid;
- the remedy must be enforceable and lead to the reparation or cessation of the violation at issue;
- the remedy should have an automatic suspensive effect on execution of the deportation.

210. Committee of Ministers 2005.

211. ECtHR, *Sharifi and Others v. Italy and Greece*, 21 October 2014, paragraphs 214-225.

The Court reiterated its finding in the *M.S.S. v. Belgium and Greece*<sup>212</sup> case, explaining that the Dublin system could only be implemented in manner that is compatible with the ECHR and did not therefore allow for automatic returns or any form of collective and indiscriminate returns. On the contrary, Italian authorities should have examined the possibility to return each applicant to Greece under the Dublin system individually, and ensured that the destination country offered sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. The Court therefore held that there had been a violation of Article 4 Protocol No.4 ECHR on account of the collective and indiscriminate expulsions of the applicants.

**Other examples:**

- ECtHR, *Hirsi Jamaa and Others v. Italy* (GC), 23 February 2012 (the ECtHR found that returning Somali and Eritrean migrants to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion. It held that there had been two violations of Article 3 ECHR because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea; a violation of Article 4 Protocol No. 4 on the prohibition of collective expulsions; and a violation of Article 13 taken in conjunction with Article 3 and with Article 4 Protocol No. 4);
- ECtHR, *Čonka v. Belgium*, 5 February 2002, paragraphs 59 and 63 (the ECtHR found that there were no sufficient guarantees demonstrating that the authorities had genuinely and individually taken into consideration the personal circumstances of each applicant, based on the fact that all the aliens concerned had been required to attend the police station at the same time, that the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms, that it was very difficult for the aliens to contact a lawyer, and that the asylum procedure had not been completed);
- ECtHR, *Sultani v. France*, 20 July 2007, paragraph 81 (no violation, the ECtHR found that the overall situation, and also the personal circumstances, of the applicant had been genuinely and individually examined).

## d. Voluntary returns

Voluntary return or repatriation of aliens is widely accepted as a considerably preferable situation, as opposed to measures of forced return. The Council of Europe has underlined that “[t]he host state should take measures to promote voluntary returns,

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212. ECtHR, *M.S.S. v. Belgium and Greece* (GC), op. cit., paragraphs 338-340.

which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.”<sup>213</sup>

It explains that forced returns are less desirable considering the higher risks of violation of human rights that they imply. It therefore encourages states to promote and facilitate such initiatives by setting up programmes of voluntary returns, such as those of the ILO, and by providing information and assistance to persons residing illegally on the territory of a state. Returnees should also be afforded reasonable time to comply with the deportation order.<sup>214</sup>

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213. *Ibid.*, Guideline 1.

214. See, also, PACE 1994, paragraph 8.ix.b, and Committee of Ministers 2004.



## VII. Application before the European Court of Human Rights

Article 34 ECHR guarantees the right of individual application before the European Court of Human Rights. It states that:

[t]he ECtHR may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

The ECtHR has described this right as a “key component of the machinery” for the protection of human rights and considers it to be a fundamental guarantee for the effectiveness of the ECHR.

### Examples:

- ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), 4 February 2005, paragraphs 100 and 122;
- ECtHR, *Loizidou v. Turkey* (Preliminary Objections), 23 March 1995, paragraphs 70-71.

This right is nonetheless subject to a series of conditions. Pursuant to Articles 32, 34 and 35 ECHR, applicants must be victims of a violation of the ECHR, must have exhausted all domestic remedies and apply within a certain time limit. The ECtHR has provided extensive jurisprudence on the admissibility criteria of an individual application before the Court.

### a. When can migrants apply?

All applicants, including migrants, are subject to the conditions set by the ECHR and the ECtHR regarding the jurisdiction of the Court and the admissibility of their application.

Pursuant to Article 32 ECHR, the Court has jurisdiction over “all matters concerning the interpretation and application of the Convention and the Protocols thereto”. In addition, should there be uncertainty regarding its jurisdiction, the ECtHR has the power to decide itself and settle the dispute.

### i. The status of the applicant and the notion of victim

According to Article 34 ECHR, the person bringing an application before the ECtHR must be a victim of a violation of the rights guaranteed by the Convention. This raises the question of who is to be considered a victim within the meaning of Article 34.

The Court has established that the notion of victim is an autonomous concept, enabling a purposive interpretation as opposed to a literal one. The ECtHR is therefore not bound by domestic definitions and rules, and should interpret the notion of victim without excessive formalism, in light of contemporary society conditions, and taking into account the fact that the status of victim may be in some circumstances linked to the merits of the case.

**Examples:**

- ECtHR, *Gorraiz Lizarraga and Others v. Spain*, 27 April 2004, paragraphs 35 and 38;
- ECtHR, *Siliadin v. France*, 26 July 2005, paragraph 63;
- ECtHR, *Monnat v. Switzerland*, 21 September 2006, paragraphs 30-33.

Hence, the flexible interpretation of the concept of victim has allowed the ECtHR to develop its jurisprudence in such a way as to recognise the status required in both direct and indirect victims. “Direct victims” are logically the applicants directly affected by the act or omission that has allegedly violated their rights under the Convention, provided that they were not, even partly, responsible for the violation. “Indirect victims” on the other hand are individuals who can claim a specific and personal link with the direct victim. The ECtHR has for instance accepted the applications from a victim’s wife who claimed that there had been a violation of Article 2 ECHR, or from the mother of a person whose disappearance while in custody was claimed to be in breach of Article 3 ECHR.

**Examples:**

- ECtHR, *McCann and Others v. the United Kingdom* (GC), 27 September 1995 (victim’s wife is an indirect victim, Article 2 ECHR);
- ECtHR, *Amuur v. France*, 25 June 1996, paragraph 36 (direct victim);
- ECtHR, *Kurt v. Turkey*, 25 May 1998 (victim’s mother is an indirect victim, Article 3 ECHR);
- ECtHR, *Pasa and Erkan Erol v. Turkey*, 12 December 2006 (absence of victim status when the person is partly responsible for the violation).

Further, only living persons, whether it is the victims themselves or persons applying on their behalf may lodge an application. The ECtHR has found that a deceased person’s claim was inadmissible although it had been brought by a representative. However, when the victim dies after having lodged his/her application, the ECtHR may accept that family members having sufficient interest pursue the application. It considers that in some cases, the protection of human rights may require the ECtHR to continue the examination of the claim, instead of striking the case out automatically, regardless of the original applicant’s death.

**Examples:**

- ECtHR, *Raimondo v. Italy*, 22 February 1994, paragraph 2 (case continued by heir or close relative);
- ECtHR, *Karner v. Austria*, 24 July 2003, paragraphs 25ff. (on the power of the Court to assess the necessity to pursue the examination of the application for the purpose of protecting human rights).

Finally, victim status must be justified throughout the entire proceedings. If at some point the domestic authorities take measures to expressly acknowledge the violation and to redress it, the applicant loses his/her status.

**Examples:**

- ECtHR, *Scordino v. Italy (No. 1)* (GC), 29 March 2006, paragraphs 178ff., 193: “the Court is required to verify that there has been an acknowledgment, at least in substance, by the authorities of a violation of a right protected by the Convention and whether the redress can be considered as appropriate and sufficient ... in conclusion, and having regard to the fact that various requirements have not been satisfied, the Court considers that the redress was insufficient. As the second condition – appropriate and sufficient redress – has not been fulfilled, the Court considers that the applicants can in the instant case still claim to be ‘victims’ of a breach of the ‘reasonable time’ requirement”;
- ECtHR, *Burdov v. Russia*, 7 May 2002, paragraph 30: “the Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether or not the applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention”.

## ii. Notion of potential victims and migrants

The ECtHR has stressed the fact that the direct impact of the violation is a criterion that cannot be applied strictly and mechanically, and has therefore established the notion of “potential victim”. It has thus recognised, on a case-by-case basis, the required victim status regarding people who were not victims of a direct violation, but only potential victims.

**Examples:**

- ECtHR, *Soering v. the United Kingdom* (Plenary), 7 July 1989 (potential victim in extradition case);
- ECtHR, *Open Door and Dublin Well Woman v. Ireland* (Plenary), 29 October 1992, paragraph 44 (potential victims in a case concerning measures restricting the distribution of information on abortion to women of child-bearing age);
- ECtHR, *Karner v. Austria*, 24 July 2003, paragraph 25 (direct violation is not a mechanical and inflexible criterion).



The development of this notion is of particular importance to migrants. As it is explained below, the right to an effective remedy in cases of deportation must have a suspensive effect, for the purpose of effectively protecting against the potential risks faced in the destination country, notably against violations of Article 3 ECHR. The ECtHR has found such hypothetical violations of the ECHR, in the event the applicant is deported, because he/she would potentially be the victim of torture and ill-treatment, unfair trial, arbitrary detention, or of a violation of his right to family life for instance.

**Examples:**

Violation of Article 3 ECHR in case of removal:

- ECtHR, *Sufi and Elmi v. the United Kingdom*, 28 June 2011 (complaint by two Somali nationals that they risked being ill-treated or killed if returned to Mogadishu; the ECtHR held that there would be a violation of Article 3 if the applicants were sent back);
- ECtHR, *Auad v. Bulgaria*, 11 October 2011 (detention in view of expulsion of a stateless person of Palestinian origin who claimed he risked ill-treatment if expelled. The ECtHR found violations of Articles 5 and 13 ECHR, and held that there would be a violation of Article 3 in the event that Mr Auad was expelled);
- ECtHR, *I.M. v. France*, 2 February 2012 (in light of the risks the applicant faced in the event of his deportation to Sudan and of the fact that his asylum application was dealt with under the fast-track procedure, the ECtHR found a violation of Article 13, on the right to an effective remedy, taken together with Article 3 ECHR).

Violation of Article 6 ECHR in case of deportation:

- ECtHR, *Othman v. the United Kingdom*, 17 January 2012 (in spite of the diplomatic assurances protecting the applicant against torture, the ECtHR found that there remained a real risk that evidence obtained by torture would be used against him at his trial. It is the first time that the ECtHR had held that an expulsion would be in violation of Article 6 ECHR – right to a fair trial – thus reflecting the international consensus that the use of evidence obtained through torture makes a fair trial impossible).

Violation of Article 8 in case of expulsion:

- ECtHR, *Nunez v. Norway*, 28 June 2011 (complaint of a national of the Dominican Republic against an order to expel her from Norway, which would separate her from her small children living in the country. The ECtHR found that there would be a violation of Article 8 ECHR and the right to respect for family life in the event the applicant were expelled from Norway).

### iii. The requirement of exhaustion of domestic remedies

The rule of exhaustion of domestic remedies is a principle of customary international law and is enshrined in the case law of the ICJ, as well as in numerous international

human rights instruments.<sup>215</sup> In the ECHR, it is expressly provided for under Article 35.1, which states that “[t]he ECtHR may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law”. In *A, B, and C v. Ireland*, the ECtHR explained that the “existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied”.<sup>216</sup>

The reasons underlying this requirement are the subsidiary role of the ECtHR and the fact that the states must be given the opportunity to prevent or redress the violation at the domestic level before an action is taken at the international level. It is also linked to the obligation of states to provide an effective remedy under Article 13 ECHR. The ECtHR considers that it is a basic principle and an indispensable aspect of the protection system of the ECHR.

**Examples:**

- ECtHR, *Selmouni v. France* (GC), 28 July 1999, paragraph 74 (subsidiary nature of the ECHR machinery);
- ECtHR, *Kudla v. Poland* (GC), 26 October 2000, paragraph 152.

Similarly to the notion of victim, the rule of exhaustion of domestic remedies should not be applied with extreme formalism, and needs to be interpreted with flexibility, in the light of the situation of every case. For instance, the ECtHR has found that it would be excessive to require of an applicant to use remedies at the domestic level that even the highest court of the state in question did not consider mandatory. Further, requiring the applicant to use a remedy which constitutes a disproportionate obstacle and impinges on the right to lodge an individual application before the ECtHR (Article 34) has also been considered excessive. Moreover, the domestic remedies must be available and accessible both in theory and in practice for the rule to apply.

**Examples:**

- ECtHR, *D.H. and Others v. the Czech Republic* (GC), 13 November 2007, paragraphs 116-18;
- ECtHR, *Ringeisen v. Austria*, 16 July 1971, paragraph 89 (flexibility of the rule);
- ECtHR, *Veriter v. France*, 14 October 2010, paragraph 27 (exemption from the rule of exhaustion of domestic remedies because requiring the applicant to use a particular remedy constituted a disproportionate obstacle to his Article 34 ECHR right).

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215. See for instance the ICJ case *Interhandel (Switzerland v. the United States)*, 21 March 1959, *ICJ Reports 1959*, p. 6. See, also, Article 41.1(c) ICCPR and Articles 2 and 5.2(b) of the Optional Protocol to the ICCPR.

216. ECtHR, *A, B, and C v. Ireland* (GC), 16 December 2010, paragraph 142.

Finally, the requirement of Article 35.1 ECHR has been complied with when the appellate court has examined the merits of the case although it was found inadmissible, or when the court has ruled on the merits of a case even briefly and although the applicant's claim barely respected the forms or wording required by domestic law. Furthermore, when an applicant has the choice between several parallel remedies with similar objectives to seek reparation, he will only be required to use one of them to comply with the rule of exhaustion of domestic remedies.

**Examples:**

- ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* (GC), 30 June 2009, paragraphs 43-45;
- ECtHR, *Vladimir Romanov v. Russia*, 24 July 2008, paragraph 52;
- ECtHR, *Jasinskis v. Latvia*, 21 December 2010, paragraphs 50 and 53-54 (on several parallel remedies).

#### iv. The six-month time limit

Article 35.1 ECHR also provides for a time limit to introduce a claim. It establishes that an application must be lodged “within a period of six months from the date on which the final decision was taken” in order to be admissible. On this issue too the ECtHR has been prolific and developed jurisprudence interpreting and detailing the requirement of the time limit.

The justification for this rule is the promotion of security of law and the need to prevent uncertainty for unreasonable periods of time. Hence, while six months is deemed sufficient for the applicant to decide on the appropriateness of his/her application before the ECtHR and on the arguments to present, it also ensures a fair examination of facts that the passage of time would render more difficult and less certain for the authorities and other persons concerned.

**Examples:**

- ECtHR, *Nee v. Ireland*, Application No. 52787/09, decision, 30 January 2003;
- ECtHR, *P.M. v. the United Kingdom*, Application No. 6638/03, decision, 24 August 2004;
- ECtHR, *O’Loughlin and Others v. the United Kingdom*, Application No. 23274/04, decision, 25 August 2005.

The six-month rule requires that a domestic court has finally settled the applicant's position as regards the object of his claim. The period will run as of the moment the decision has reached *res judicata*. Further, the ECtHR has established that only normal and effective remedies count, as potential applicants should not be tempted to

circumvent the time limit with abusive claims before inappropriate bodies. Similarly, applications for reopening of proceedings or extraordinary remedies are not taken into account and do not allow in principle the extension of the six-month rule, unless such a remedy is the only one available.

**Examples:**

- ECtHR, *Varnava and Others v. Turkey* (GC), 18 September 2009, paragraph 157;
- ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99, decision, 7 June 2001;
- ECtHR, *Ahtinen v. Finland*, Application No. 48907/99, decision, 31 May 2005 (the extraordinary remedy may count if it is the only remedy available);
- ECtHR, *Fernie v. the United Kingdom*, Application No. 14881/04, decision, 5 January 2006;
- ECtHR, *Tucka v. the United Kingdom (No. 1)*, Application No. 34586/10, decision, 18 January 2011.

In the case of a continuing situation, the six-month time limit will start running when the said situations ends. However, it is important to note that the consequences of a violation, however significant, do not qualify as a continuing situation and will not suspend the application of the rule.

**Examples:**

- ECtHR, *Varnava and Others v. Turkey* (GC), 18 September 2009, paragraph 161;
- ECtHR, *Iordache v. Romania*, 14 October 2008, paragraphs 49-50.

Regarding the exact date on which the time starts to run, the ECtHR has established that it is the day following the date on which the final decision was made public or was communicated to the applicant or his/her representative. As of the date of introduction of the application, Rule 47.5 of the ECtHR (entered into force 1 May 2012) states that:

[t]he date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the subject matter of the application, provided that a duly completed application form has been submitted within the time limits laid down by the ECtHR. The ECtHR may for good cause nevertheless decide that a different date shall be considered to be the date of introduction.

The ECtHR has specified that the date taken for registration purposes is the date of the postmark and not the date of receipt.

**Example:**

- ECtHR, *Kipritci v. Turkey*, 3 June 2008, paragraph 18.

## v. The application must not be substantially the same as one already submitted to the ECtHR or another international investigation or settlement

This rule is provided for under Article 35.2 ECHR and means that an application which is substantially the same and presents no relevant new information or element will be declared inadmissible. The ECtHR has established that a claim will be considered to be substantially the same where the facts, the complaint and the parties involved are the same. Regarding other international proceedings, to fall within the scope of Article 35.2 ECHR, they must be public, international, judicial and independent.

### Examples:

- ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* (GC), 30 June 2009, paragraph 63 (on criteria for an application that is “substantially the same” before the ECtHR);
- ECtHR, *Lukanov v. Bulgaria*, Application No. 21915/93, decision, 12 January 1995 (on the requirement of public proceedings);
- ECtHR, *Jeličić v. Bosnia and Herzegovina*, Application No. 41183/02, decision, 15 November 2005 (on the requirement of international procedure);
- ECtHR, *Mikolenko v. Estonia*, Application No. 10664/05, decision, 8 January 2008 (on the requirement of an independent procedure).

These rules aim at preventing redundant cases and a plurality of international proceedings carried out concerning one case.

For further information concerning the admissibility criteria, see the “Practical guide on admissibility criteria”, published by the ECtHR.<sup>217</sup>

## b. Can migrants apply for interim measures?

Rule 39.1 of the Rules of the ECtHR states that “[t]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it”. Accordingly, states must take such urgent and provisional measures as indicated by the ECtHR upon request of the applicant, to prevent the realisation of an “imminent risk of irreparable damage” while the examination of the case is ongoing.

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217. Available on the website of the ECtHR ([www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide)).

**Examples:**

- ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), 4 February 2005;
- ECtHR, *Paladi v. Moldova* (GC), 10 March 2009.

They usually concern situations falling under Articles 2 and 3 ECHR, in which the applicant is exposed to a threat to his/her life, or to ill-treatment, such as torture and inhuman or degrading treatment. In more exceptional cases, interim measures may seek to protect the right to respect of family life of Article 8 ECHR. Such measures are therefore of particular interest for migrants, especially in cases of *non-refoulement*, considering that a significant majority of the measures ordered by the ECtHR concern the suspension of deportations and extraditions.

**Examples:**

*Risk of persecution for political, ethnic or religious reasons:*

- ECtHR, *F.H. v. Sweden*, 20 January 2009
- ECtHR, *Y.P. and L.P. v. France*, 1 September 2010
- ECtHR, *W.H. v. Sweden*, 8 April 2015 (GC)

*Risk of ill-treatment related to sexual orientation:*

- ECtHR, *M.E. v. Sweden*, 8 April 2015 (GC)

*Risk of being subjected to genital mutilation:*

- ECtHR, *Abraham Lunguli v. Sweden*, 1 July 2003 (strike-out decision)

*Expulsion cases with a health or medical element:*

- ECtHR, *D. v. the United Kingdom*, 2 May 1997
- ECtHR, *N. v. the United Kingdom*, 27 May 2008 (GC)

Interim measures are requested and addressed through a written procedure. Unless the request is manifestly ill-founded and aims at delaying the proceedings, every request is treated as a matter of priority and examined on an individual basis. The decision of the ECtHR as regards interim measures is not appealable. However, when a person has been deported to another member state following the rejection of their interim measures request, they can introduce a new one against the destination state. Moreover, the duration of orders pursuant to Rule 39 varies, and may be lifted at any time by the ECtHR.

Further, the ECtHR has established that in light of the issues at stake (Articles 2 and 3 ECHR) and in case of the existence of a real risk of serious, irreversible harm, an interim measure requested to prevent the execution of an extradition or deportation order has binding legal effect on the state concerned. Hence, authorities that fail to

take all reasonable steps to comply with a measure indicated by the ECtHR pursuant to a Rule 39 procedure are in breach of Article 34 ECHR. It is the ECtHR's responsibility to verify states' compliance with an interim measure.

**Examples:**

- ECtHR, *Paladi v. Moldova* (GC), 10 March 2009, paragraphs 87-92 (on the obligation to take all reasonable steps to comply with the interim measure);
- ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, decision, 30 June 2009, paragraphs 162-65 (transfer of detainees to Iraqi authorities in contravention of an interim measure);
- ECtHR, *Kamaliyevy v. Russia*, 3 June 2010, paragraphs 75-79 (expulsion of the first applicant in contravention of an interim measure);
- ECtHR, *D.B. v. Turkey*, 13 July 2010, paragraph 67 (failure to secure a timely meeting between an asylum seeker in detention and a lawyer as indicated by the interim measure).

The Court is not an appeal tribunal in asylum and immigration cases: interim measures should only intervene in exceptional cases.

It should be noted that the simple fact that a request under Rule 39 of the Rules of Court has been made is not sufficient to entail the suspension of the extradition or deportation proceedings. The execution will be stayed solely as a result of an order by the ECtHR.

**Example:**

- ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, decision, 20 February 2007, paragraphs 122ff. (a request for interim measures is not sufficient to stay the execution of the extradition order).

Finally, it is important to recall that “[t]he ECtHR is not an appeal tribunal from the asylum and immigration tribunals of Europe”.<sup>218</sup> In response to the drastic increase of interim measures requests in immigration cases, the President of the ECtHR issued a statement recalling the fact that the ECtHR should not be used as an appellate court in asylum and immigration cases; the same way it is not a court of criminal appeal for criminal convictions. He emphasised the exceptional character of interim measures, underlying the fact that “[w]here national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the ECtHR should only be required to intervene in truly exceptional cases”.

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218. ECtHR 2011.

For more information on interim measure requests, see the “Practice direction – Requests for interim measures (Rule 39 of the Rules of Court)” issued by the President of the ECtHR in accordance with Rule 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011, available at [www.echr.coe.int](http://www.echr.coe.int).





## VIII. Collective complaints before the European Committee of Social Rights

The collective complaints mechanism allowing for claims to be lodged with the ECSR against violations of the ESC(r) was provided for under the 1995 Additional Protocol. It entered into force in 1998.

Pursuant to Rules 23 and 24 of the ESCR Rules, collective complaints must be addressed to the Executive Secretary acting on behalf of the Council of Europe Secretary General, in one of the working languages – English or French. The Secretary General will “acknowledge receipt of it, notify it to the Contracting Party concerned and immediately transmit it to the Committee of Independent Experts”.<sup>219</sup>

The ECSR first examines the admissibility of the complaint (Rule 29). If it meets the formal requirements (Rule 30) and is declared admissible, a written procedure is engaged requiring the exchange of submissions between the parties (Rule 31). The ECSR then assesses the merits of the complaint, and informs the parties, as well as the Committee of Ministers, of its decision (Rule 35). As of that moment, the decision must be rendered public either at the occasion of the adoption of the Committee of Ministers’ resolution or at the latest within four months (Rule 35.4).

Moreover, the collective complaints procedure of the ECSR benefits from a system of urgent measures which could be comparable to the ECtHR’s Rule 39 interim measures. Pursuant to Rule 36 of the ESCR Rules, once the ECSR has declared a complaint admissible, it has the power at any subsequent time to indicate to the parties concerned immediate measures deemed necessary in order to avoid “the risk of a serious irreparable injury and to ensuring the effective respect for the rights recognised in the European Social Charter”. Immediate measures may be requested by the applicant organisation, the respondent state or adopted by the ECSR *proprio motu*.

### a. Who can apply?

Certain organisations only are entitled to lodge complaints with the ESCR and they are listed under Articles 1 and 2 of the Additional Protocol to the ESC (and ESC(r)):

1. international organisations of employers and trade unions;
2. international non-governmental organisations (INGOs) enjoying participatory status with the Council of Europe and which are on a list drawn up for this purpose by the

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219. Council of Europe, Additional Protocol to the European Social Charter providing for a System of Collective Complaints, Article 5.

Governmental Committee<sup>220</sup> of the ESC (or ESC(r)) for a four-year period which may be renewed;

3. employers' organisations and trade unions in the country concerned;
4. national non-governmental organisations with a particular competence in the matters governed by the ESC (or ESC(r)) and within the jurisdiction of a contracting state that has expressly recognised their right to lodge collective complaints against it.

## **b. Admissibility criteria**

The collective complaint file must contain the following information:

- the name and contact details of the organisation submitting the complaint;
- proof that the person submitting and signing the complaint is entitled to represent the organisation lodging the complaint;
- the state against which the complaint is directed;
- an indication of the provisions of the ESC(r) that have allegedly been violated;
- the subject matter of the complaint, namely the point(s) in respect of which the state in question has allegedly failed to comply with the ESC(r), along with the relevant arguments, with supporting documents.

The complaint must be drafted in English or French in the case of organisations in categories 1 and 2 above. In the case of the others (categories 3 and 4), it may be drafted in the official language, or one of the official languages, of the state concerned.

The ECSR examines the complaint and, if the formal requirements have been met, declares it admissible.

## **c. Benefits and disadvantages**

The collective complaints mechanism of the ECSR is both similar and different to the ECtHR procedure. This raises the question of what the benefits and disadvantages of the ECSR's system are.

The most obvious difference concerns the applicants. While it may seem that the collective complaints mechanism, which does not allow persons from bringing individual complaints before the ECSR, is more restrictive, it nonetheless presents a series of advantages. The procedure is indeed less onerous in terms of formalism and involves fewer constraints regarding admissibility criteria, when compared to the procedure of

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<sup>220</sup>. List available at: [www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOListJanuary2012\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOListJanuary2012_en.pdf).

the ECtHR. Organisations entitled to lodge a complaint do not need to exhaust domestic remedies, nor do they need to demonstrate their status as a victim. In addition, it allows for class actions.

On the other hand, the simplified formalism involves some disadvantages for the applicants. Applicants may not be granted just satisfaction through the collective complaints procedure; the role of the Committee of Ministers in ensuring proper follow-up to ECSR decisions is not as strong as the procedure for the supervision of the execution of ECtHR judgments. The Committee of Ministers is responsible for follow-up pursuant to the Additional Protocol, according to Article 9, while the ECSR verifies in subsequent reports under the reporting procedure whether the requisite measures have actually been taken by the states to bring the situation into conformity with the Charter (Article 10 of the Additional Protocol and Rule 40).



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Council of Europe	Convention for the Protection of Human Rights and Fundamental Freedoms	ECHR	4 November 1950	ETS No. 5	5 September 1953	All member states of the Council of Europe
Council of Europe	European Convention on Extradition		13 December 1957	ETS No. 24	18 April 1960	All member states of the Council of Europe
Council of Europe	European Code of Social Security		16 April 1964	ETS No. 48	17 March 1968	21 member states of the Council of Europe: Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, Montenegro, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom
Council of Europe	European Convention on the Suppression of Terrorism		27 January 1977	ETS No. 90	4 August 1988	All member states of the Council of Europe except Andorra
Council of Europe	European Convention on the Legal Status of Migrant Workers		24 November 1977	ETS No. 93	1 May 1983	11 member states of the Council of Europe: Albania, France, Italy, Moldova, Netherlands, Norway, Portugal, Spain, Sweden, Turkey and Ukraine
Council of Europe	Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms		22 November 1984	ETS No. 117	1 November 1988	All member states of the Council of Europe except Germany, Netherlands, Turkey and the United Kingdom
Council of Europe	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment		26 November 1987	ETS No. 126	1 February 1989	All member states of the Council of Europe
Council of Europe	Additional Protocol to the European Social Charter providing for a System of Collective Complaints		9 November 1995	ETS No. 158	1 July 1998	13 member states of the Council of Europe: Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal and Sweden

Authority	Title	Abbreviation	Date adopted	Reference information	Entry into force	Ratifications
Council of Europe	European Social Charter (revised)	ESC(r)	3 May 1996	ETS No. 163	1 July 1999	34 member states of the Council of Europe: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Portugal, Romania, Russian Federation, Serbia, Republic of Slovakia, Slovenia, Sweden, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine
Council of Europe	Council of Europe Convention on Action against Trafficking in Human Beings		16 May 2005	CETS No. 197	1 February 2008	All member states except Czech Republic and Russian Federation. Plus Belarus.
ILO	Forced Labour Convention		28 June 1930	ILO C29	1 May 1932	178 member states of the UN (44 member states of the Council of Europe: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Republic of Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom)
League of Nations	Convention relating to the International Status of Refugees		28 October 1933	Treaty Series Vol. CLIX No. 3663		9 member states of the UN (9 member states of the Council of Europe: Belgium, Bulgaria, Czech Republic, Denmark, Ireland, Italy, Norway, Republic of Slovakia and the United Kingdom)

Authority	Title	Abbreviation	Date adopted	Reference information	Entry into force	Ratifications
UNGA	Convention relating to the Status of Refugees		28 July 1951		22 April 1954	145 member states of the UN (44 member states of the Council of Europe: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Republic of Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom)
UNGA	Convention relating to the Status of Stateless Persons		28 September 1954	UN, Treaty Series, Vol. 360, p. 117	6 June 1960	88 member states of the UN (38 member states of the Council of Europe: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Republic of Moldova, Romania, Serbia, Republic of Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom)
UNGA	International Convention on the Elimination of All Forms of Racial Discrimination	ICERD	7 March 1966	UN, Treaty Series, Vol. 660, p. 195	4 January 1969	177 member states of the UN (including all member states of the Council of Europe)
UNGA	International Covenant on Civil and Political Rights	ICCPR	16 December 1966	UN, Treaty Series, Vol. 999, p. 171	23 March 1976	168 member states of the UN (including all member states of the Council of Europe)

Authority	Title	Abbreviation	Date adopted	Reference information	Entry into force	Ratifications
UNGA	International Covenant on Economic, Social and Cultural Rights	ICESCR	16 December 1966	UN, Treaty Series, Vol. 993, p. 3	3 January 1976	164 member states of the UN (including all member states of the Council of Europe with the exception of Andorra)
UNGA	Convention on the Elimination of All Forms of Discrimination against Women	CEDAW	18 December 1979	UN, Treaty Series, Vol. 1249, p. 13	3 September 1981	189 member states of the UN (including all member states of the Council of Europe)
UNGA	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	CAT	10 December 1984	UN, Treaty Series, Vol. 1465, p. 85	26 June 1987	159 member states of the UN (including all member states of the Council of Europe)
UNGA	Convention on the Rights of the Child	CRC	20 November 1989	UN, Treaty Series, Vol. 1577, p. 3	2 September 1990	196 member states of the UN (including all member states of the Council of Europe)
UNGA	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	IORMW	18 December 1990	UN, Treaty Series, Vol. 2220, p. 3	1 July 2003	48 member states of the UN (including 6 member states of the Council of Europe: Albania, Azerbaijan, Bosnia and Herzegovina, Montenegro, Serbia and Turkey)
UNGA	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime		15 November 2000	UN, Treaty Series, Vol. 2241, p. 507	28 January 2004	142 member states of the UN (including all member states of the Council of Europe with the exception of: Andorra, Czech Republic, Iceland and Ireland)

Authority	Title	Abbreviation	Date adopted	Reference information	Entry into force	Ratifications
UNGA	Convention on the Rights of Persons with Disabilities	CRPD	13 December 2006	UN, Treaty Series, Vol. 2515, p. 3	3 May 2008	166 member states of the UN (including 42 member states of the Council of Europe: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Republic of Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" Turkey, Ukraine and the United Kingdom)
UNGA	International Convention for the Protection of All Persons from Enforced Disappearance	CPED	20 December 2006	Doc. A/RES/61/177	23 December 2010	52 member states of the UN (including 18 member states of the Council of Europe: Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Italy, Lithuania, Malta, Montenegro, Netherlands, Portugal, Serbia, Republic of Slovakia, Spain and Ukraine)





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