Migration and International Human Rights Law

A Practitioners' Guide

Updated Edition, 2014

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The Guide was researched and written by Massimo Frigo and edited by Róisín Pillay. Legal review was provided by Ian Seiderman. Priyamvada Yarnell co-ordinated the production of its English version. Additional contributions were provided by Leah Hoctor, Sandra Ratjen, Allison Jernow, Mina Baghai and Anne Poulos.

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ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
ICERD	*International Convention on the Elimination of All Forms of Racial Discrimination*
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*
CAT	*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
CRC	*Convention on the Rights of the Child*
ICRMW	*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*
CPED	*International Convention for the Protection of All Persons from Enforced Disappearance*
CRPD	*Convention on the Rights of Persons with Disabilities*
ECHR	*Convention for the Protection of Human Rights and Fundamental Freedoms*
ACHR	*American Convention on Human Rights*
ADRDM	*American Declaration on the Rights and Duties of Man*
ACHPR	*African Charter on Human and Peoples' Rights*
ArCHR	*Arab Charter on Human Rights*

International bodies

CCPR	*Human Rights Committee*
CESCR	*Committee on Economic, Social and Cultural Rights*
CAT	*Committee against Torture*
CERD	*Committee on the Elimination of Racial Discrimination*
CEDAW	*Committee on the Elimination of Discrimination against Women*
CRC	*Committee on the Rights of the Child*
CMW	*Committee on Migrant Workers*
CED	*Committee on Enforced Disappearances*
CRPD	*Committee on the Rights of Persons with Disabilities*
ECommHR	*European Commission on Human Rights*
ECtHR	*European Court of Human Rights*
IACHR	*Inter-American Commission on Human Rights*
IACtHR	*Inter-American Court of Human Rights*
ACommHPR	*African Commission on Human and Peoples' Rights*
ACtHPR	*African Court on Human and Peoples' Rights*
UNHCR	*UN High Commissioner for Refugees*
ExCom	*UNHCR Executive Committee*

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"It is true that we have risked to die. But we were born in the wrong part of the world. If we do not risk, we get nothing from this life"

Youssef, an undocumented migrant in Italy*

"How our societies treat migrants will determine whether we succeed in building societies based on justice, democracy, dignity and human security for all."

Navanethem Pillay,
UN High Commissioner for Human Rights**

* From Fabrizio Gatti, Bilal: Viaggiare, Lavorare, Morire da Clandestini, RCS Libri SpA, Milan, 2007, p. 385 (unofficial translation).

** Address by Ms Navanethem Pillay, United Nations High Commissioner for Human Rights, at the Global Forum on Migration and Development/Civil Society Days, Puerto Vallarta, Mexico, 8 November 2010.

Introduction

I. Purpose of this Guide

When people cross their country's border, they might not know it yet, but the world no longer sees them as it did before. They have a special label or status now: they are migrants. And because of this, they will often find themselves in an inferior position to those around them, who hold the passport of the country in which they live.

Whatever the circumstances in which they travel, those who become migrants typically move in a new, unfamiliar, and less secure world. Whether they have entered with an authorisation or they are undocumented, migrants will generally find their rights diminished in comparison with the citizens of their country of residence. The degree to which those rights are violated, and the degree to which migrants are excluded from legal protection or redress, varies widely from jurisdiction to jurisdiction. A "legal" migrant may face workplace violence or sub-standard working conditions and a lack of labour rights protection and be fearful of claiming legal protection because a supervisor threatens dismissal and subsequent loss of a work permit. A refugee may become caught in the complex, long, and often arbitrary maze of a refugee qualification procedure, during which rights are curtailed and the applicant is suspended in a legal limbo without identity. Most vulnerable will be the undocumented migrant. People finding themselves in this situation, while having a nominal entitlement to their human rights, effectively lack, because of their fear of being identified and deported, any opportunity to vindicate those rights, or to access the remedies which should protect them.[1] They risk exposure to economic or physical exploitation, to destitution, and to summary return to their country of origin, where some may face danger to their safety or even to their life.

There is, as will be described, a multitude of reasons to migrate.[2] For irregular migrants however, who enter a country in an undocumented fashion or stay there after expiration of a permit, an almost constant factor is, that the motivation not to be sent back to their country of origin is so strong they are prepared to accept many hardships and denials

[1] Global Group on Migration (GMG), *Statement on the Human Rights of Migrants in Irregular Situation,* 30 September 2010, http://www.globalmigrationgroup.org/sites/default/files/uploads/news/GMG Joint Statement Adopted 30 Sept 2010.pdf. See, footnote No. 4 for a description of the GMG.

[2] IACHR, *Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere,* OAS Doc. OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, para. 61. See also, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their family,* CMW, UN Doc. CMW/C/GC/2, 28 August 2013.

of rights. Whether someone migrates to escape war, famine, persecution, natural catastrophes, economic depression, or just to find a better chance for a better life, the person often finds the insecurity, restrictions and sometimes destitution of their situation in the country of destination preferable to that at home. Many have no choice but to leave. Those with some limited choice are prepared to risk losing their rights, for a fighting chance of thereafter gaining them. This is the human condition that migration policies and laws struggle with, manage and sometimes exploit.

Migration is a highly charged and contested political issue in most destination States. Control of national borders is seen as an essential aspect of the sovereign State. National political debates on migration or migrants can be a flashpoint for political and social anxieties about security, national identity, social change and economic uncertainty. These political battles are also manifested in national law, which sets the framework within which migrants' human rights are threatened. States adopt increasingly restrictive rules, often fuelled by popular hostility to immigrants. Such policies and laws, restricting legal migration, often have the effect of increasing the proportion of undocumented migrants, whose vulnerability to exploitation and abuse is acute.[3] There are therefore essential interests at stake for both the individual and the State.

II. Migration and Human Rights

Human rights, as they are guaranteed in both national and international law, have an essential role in protecting migrants caught up in these powerful forces. The Global Migration Group[4] recently recalled that the "fundamental rights of all persons, regardless of their migration status, include:

- The right to life, liberty and security of the person and to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;
- The right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status;

[3] IACHR, *Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere,* OAS Doc. OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, para. 56. See also, CMW, General Comment No. 2, *op. cit.*, fn. 2.

[4] The Global Migration Group (GMG) is an inter-agency group bringing together heads of the International Labour Organisation (ILO), the International Organisation for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), the UN Conference on Trade and Development (UNCTAD), the UN Development Programme (UNDP), the UN Department of Economic and Social Affairs (UNDESA), the UN Education, Scientific, and Cultural Organisation (UNESCO), the UN Population Fund (UNPF), the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNCF), the UN Institute for Training and Research (UNITR), the UN Office on Drugs and Crime (UNODC), the World Bank and UN Regional Commissions.

- The right to be protected from abuse and exploitation, to be free from slavery, and from involuntary servitude, and to be free from torture and from cruel, inhuman or degrading treatment or punishment;
- The right to a fair trial and to legal redress;
- The right to protection of economic, social and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work; and
- Other human rights as guaranteed by the international human rights instruments to which the State is party and by customary international law."[5]

All these rights are human rights to which all persons, without exception, are entitled. Persons do not acquire them because they are citizens, workers, or on the basis of a particular status. No-one may be deprived of their human rights because they have entered or remained in a country in contravention of the domestic immigration rules, just as no-one may be deprived of them because they look like or are "foreigners", children, women, or do not speak the local language. This principle, the universality of human rights, is a particularly valuable one for migrants.

The reality, however, is that rights are illusory if there is no way to claim their implementation. A national legal system that can provide effective access to justice and remedies for violations of human rights is therefore essential. The whole apparatus of legal standards, lawyers, judges, prosecutors, legal practitioners and activists must operate effectively to provide migrants with legal remedies for violations of their human rights.

This is where this Guide has a role. Migrants generally—and undocumented migrants especially—do not have easy, if any, access to an effective legal remedy for redressing human rights violations. Most of the time, national legislation will not provide them with a remedy, or will create many obstacles to its access, such as the threat of an automatic expulsion or deportation once the migrant contacts the authorities. In this world, migrants have rights, but no or little way to make use of them or ask for their respect. They are legally voiceless.

International law—and, in particular, international human rights law and international refugee law—may provide an, albeit incomplete, answer to the problem. States' legal systems are becoming increasingly open to

[5] GMG, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation, op. cit.*, fn. 1.

the influence of international law. In many countries it is now possible to invoke, in one way or another, international law in domestic courts in order to claim the respect and implementation of human rights, including for migrants. Even in countries where that is not possible, or when the international human rights law claim has failed in the national system, if the country is a party to an international or regional human rights treaty, it is often possible to challenge the State at the international level for its failure to do so. International law can be a powerful tool for change: either for the actual situation of the individual migrant, through redress in domestic courts, or for the advancement of policy or laws that can ameliorate migrants' situation, through claims before international mechanisms.

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

III. The multifaceted characteristic of the migration experience

The share of international migrants in the world's population has remained stable in the past 50 years, at a rate of around three percent of the world population. Therefore, although particular population movements may be temporary or cyclic, the phenomenon of migration is constant.[6] In 2009, the total population of international migrants was estimated at around 214 million people.[7] Forty-eight percent of the total international migration is composed of women, most of whom now migrate on their own rather than as family members of other migrants.[8] The ILO has established that around 90% of international migration is composed of economically active migrants and members of their families. Only seven to eight percent of migrants are refugees and asylum-seekers.[9] In 2009, an estimated 50 million people were living or working in a foreign country with irregular status.[10]

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[6] See, UNDP, *Human Development Report 2009—Overcoming barriers: Human Mobility and Development,* 2009, p. 2.

[7] See, *Ibid.*, p. 21. See also, *Migration in an interconnected world: New directions for action,* Report of the Global Commission on International Migration, October 2005, para. 2; *International Labour Migration. ARights-based Approach,* Geneva, International Labour Office, 2010, p. 1.

[8] See, *Ibid.*, p. 25. See also, *International Labour Migration. A Rights-based Approach, op. cit.,* fn. 7, pp. 1, 3; *General Recommendation No. 26 on women migrant workers,* CEDAW, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, para. 8. See also, IACHR, *Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, op. cit.,* fn. 2, para. 43.

[9] See, *International Labour Migration. A Rights-based Approach, op. cit.,* fn. 7, p. 2.

[10] See, UNDP, *Human Development Report 2009, op. cit.*, fn. 6, p. 2.

One of the difficulties for any publication that aims to address problems of migration—in law or in practice—is the complexity and diversity of the migration experience. The reasons why people migrate are varied, complex, and subject to change; and the people who migrate are not easily classifiable—they come from a range of circumstances and backgrounds.[11]

Generally speaking, 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, or in order to escape persecution, human rights abuses, threats to life or physical integrity, war or civil unrest. The distinction between the causes of migration is not straightforward and the boundaries drawn by international law do not always reflect the reality of migrant's lives. A migrant might leave his or her country because of persecution on grounds of race, for example, or due to extreme poverty there. In the first case, he or she will be entitled to claim refugee status, while the second will be considered a case of economic migration, attracting no particular international protection, even though the threat to the individual's life may be just as significant as in the first case. The same must be said for people who leave their country due to natural catastrophes caused by climate change, although discussion at a political level on the existence of "climate-change refugees" has now begun.[12]

As regards entry, or attempted entry, of a migrant to a foreign country, a number of broad, sometimes overlapping, groups of migrants can be identified:

- Regular migrants: migrants who enter the State after having obtained an authorisation, whether temporary or not, by the destination State;
- Undocumented migrants: migrants who enter the State in an irregular fashion, without having the proper documentation; or migrants who entered in a regular fashion whose authorisation has expired and who have remained, nonetheless, in the national territory. This Guide uses the terminology recommended by the UN General Assembly,[13] by avoiding the term "illegal migrant" and using "undocumented or irregular migrant" as synonyms. It must be stressed that the term "irregular" migrant does not express a quality of the person but a mere reference to his or her situation of entry or stay.

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[11] See, Gabriela Rodríguez Pizarro, UN Special Rapporteur on the rights of migrants, *Annual Report 2004,* UN Doc. E/CN.4/2005/85, 27 December 2004, para. 74; and, IACHR, *Second Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, op. cit.,* fn. 2, para. 61.

[12] See, *inter alia*, the webpage on "climate change" of the UN High Commissioner for Refugees (UNHCR) at: http://www.unhcr.org/pages/49e4a5096.html.

[13] General Assembly (GA) resolution 3449(XXX), *Measures to ensure the human rights and dignity of all migrant workers,* 9 December 1975, para. 2.

- Asylum-seekers or refugees: migrants who enter a country, whether regularly or irregularly, in order to escape persecution in their country of origin as defined by Article 1A of the *Geneva Refugee Convention*.
- Other migrants needing protection: this category includes several kinds of migrants whose status is not well-defined but who are in need of international protection, recognised, to varying extents, by international law. These include stateless persons (whether or not they are asylum-seekers or refugees), victims of trafficking, unaccompanied children whose status has not been defined, failed asylum-seekers or undocumented migrants who cannot be expelled due to principle of *non-refoulement* (see Chapter 1).

This classification is only partially appropriate, since, as was recognised by the Global Commission on International Migration, "an individual migrant may belong to one or more [...] categories at the same time. She or he may move successfully from one category to another in the course of the migratory movement, or may seek to be reclassified from one category to another, as when an economic migrant submits a claim to asylum in the hope of gaining the privileges associated with refugee status."[14]

By choice or force of circumstance, the status of a migrant is almost never stable. An economic migrant might become a refugee while in the country of destination. A refugee might lose his status and become an undocumented migrant because the circumstances which led to a fear of persecution cease to exist in his country of origin. A regular migrant might become undocumented if she overstays a residence permit term, or might be regularised, through amnesties, or regular employment. "Overstaying" has been identified as one of the major channels through which a migrant acquires irregular status. As the UNDP pointed out, "in some island states, such as Australia and Japan, overstaying is practically the only channel to irregular entry; even in many European countries, overstay appears to account for about two thirds of unauthorised migration."[15]

Factors such as sex and gender, age, race and national origin, also have a significant impact on the migration experience.

Migrants often face discrimination based on their race, national, religious or ethnic origin or identity. This constitutes a form of discrimination additional to the xenophobia to which they are often subject for the mere fact of being non-nationals. As the UN Special Rapporteur on the right of migrants pointed out, "[p]eople whose colour, physical

[14] *Migration in an interconnected world: New directions for action, op. cit.*, fn. 7, para. 15. See also, UNDP, *Human Development Report 2009, op. cit.*, fn. 6, p. 26.

[15] UNDP, *Human Development Report 2009, op. cit.*, fn. 6, p. 26.

appearance, dress, accent or religion are different from those of the majority in the host country are often subjected to physical violence and other violations of their rights, independently of their legal status. The choice of victim and the nature of the abuse do not depend on whether the persons are refugees, legal immigrants, members of national minorities or undocumented migrants."[16] She also highlighted the situations in which some migrants are preferred to others for granting of authorisations of entry or in the labour market, due to their race, national or ethnic origin or religious identity.[17] Such discrimination is prohibited by international human rights law, and, more specifically, by the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).[18] The international community has also rejected this discrimination and has strongly held in the *Durban Declaration* that "policies towards migration should not be based on racism, racial discrimination, xenophobia and related intolerance".[19]

Women migrants often face additional human rights concerns as a result of their sex and gender. Not only may they confront discrimination as a result of their status as non-nationals, but in addition a range of sex or gender-specific forms of discrimination may arise for them as women. In the words of the Committee on the Elimination of Discrimination against Women female migrants "often experience intersecting forms of discrimination, suffering not only sex- and gender-based discrimination, but also xenophobia and racism. Discrimination based on race, ethnicity, cultural particularities, nationality, language, religion or other status may be expressed in sex- and gender-specific ways."[20] The Committee on the Elimination of Racial Discrimination has noted that "there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way or to a different degree than men," and "racial discrimination may have consequences that affect primarily or only women."[21] Women migrants may also be at

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16 Gabriela Rodríguez Pizarro, UN Special Rapporteur on the rights of migrants, *Annual Report 1999,* UN Doc. E/CN.4/2000/82, 6 January 2000, para. 32. See also para. 48.

17 *Ibid*., para. 54.

18 Article 1, *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). The permission of distinctions between nationals and non-nationals of Article 1.2 ICERD cannot override the prohibition of discrimination based on race, colour, descent, or national or ethnic origin. See, *General Recommendation No. 30, Discrimination against Non-citizens,* CERD, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 1 October 2004; and, Gabriela Rodríguez Pizarro, UN Special Rapporteur on the rights of migrants, *Annual Report 2000,* UN Doc. E/CN.4/2001/83 9 January 2001.

19 *Declaration of World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,* 2001, para. 12. See also, paras. 16, 38, 47–51, and for asylum-seekers and refugees, paras. 52–55.

20 CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 14.

21 *General Recommendation No. 25, Gender-related dimensions of racial discrimination,* CERD, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 20 March 2000, para.1.

heightened risk of discrimination on grounds of age, disability, class and social status.[22] As discussed in Section IV below, such discrimination is prohibited by international human rights law.

Children also migrate and require a different approach than that reserved to adults. Again, traditional migration perspectives have been modelled on the assumption that migrants are adults. Children may migrate with adult family members, or alone. Under international human rights law, the overriding principle governing the rights of children, is that in all actions relating to them, the best interests of the child must be a primary consideration.[23] Unaccompanied minors are particularly vulnerable to exploitation and abuse,[24] but children migrating with their family, especially where they are undocumented, may also encounter problems of access to education or healthcare because their parents, out of fear of being deported upon contact with national authorities, will not allow their children to have access to those authorities.[25]

Many other migrants may also suffer discrimination on a range of other grounds, including discrimination on the basis of age, class, disability, economic or social status, marital status, or sexual orientation and gender identity.[26]

In this Guide, the term of "migrant" will be used to include all people who find themselves outside of their country of origin and/or nationality, regardless of their reason to migrate. The term "migrant", when used in this general way, will also include refugees and asylum-seekers. However, when certain rights or situations apply only to certain catego-

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[22] *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights,* CESCR, UN Doc. E/C.12/GC/20, 10 June 2009, para. 17. See also, *General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights,* CESCR, UN Doc. E/C.12/2005/4, 11 August 2005, para. 5. Similarly the Human Rights Committee has noted that discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. See, *General Comment No. 28, Equality of rights between men and women (article 3),* CCPR, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 30; *General Recommendation No. 25 on temporary special measures,* CEDAW, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 2004, para. 12.

[23] Article 3.1, *Convention on the Rights of the Child* (CRC) (emphasis added).

[24] GA resolution No. 50/150, UN Doc. A/RES/50/150, 9 February 1996, Article 3. See also, GA resolutions No. 51/73, UN Doc. A/RES/51/73, 12 February 1997; No. 52/105, UN Doc. A/RES/52/105, 11 February 1998; No. 53/122, UN Doc. A/RES/53/122, 10 February 1999; No. 56/136, UN Doc. A/RES/56/136, 15 February 2002; No. 49/172, UN Doc. A/RES/49/172, 24 February 1995.

[25] GMG, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation, op. cit.*, fn. 1

[26] A useful reference in regard to the latter are the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity,* March 2007, available at http://www.yogyakartaprinciples.org/principles_en.pdf ("Yogyakarta Principles"). The Principles were developed by the ICJ and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, 6–9 November 2006.

ries of migrants, these will be referred to by more specific terms such as "refugees", "asylum-seekers" or "migrant workers".

IV. The Legal Framework

Human rights are rights to which all persons, without exception, are entitled. Persons do not acquire them because they are citizens, workers, or have any other status. The Universal Declaration of Human Rights (UDHR) affirmed in 1948 that "**all human beings** are born free and equal in dignity and rights".[27]

The legal framework which this Guide applies is the universal framework of international human rights law, applicable to all human beings, contained in the *Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Covenant on Civil and Political Rights* (ICCPR). These treaties are supplemented by regional human rights instruments of general breath: the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and its Protocols and the *Revised European Social Charter* (ESCr) in the Council of Europe system; the *American Declaration on Rights and Duties of Man* (ADRDM), the *American Convention on Human Rights* (ACHR) and its *Additional Protocol in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador), for the Inter-American system; the *African Charter on Human and Peoples' Rights* for the African one; and the *Arab Charter on Human Rights* for the Arab system.

Other specific human rights treaties further elaborate the framework for the respect, protection, promotion and fulfillment of the human rights of specific categories of people or address specific human rights, many of which are of significant for some or all migrants. These include, at a global level, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); the *Convention on the Rights of the Child* (CRC) and its Protocols; the *Convention on the Rights of Persons with Disabilities* (CRPD); the *International Convention for the Elimination of All Forms of Racial Discrimination* (ICERD); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and the *International Convention for the Protection of All Persons from Enforced Disappearance* (CPED). These treaties are supplemented by many other global and regional treaties and standards, considered throughout the Guide.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is the human rights treaty elaborating particular standards addressed to migrant

[27] Article 1, *Universal Declaration of Human Rights* (UDHR).

workers and members of their families. It has not yet been widely ratified, and none from the most developed countries are party to it.[28] These treaties constitute the backbone of the analysis of the specific human rights issues which are addressed by the Guide.

A basic principle of international human rights law, which will pervade all the Chapters of the Guide, is that States have obligations not only to respect, but also to protect and fulfil human rights. The duty to respect requires the State not to take action that directly violates a particular right. The duty to protect requires the State, through legislation, policy and practice, to ensure the protection of rights, including by taking steps to prevent third parties from violating rights. The duty to fulfil imposes on a State's obligations to facilitate, provide or promote access to human rights.[29]

1. Equality and Non-Discrimination

Of paramount importance for migrants, is the international legal entitlement of all human beings to the enjoyment of human rights on a basis of equality and free from discrimination on grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.[30] This fundamental legal principle is encompassed in a wide range of international and regional

[28] At 10 January 2014, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW) had 47 State Parties.

[29] See, generally, International Commission of Jurists, *Courts and Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability,* ICJ Human Rights and Rule of Law Series No. 2, Geneva, 2008, pp. 42–53. See also a complete description in *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria,* ACommHPR, Communication No. 155/96, 30th Ordinary Session, 13–27 October 2001, paras. 44–48; and, *General Recommendation No. 24: Women and Health,* CEDAW, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), 1999, paras. 13–17. See also, Article 6, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* adopted 22–26 January 1997 (Maastricht Guidelines). The Maastricht Guidelines were adopted in an expert conference held in Maastricht, 22–26 January 1997, at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The instrument has been extensively employed by the CESCR to interpret the ICESCR).

[30] Articles 2.3 and 26, *International Covenant on Civil and Political Rights* (ICCPR); Article 7 ICRMW; Article 14, *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights—ECHR); Article 1 of Protocol 12 ECHR; Articles 1 and 24, *American Convention on Human Rights* (ACHR); Articles 2 and 3, *African Charter on Human and Peoples' Rights* (ACHPR); Articles 3 and Article 11 *Arab Charter on Human Rights* (ArCHR). See also, *General Comment No. 15, The position of aliens under the Covenant,* CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 11 April 1986, paras. 9–10. Article E of the *Revised European Social Charter* (ESC(r)) and Article 21 of the *Charter of Fundamental Rights of the European Union* (EU Charter) refer also to the ground of "national association with a national minority"; the EU Charter additionally refers to "ethnic origin", "genetic features", "disability", "age", and "sexual orientation"; the ACHR (Article 1) and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador) (Article 3) to "economic status"; Article 2 ACHPR and Article 3 of the *African Charter on the Rights and Welfare of the Child* (ACRWC) to "ethnic group" and "fortune"; Article 3.1 ArCHR to "physical or mental disability".

treaties.[31] It is also the subject of dedicated instruments which address particular forms of discrimination and apply the principles of universality, non-discrimination and equality in respect of particular groups, for example, ICERD, CEDAW, CRPD.[32]

International and regional judicial and quasi-judicial bodies have repeatedly addressed the obligation on States to respect and ensure the equal enjoyment of human rights and freedom from discrimination on prohibited grounds.[33] They have addressed what constitutes a prohibited ground of discrimination, specifying that in addition to the express grounds listed in the treaties, the "other status" ground entails a number of implied grounds, including: age, disability, economic and social status, health situation, marital status, sexual orientation and gender identity.[34]

They have also addressed the nature of States' obligations to ensure equality and non-discrimination. They have specified that State actors must refrain from discriminatory actions that undermine the enjoyment of rights (duty to respect); prevent and protect against certain forms of discrimination by private actors (duty to protect); and take positive pro-

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31 See, above, fn. 30. See, furthermore, *General Comment No. 18, Non-Discrimination,* CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 11 October 1989; CCPR, *General Comment No. 28, op. cit.*, fn. 22; CESCR, *General Comment No. 20, op. cit.*, fn. 22; CESCR, *General Comment No. 16, op. cit.*, fn. 22; CEDAW, *General Recommendation No. 25, op. cit.*, fn. 22; *General Recommendation No. 28 on Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,* CEDAW, UN Doc. CEDAW/C/2010/47/GC.2, 19 October 2010; CERD, *General Recommendation No. 25, op. cit.*, fn. 21; *General Comment No. 2: Implementation of article 2 by States parties,* CAT, UN Doc. CAT/C/GC/2, 24 January 2008.

32 It has not yet been widely ratified, and none from the most developed countries are party to it. See also, at the regional level, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Convention of Belém do Pará); *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.*

33 See, fn. 31. See also, for example, *Juridical Condition and Rights of the Undocumented Migrants,* IACtHR, Advisory Opinion OC-18/03, 17 September 2003 (Advisory Opinion on Undocumented Migrants); *Legal Resources Foundation v. Zambia,* ACommHPR, Communication No. 211/98, 29th Ordinary Session, 23 April – 7 May 2001; *Certain Aspects of the Laws on the Use of Languages in Education in Belgium,* ECtHR, Applications Nos. 1474/62–1677/62–1691/62–1769/63–2126/64, Judgment of 23 July 1968.

34 CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 15. See also, as example, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* IACtHR, Advisory Opinion OC-4/84, 19 January 1984; *Legal Resources Foundation v. Zambia,* ACommHPR, *op. cit.*, fn. 33; *Alatulkkila and Others v. Finland,* ECtHR, Application No. 33538/96, Judgment of 28 July 2005; *Sidabras and Dziautas v. Lithuania,* ECtHR, Applications Nos. 55480/00 and 59330/00, Judgment of 27 July 2004; *Salgueiro da Silva Mouta v. Portugal,* ECtHR, Application No. 33290/96, Judgment of 21 December 1999; *E.B. v. France,* ECtHR, GC, Application No. 43546/02, 22 January 2008; *Young v. Australia,* CCPR, Communication No. 941/2000, Views of 6 August 2003; *Love et al. v. Australia,* CCPR, Communication No. 983/2001, Views of 25 March 2003. For a thorough explanation and jurisprudence related to the ground of "sexual orientation" see, International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law—Practitioners' Guide No. 4,* Geneva, 2009.

active steps to ensure the equal enjoyment of human rights (obligation to fulfil).[35] They have affirmed that States must ensure both *de facto* and *de jure* equality,[36] and eliminate both direct and indirect discrimination. This requires that States address and prevent discrimination in law and practice. It also necessitates that they not only eliminate plainly discriminatory laws, policies, and practices but also ensure that seemingly neutral measures do not have a discriminatory effect in real terms.[37] In certain instances, States will be obliged to take account of differences and under certain circumstances, different treatment will be required in order to ensure substantive equality.[38] In order to correct situations of inequality and discrimination, a State may also be required to implement temporary special measures deemed necessary in order to re-establish equality.[39]

ICERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[40] Although differences in treatment between nationals and non-nationals are permitted by Article 1.2 ICERD, discrimination in legislation, policy or practice between different groups of non-nationals based on race, colour, descent, or national or ethnic origin would constitute a breach of the treaty.[41]

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35 CESCR, *General Comment No. 16, op. cit.*, fn. 22, paras. 17–18, and 21; CESCR, General Comment No. 20, *op. cit.*, fn. 22, para. 8(b); CEDAW, *General Recommendation No. 25, op. cit.*, fn. 22, paras. 4, 7–8. See also, paras. 2 and 19. See, on the obligation to fulfil, CERD, *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination,* 75th session, August 2009, para. 20.

36 CESCR, *General Comment No. 16, op. cit.*, fn. 22, para. 7; CEDAW, *General Recommendation No. 25, op. cit.*, fn. 22, para. 4; CERD, *General Recommendation No. 32, op. cit.*, fn. 35, para. 6; CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 8.

37 CEDAW, *General Recommendation No. 25, op. cit.*, fn. 22, para. 7; CESCR, *General Comment No. 16, op. cit.*, fn. 22, paras. 5, 12–13; CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 10; *General Comment No. 14, The right to the highest attainable standard of health,* CESCR, Un Doc. E/C.12/2000/4, 11 August 2000, para. 19; CERD, *General Recommendation No. 32, op. cit.*, fn. 35, para. 7.

38 CERD, *General Recommendation No. 32, op. cit.*, fn. 35, para. 8; CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 4; CEDAW, *General Recommendation No. 25, op. cit.*, fn. 22, para. 8.

39 Article 2.2 ICERD; Article 4, *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). See also, CEDAW, *General recommendation No. 25, op. cit.*, fn. 22, and CERD, *General Recommendation No. 32, op. cit.*, fn. 35.

40 Article 1.1 ICERD.

41 See, CERD, *General Recommendation No. 30, op. cit.*, fn. 18; and Gabriela Rodríguez Pizarro, UN Special Rapporteur on the rights of migrants, *Annual Report 2000, op. cit.*, fn. 18. The CERD has expanded on the nature of the obligations on States parties to the Convention in a number of general comments available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11.

CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[42]

2. Beyond International Human Rights Law

Although international human rights law constitutes the main framework for the Guide, there are other bodies of international law without which a Guide on the human rights of migrants would be incomplete. The first of these is international refugee law embodied in the *Geneva Convention Relating to the Status of Refugees* of 1951, and its *Protocol Related to the Status of Refugees* of 1967 (altogether, the *Geneva Refugee Convention*), and supplemented by regional instruments and standards. International refugee law is considered in particular in Chapter 1 of the Guide.

As violations of labour rights are a common feature of the migration experience, the Conventions negotiated under the auspices of the International Labour Organisation are addressed in Chapter 6. Finally, mention will also be made of other two bodies of law which concern migrants in specific situations: one is international criminal law related to trafficking and smuggling, which will be dealt with briefly in Chapter 1. The other, also addressed in Chapter 1, is international maritime law, which is of relevance for those migrants who try to reach their destination by sea.

V. A Guide for Practitioners: limits and benefits

The Guide has admittedly certain limitations. First, it presents a snapshot of an area of law in constant and dynamic development. It addresses some recent developments and principles which are not yet clearly established in international law, but it does not speculate or make recommendations on the many points where standards and jurisprudence may progress further. As the Guide is aimed at practitioners, it presents the established law and principles which will be of most use in practice before national or international courts or tribunals, or in making legal arguments in regard to proposed laws or policies. In setting out the cur-

[42] The Committee has expanded on the nature of the obligations on States parties to the Convention in a number of general recommendations available at http://www2.ohchr.org/english/bodies/cedaw/comments.htm. See also, Article 3 ICCPR; Article 3, *International Covenant on Economic, Social and Cultural Rights* (ICESCR); Articles 1 and 2 CEDAW; CESCR, *General Comment No. 16, op. cit.*, fn. 22, paras. 1 and 10; CESCR, *General Comment No. 20, op. cit.*, fn. 22, paras. 2, 3, 4 and 20.

rent state of international human rights law, it is intended to provide a tool to further develop national and international law protections of the human rights of migrants.

Secondly, the Guide focuses on human rights issues and standards that are generally of most relevance to the migration process and to the circumstances and treatment of migrants. It by no means addresses all aspects of the migration experience—which can differ significantly between countries or regions—nor does it deal comprehensively with every human rights violation that migrants may experience. Instead it aims to synthesise and clarify international standards on key issues, in particular: the rights and procedures connected to the way migrants enter a country and their status in the country of destination (Chapter 1); the human rights and refugee law obstacles to the carrying out of expulsion of migrants (Chapter 2); the human rights and refugee law rights linked to expulsion procedures (Chapter 3); the rights and guarantees for administrative detention of migrants (Chapter 4); the respect, protection and promotion of certain economic, social and cultural rights of particular concern to migrants, such as the right to education, to the highest attainable standard of health, to adequate housing, to water, to food, and to social security (Chapter 5); and the rights connected to work and labour (Chapter 6). Amongst the issues which the Guide does not deal with, for example, are those of racial and ethnic hatred, hate speech and xenophobia, and the issue of extradition procedures, which pertain more to the domain of criminal cooperation, although the principles presented in Chapter 2 will also be generally applicable to extradition.

The Guide aims to have a global scope, in drawing on the jurisprudence of all international and regional human rights systems, although it is notable that on some issues, there is a preponderance of ECHR case-law, since many migration matters have been litigated extensively before the European Court, leading to a very detailed jurisprudence. However, there are themes, such as that of labour rights, where the influences of international labour law and of the Inter-American system are dominant. It is hoped that jurisprudence from regional systems should also be useful to practitioners in countries outside that region, as comparative precedent and in illustrating the development of international human rights principles.

The Guide does not, for practical reasons, draw on the vast and valuable comparative national jurisprudence relating to human rights and migration. Neither is it possible for the Guide to analyse comprehensively the impact of European Union law, in both protecting and at times restricting the rights of migrants in EU Member States, although key EU legal instruments and principles are described. It does not address the particular situation of citizens of EU Member States, who under the Treaty

on the European Union (TEU) are European citizens, and enjoy freedom of movement and residence in the EU, without particular procedures and subject to very few conditions. This notwithstanding, in consideration of the fact that EU law presently binds 28 States, the Guide provides some summaries of the most relevant EU immigration legislation applying to nationals of non-EU Member States. This will be of particular use to those lawyers who have to litigate in a EU Member State, as the provisions of EU law are directly applicable in those countries.

VI. A Guide to make rights real

Regardless of its limitations, this Guide has been written as a practical means to enhance the human rights of migrants, to assist in freeing them from the limbo of legal process. As outlined above, international law is a powerful tool for change. It is for lawyers, activists, and legal practitioners to use it to provide tangible rights to migrants. To do this, they need the best possible understanding of the international human rights standards relevant to migrants and the means to claim their respect or implementation at the national and international level. This is what this Guide hopes to provide: a tool to empower migrants and their representatives to make migrants' rights a reality and to create effective systems of domestic redress for violations of their human rights. It aims to contribute towards ending that second-class status of migrants which, in the spirit of the Universal Declaration of Human Rights' affirmation that "all human beings are born free and equal in dignity and rights", cannot be accepted.

CHAPTER 1: ENTRY, STAY AND STATUS OF MIGRANTS

This Chapter addresses the rights of different categories of migrants related to entry and stay on the territory of a foreign State. Part I addresses general principles related to entry of migrants to the jurisdiction. Part II considers specific statuses or situations which confer rights to enter or remain on the territory, and/or additional procedural rights or rights to protection or support.

I. Entry and stay on the territory

1. Rights to enter and remain

As a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals. However in exercising control of their borders, States must act in conformity with their international human rights obligations.[43] In certain specific categories of cases, States may be required by international law to permit a migrant to enter or remain: where a migrant meets the criteria for refugee status, or complementary protection; or where entry to the territory is necessary for purposes of family reunification. These categories are considered below in Section II.

2. When someone "enters": issues of jurisdiction

The key to the responsibility of a State to protect the rights of a migrant (as of any other person) is whether the person is subject to the jurisdiction, i.e. the space or persons over which a State has authority and for which the State is therefore internationally responsible. This follows from the basic principle of international human rights law that States must guarantee, secure and protect the human rights of everyone with-

[43] Maurice Kamto, UN Special Rapporteur of the International Law Commission, *Third report on the expulsion of aliens,* UN Doc. A/CN.4/581, 19 April 2007 ("ILC Third Report"), paras. 2 and 7. See also, *Boffolo case* (Italian-Venezuelan Mixed Claims Commission, 1903), UNRIAA, vol. X, p. 531; *Paquet case* (Belgian-Venezuelan Mixed Claims Commission, 1903), UNRIAA, vol. IX, p. 325; *Moustaquim v. Belgium,* ECtHR, Application No. 12313/86, Judgment of 18 February 1991, para. 43; *Vilvarajah and Others v. United Kingdom,* ECtHR, Applications Nos. 13163/87—13164/87—13165/87—13447/87—13448/87 Judgment of 30 October 1991, para. 102; *Chahal v. United Kingdom,* ECtHR, GC, Application No. 22414/93, Judgment of 15 November 1996, para. 73; *Ahmed v. Austria,* ECtHR, Case No. 71/1995/577/663, Judgment of 17 December 1996, para. 38; *Boughanemi v. France,* ECtHR, Case No. 16/1995/522/608, Judgment of 24 April 1996, para. 41; *Bouchelkia v. France,* ECtHR, Case No. 112/1995/618/708, Judgment of 29 January 1997, para. 48; and *H. L. R. v. France,* ECtHR, GC, Application No. 24573/94, Judgment of 29 April 1997, para. 33; *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* ECtHR, Plenary, Case No. 15/1983/71/107–109, Judgment of 24 April 1985, para. 67; *Union Inter-Africaine des Droits de l'Homme (UIADH) and Others v. Angola,* ACommHPR, Communication No. 159/96, 22nd Ordinary Session, 11 November 1997.

in their jurisdiction,[44] irrespective of nationality. Such jurisdiction is not identified solely with a State's territory. The first question to be answered when a migrant arrives in a foreign State is therefore whether they have indeed "entered" the State. In most cases, this will be clear: the person will be considered to have entered the State when he or she accesses its territory. It has also been clearly established that the migrant is within the jurisdiction of the State when he or she is present in an "international zone" or *"zone d'attente"* of an airport.[45]

However, the term "jurisdiction" has a wider reach than the national territory of the State. It applies to all persons who fall under the authority or the effective control of the State's authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, in a range of contexts. These include situations where the State exercises effective control over all or part of a territory or persons; some situations where it has effectively extended its jurisdiction by bringing about forseeable effects in another territority; or where it may be required by under an international obligation to to so extend its jurisdiction.[46] The European Court of Human Rights has found that jurisdiction has extra-

[44] Article 2.1 ICCPR; Article 2.1 CRC; Article 7 ICRMW; Article 1 ECHR; Article 1.1 ACHR; Article 3.1 ArCHR.

[45] *Amuur v. France,* ECtHR, Case No. 17/1995/523/609, Judgment of 20 May 1996, paras. 52–53.

[46] See, *General Comment No. 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, CCPR, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 10–11; *Lopez Burgos v. Uruguay,* CCPR, Communication No. R 12/52, Views of 6 June 1979; *Celiberti de Casariego v. Uruguay,* CCPR, Communication No. 56/1979, Views of 29 July 1981. See also, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* ICJ, Judgment, 19 December 2005, ICJ Reports 2005, p. 168, paras. 180 and 216; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ, Advisory Opinion, ICJ Reports 2004, p. 136, para. 109; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia Montenegro),* ICJ, Judgment, 26 February 2007 No. 91 [2007] ICJ 1; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation),* ICJ, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353; *Victor Saldaño v. Argentina,* IACHR, Petition, Report No. 38/99, Admissibility Decision, 11 March 1999, para. 17; *Haitian Centre for Human Rights v. United States of America,* IACHR, Case 10.675, Report No. 51/96, Merits, 13 March 1997 (Haitian Interdictions Case); *Coard et al v. United States,* IACHR, Case 10.951, Report no 109/99, Merits, 29 September 1999, para. 37; *Detainees in Guantanamo Bay, Cuba,* IACHR, Request for Precautionary Measures, 13 March 2002, para. 532; *Democratic Republic of Congo (DRC) v. Burundi, Rwanda, Uganda,* ACommHPR, Communication 227/1999, 33rd Ordinary Session, May 2003; CAT, General Comment No. 2, *op. cit.,* fn. 31, paras. 7 and 16; *Concluding Observations on USA,* CAT, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 15; *Xhavara and Others v. Italy and Albania,* ECtHR, Application No. 39473/98, Admissibility decision, 11 January 2001; *Women on Waves and Others v. Portugal,* ECtHR, Application No. 31276/05, Judgment of 3 February 2009; *Loizidou v. Turkey,* ECtHR, GC, Application No. 15318/89, Judgment of 18 December 1996; *Issa and Others v. Turkey,* ECtHR, Application No. 31821/96, Judgment of 16 November 2004, para. 66; *Al-Skeini and Others v. United Kingdom,* ECtHR, GC, Application No. 55721/07, Judgment of 7 July 2011, paras. 133–142; *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, Application No. 27765, 23 February 2012, paras. 73–82. See also, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,* 29 February 2012, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf; and their commentary available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf.

territorial reach[47] in a number of distinct situations. This includes cases where the State exercises effective control of an area outside its borders (e.g. in the case of military occupation where effective control of an area can be shown).[48] It also includes situations where agents of the State acting, either lawfully or unlawfully, outside the State's territory, exercise authority or control over an individual—for example, where someone is held in detention, or is within firing range of the State's forces in a border zone.[49] Therefore, a State may have obligations to respect and protect the rights of persons who have not entered the territory, but who have otherwise entered areas under the authority and control of the State, or who have been subject to extra-territorial action (such as detention) by a State agent who has placed them under the control of that State.

Of particular relevance for migrants is the fact that the State's jurisdiction may extend in certain situations to international waters. The Inter-American Commission on Human Rights ("Inter-American Commission") has found that returning asylum-seekers, intercepted on the high seas, to their country of origin, suffered a violation of their right to seek asylum in a foreign country, as protected by the *American Declarations of the Rights and Duties of Man* (ADRDM) and the *American Convention on Human Rights* (ACHR).[50] The Grand Chamber of the European Court of Human Rights has held that measures of interception of boats, including on the high seas, attract the jurisdiction of the State implementing the interception. From the moment of effective control of the boat, all the persons on it fall within the jurisdiction of the intercepting State, which must secure and protect their human rights.[51] The same principles apply in the context of operations of rescue at sea, as will be discussed in Section II.6.

3. Human rights in the entry process

As outlined above, it is a basic principle of human rights law that States' human rights obligations are owed to all within its jurisdiction, regard-

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47 See, *Issa and Others v. Turkey,* ECtHR, *op. cit.,* fn. 46; *Öcalan v. Turkey,* ECtHR, GC, Application No. 46221/99, Judgment of 12 May 2005; *Illich Sanchez Ramirez v. France,* ECommHR, Application No. 28780/95, Admissibility Decision, 24 June 1996; *Pad and Others v. Turkey,* ECtHR, Application No. 60167/00, Admissibility Decision, 28 June 2007; *Isaak and Others v. Turkey,* ECtHR, Application No. 44587/98, Admissibility decision, 28 September 2006; *Xhavara and Others v. Italy and Albania,* ECtHR, *op. cit.,* fn. 46; and, *Women on Waves cases,* ECtHR, *op. cit.,* fn. 46; *Al-Skeini and Others v. United Kingdom,* ECtHR, GC, *op. cit.*, fn. 46, paras. 133–142: *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, paras. 73–82.

48 *Loizidou v. Turkey,* ECtHR, *op. cit.,* fn. 46; *Al-Skeini and Others v. United Kingdom,* ECtHR, GC, *op. cit.*, fn. 46.

49 *Solomou and Others v. Turkey,* ECtHR, Application No. 36832/97, Judgment of 24 June 2008, paras. 50–51.

50 *Haitian Interdictions Case,* IACHR, *op. cit.,* fn. 46, paras. 156, 157 and 163.

51 See, *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, paras. 77–82; *Medvedyev and Others v. France,* ECtHR, GC, Application No. 3394/03, Judgment of 29 March 2010, paras. 62–67.

less of nationality. From the moment migrants enter the State's jurisdiction, territorial or extraterritorial, the State has a duty to respect all their human rights and to protect them from impairment of their rights from third parties that may occur in the entry process, or in the case of irregular migrants, on their interception on entry to the territory. This means that, for example, irregular migrants entering or attempting to enter the territory must not be arbitrarily deprived of life by agents of the State;[52] and that the State has positive obligations to take measures within its power to protect migrants from arbitrary deprivation of life or ill-treatment by third parties, including private actors, on entry to the territory (for example in cases of trafficking or smuggling). This means that where irregular migrants are apprehended by the authorities, they must not be subjected to physical or psychological treatment amounting to torture or other cruel, inhuman or degrading treatment, including the use of excessive physical restraint, or excessive and inappropriate body searches, or compulsory medical testing, and that their rights to health and adequate food while in detention must be guaranteed.

Nevertheless, international human rights law affords limited procedural protection to migrants entering a country: in particular, the right to a fair hearing is unlikely to apply to decisions on entry to the territory. It has been expressly excluded by the European Court of Human Rights in relation to decisions regarding other aspects of immigration control,[53] while the UN Human Rights Committee has left the question open.[54]

Granting of entry must not infringe the protection from discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[55] This protection is enshrined in Article 2.1 ICCPR, read together with Article 13 ICCPR and Article 26 ICCPR (general clause on non-discrimination) as well as in other universal and regional human rights treaties.[56] Both

[52] This also applies to migrants in border zones who have not yet entered the territory but are close enough to be within its agents' authority and control and therefore within its jurisdiction—e.g. within firing range of border guards—see, *Solomou and Others v. Turkey,* ECtHR, *op. cit.*, fn. 49.

[53] *Maaouia v. France,* ECtHR, GC, Application No. 39652/98, Judgment of 5 October 2000, para. 37.

[54] *Adu v. Canada,* CCPR, Communication No. 654/1995, Views of 28 December 1994.

[55] CCPR, *General Comment No. 15, op. cit.*, fn. 30. See, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius,* CCPR, Communication No. 35/1978, Views of 9 April 1981 (Mauritian Women Case), on discrimination based on sex.

[56] 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 I CEDAW; Article 2.1 CRC; Article 1.1 ICRMW; Article 4, *Convention on the Rights of Persons with Disabilities* (CRPD); Article 14 ECHR; Article E, ESC(r); Article II, *American Declaration on the Rights and Duties of Man* (ADRDM); Article 1.1 ACHR; Article 3, *Protocol of San Salvador;* Article 2 ACRWC. However, the principle of non-discrimination does not mean that the State cannot differentiate among different categories of migrants when there is a reasonable ground of justification, e.g. the need to hire people of a certain expertise instead of others. See further, in relation to discrimination in expulsion, Chapter 3 section II.1.e., and, CCPR, General Comment No. 15, *op. cit.*, fn. 30, paras. 9–10.

the UN Human Rights Committee[57] and the European Court of Human Rights[58] have found that legislation which limited the right of free access to the destination country and immunity from deportation to the wives of male citizens, and not the husbands of female citizens, violated the prohibition of discrimination on grounds of sex (Articles 2 ICCPR and 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)), and the rights of the country's female citizens to family life (Articles 17 ICCPR and 8 ECHR) and to the equal enjoyment of human rights (Article 3 ICCPR). It is also worth noting the case of *Hode and Abdi v. the United Kingdom,* in which the European Court of Human Rights ruled that laws differentiating between refugees who had married before leaving their country of origin and those who had married afterwards, for the purpose of family reunification, constituted an unjustified discrimination and, therefore, violated Article 14 ECHR in connection with Article 8 ECHR. The Court, in taking this position, accepted that "in permitting refugees to be joined by pre-flight spouses, the [State] was honouring its international obligations. However, where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State's international obligation will not in itself justify the difference in treatment."[59]

II. Categories and status of migrants

Notwithstanding the right of the State to control its borders, certain situations or legal statuses confer rights to enter or remain on the territory. Others, while not leading to a right to enter or remain, confer particular rights or obligations of protection. This Section describes two types of status which migrants may seek to establish in order to secure leave to enter or remain: refugee status, and the status resulting from family reunification with a migrant already present in the destination State. The procedural rights connected with establishing these statuses and the substantive rights conferred by their establishment are considered. In addition, this Section addresses situations which are recognised as making migrants particularly vulnerable—in particular, human trafficking and smuggling—and therefore giving rise to some additional rights of protection of migrants.

1. Refugee status

The international right to seek asylum was first recognised in the *Universal Declaration of Human Rights* which states in Article 14.1 that "everyone has the right to seek and to enjoy in other countries asylum from perse-

[57] *Mauritian Women Case,* CCPR, *op. cit.*, fn. 55.

[58] *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43.

[59] *Hode and Abdi v. the United Kingdom,* ECtHR, Application No. 22341/09, Judgment of 6 November 2012, para. 55.

cution".[60] While not enshrining a right of asylum, the *Geneva Convention relating to the status of refugees* of 1951, read together with its Additional Protocol of 1967 (*Geneva Refugee Convention*), contains a set of rights and entitlements that follow from the recognition of refugee status. The Convention provides a quasi-universal definition of refugee in Article 1A.2 according to which a refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Although the right of asylum is not guaranteed by binding international human rights law treaties at a global level, the right is protected in several regional instruments. The *American Declaration on the Rights and Duties of Man* protects the right, in Article XXVII, "to seek and receive asylum." The ACHR, in Article 22.7, protects the right "to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes." Despite the seemingly more liberal reference to a "right to seek and receive or be granted asylum", the Inter-American Commission has stressed that this right "implies no guarantee that it will be granted".[61] However, it does assure the right to be heard in presenting the asylum application and other procedural guarantees discussed below.[62] The Commission has generally interpreted these provisions in light of the *Geneva Refugee Convention.*[63] The meaning of asylum under the American Convention and Declaration may also include the other forms of asylum recognised in several Inter-American Conventions on the subject.[64]

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[60] See, Guy S. Goodwin-Gil, *The Refugee in International Law,* Oxford University Press, 2nd Edition, 1998, p. 175; and Alice Edwards, "Human Rights, Refugees and The Right 'To Enjoy' Asylum", 17 *Int'l J. Refugee L.* 293 (2005), p. 299. Within the European Union, the right of asylum is enshrined in Article 18 of the *Charter of Fundamental Rights of the European Union* ("EU Charter").

[61] *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system,* OAS Doc. OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000 (IACHR, Report on Canada), para. 60.

[62] *Ibid*.

[63] *Desmond McKenzie and Others v. Jamaica,* IACHR, Cases 12.023—12.044—12.107—12.126—12.146, Report No. 41/00, Merits, 13 April 2000, para. 229; *Donnason Knights v. Grenada,* IACHR, Case 12.028, Report No. 47/01, Merits, 4 April 2001, para. 111; *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 151–163.

[64] *Convention on Territorial Asylum,* OAS, A-47, adopted on 28 March 1954; *Convention on Diplomatic Asylum,* OAS, A-46, adopted on 28 March 1954; *Treaty on Asylum and Political Refuge,* adopted on 4 August 1939; *Convention on Political Asylum,* OAS, A-37, adopted on 26 December 1933; *Convention on Asylum,* adopted on 20 February 1928, at the Sixth International Conference of American States. Due to the limited number of States and reach of subject-matter of these conventions, they will not be dealt with in this Guide.

The *African Charter on Human and Peoples' Rights* also recognises the right of asylum in Article 12.3: "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions." The African Commission on Human and Peoples' Rights (African Commission) has held that this right "should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state."[65] The Commission has not yet offered an interpretation of the right "to obtain asylum" contained in the Charter.

Article 28 of the *Arab Charter on Human Rights* (ArCHR) recognises only a "right to seek political asylum in another country in order to escape persecution", while the ECHR contains no mention of the right of asylum.

a) When someone is a refugee

A person falls within the definition of a refugee from the moment he or she meets the criteria of Article 1A.2 of the *Geneva Refugee Convention*. A determination by the State to "grant" refugee status is not a determination of the status, but only its formal recognition.[66] Therefore, a refugee attains such status even before the State of asylum provides the refugee with relevant documentation or ensures that the status is affirmed under domestic laws and procedures, although the protection of his rights afforded by the *Geneva Refugee Convention* will be limited until the State determines whether the refugee's situation fulfils the Convention's definition. The *Geneva Refugee Convention* recognises a range of rights of the refugee, which will be considered in different chapters of this Guide, and whose protection depends on the recognition of refugee status.[67]

For refugee status to be recognised under the *Geneva Refugee Convention,* the following criteria must apply:

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[65] *Organisation Mondiale Contre la Torture (OMCT) and Others v. Rwanda,* ACommHPR, Communications No. 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session, October 1996.

[66] See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* UNCHR, Geneva, September 1979 (UNHCR Handbook), para. 28. The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Refugee Convention) seems to contrast to this universal regime as it establishes in its Article 1.6 that it is apt to the State of asylum to "determine" whether an applicant is a refugee. Nevertheless, as the Convention declares that it is complementary to the *Geneva Convention relating to the status of refugees* of 1951, read together with its *Additional Protocol* of 1967 ("*Geneva Refugee Convention*") (Preamble, para. 9; Article 8.2), "determine" must be interpreted as recognition and not as granting of refugee status.

[67] The *OAU Refugee Convention* generally recognises more limited rights than the *Geneva Refugee Convention*. Its protection regime cannot, therefore, substitute that of the older Convention, apart for those people falling under the definition of Article 1.2 of the *OAU Refugee Convention* who are not contemplated by the *Geneva Refugee Convention*, or for States which have ratified the *OAU Refugee Convention* but not the *Geneva Refugee Convention* or its Additional Protocol.

1. a well-founded fear of persecution;
2. the persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion;
3. the person must be outside the country of his or her nationality or, if stateless, outside the country of his or her former habitual residence;
4. the person must be unable or, owing to such fear, unwilling to avail him or herself of the protection of that country.

i) Well-founded fear of persecution

The requirement of well-founded fear includes a subjective examination (that the individual personally has fear) and an objective one (that the fear is well-founded). The first criterion will depend on the subjective situation of the person and therefore will need to be assessed on a case-by-case basis. The second criterion will require an examination of the factual circumstances alleged and also a consideration of the individual case and person alleging the fear, as different persons face different risks depending on their situation, and will have different reasons for a fear to be well-founded.[68]

Persecution is an evolving concept under international law. While no general definition of persecution is available, the UN High Commissioner for Refugees (UNHCR) has identified some general categories of situations that will amount to persecution (the list is not exhaustive):

- a threat to life or liberty on account of one of the listed grounds;
- other serious infringements of human rights on account of one of those grounds; [69]
- discrimination leading to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn his/her living, right to practice his/her religion, or access to normally available educational facilities;
- discriminatory measures not amounting as such to persecution, but that produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his/her future existence;
- criminal prosecution or fear of it for one of the grounds enlisted in the refugee definition or excessive punishment or fear of it for a criminal offence.[70]

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[68] See, for more detail, *UNHCR Handbook, op. cit.*, fn. 66, paras. 37–50.

[69] This concept is not defined in international human rights law. The *UNHCR Handbook* provides a non-exhaustive list and is likely to develop over time.

[70] See, *UNHCR Handbook, op. cit.*, fn. 66, paras. 51–60.

ii) Grounds of persecution

Persecution must have a causal link with one of the grounds listed in the refugee definition, set out below. As recalled by the UNHCR, it is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant cause.[71] It is possible that different grounds will overlap and that a refugee might claim asylum based on more than one ground. It is not necessary that the person actually possesses the characteristics for which he or she is being persecuted, only that these characteristics are imputed to them by their persecutors.

Race: this term has to be understood broadly as including not only strictly race, but also colour, descent or national or ethnic origin.[72] Furthermore, it may entail members of a specific social group of common descent forming a minority within a larger population. International human rights law, in particular ICERD, is based on a similarly broad notion of race, and the *Geneva Refugee Convention* should be interpreted in light of this. Racial discrimination is an important element in establishing persecution.[73]

Religion: this term is considered to have three possible different manifestations, which are not cumulative conditions. It includes a belief (conviction or values about the divine or ultimate reality or the spiritual destiny of humankind, including atheism); an identity (as membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality or ancestry); or a way of life (where religion manifests in certain activities as wearing of particular clothing, observance of particular practice).[74]

Nationality: this term is not to be understood merely as "citizenship". It refers also to membership of an ethnic or linguistic group[75] and includes national origin and statelessness.

Membership of a particular social group: The term "social group" should be interpreted as having fluid and evolving content. A social group may be country specific or may be defined with reference to international

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71 *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked,* UNHCR, UN Doc. HCR/GIP/06/07, 7 April 2006, para. 29 (UNHCR Guidelines on victims of trafficking).

72 See, *Declaration and Action Programme on Racism, Racial Discrimination, Xenophobia and Related Intolerance,* para. 2.

73 See, *UNHCR Handbook, op. cit.*, fn. 66, paras. 68–70.

74 See, for more information, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UNHCR, UN Doc. HCR/GIP/04/06, 28 April 2004 (UNHCR Guidelines on Religion-Based Refugee Claims); see also, *UNHCR Handbook, op. cit.*, fn. 66, paras. 71–73.

75 See, *UNHCR Handbook, op. cit.*, fn. 66, paras. 74–76.

human rights law. To identify a social group, UNHCR adopts the following standard: *"a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."*[76] As outlined in more detail below in Box No. 1, women, who face persecution related to their sex or gender, will constitute a particular social group for the purposes of refugee status. Lesbian, gay, bisexual and transgender individuals who face discrimination on the basis of their sexual orientation or gender identity will also qualify as members of a particular social group. The size of the group is not a relevant element.[77]

Political opinion: The individual must hold an opinion that either has been expressed, has come to the attention of the authorities, or in respect of which there there is a reasonable possibility that the authorities will become aware, nonetheless.[78] It might also be that the person is persecuted because perceived by the authorities to hold a certain political opinion.

Box 1. Persecution Based on Sex and Gender

Women not only face persecution, as men do, on grounds of race, religion, nationality and political opinion, but such persecution may also give rise to sex or gender specific impacts or may disproportionately affect women. Women may also suffer forms of persecution because they are women i.e. persecution because of sex or gender.

Such persecution may arise from State laws, policies and practices that discriminate against women, and violate their human rights. Examples include: legal guardianship regimes marked by lack of equal legal status; national laws that criminalise sex outside marriage and/or adultery; laws which criminalise certain female dress or conduct; discriminatory laws regarding child custody and employment; coercive sexual and reproductive health policies and practices (e.g. forced abortions and sterilisation); and criminalisation of health-care interventions only women need. In addition, women may face

[76] *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UNHCR, UN Doc. HCR/GIP/02/02, 7 May 2002 (UNHCR Guidelines on "Membership of a particular social group"), para. 11.

[77] See for more, *ibid.* See also, *UNHCR Handbook, op. cit.*, fn. 66, paras. 77–79.

[78] See, *ibid.,* paras. 80–86.

gender or sex-specific persecution as a result of the actions of non-State actors and the failure of a State to effectively prohibit and prevent such conduct. Examples include harmful practices against women and girls, sexual violence; domestic violence; honour crimes; workplace violence and harassment and deprivation of liberty.

Sex-specific or gender-based persecution is not an explicit ground for refugee status under the *Geneva Refugee Convention.* However it is clear that persecution of a woman related to her sex or gender may, if the other criteria are met, entitle her to refugee status under the Convention. The UNCHR *Guidelines on Gender-Related Persecution* explore this matter in depth and set out the ways in which treatment or circumstances faced by women or which has gender-specific consequences will constitute persecution for the purposes of the Convention.[79] As noted above, where a woman faces persecution as a result of her sex or gender, she will constitute a member of a particular social group (i.e. women) for the purposes of the Convention. The size of the group or a lack of cohesion are irrelevant. Moreover, the risk of the persecution in question does not need to exist for all members.

In gender related claims, the persecution feared could be for one or more of the Convention grounds. For example, persecution on the basis of religion would arise where a woman risks certain consequences as a result of her failure to adhere to religious views which ascribe particular roles to men and women, or entrench gender stereotypes.[80]

Where conduct of a non-State actor is the source of the persecution concerned, any assessment of the ability or willingness of a State to offer effective protection and/or of the person concerned to receive the protection must take sex or gender

[79] *Guidelines on International Protection: Gender-Related Persecution with the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UNHCR, UN Doc, HCR/GIP/02/01, 7 May 2002 (UNHCR Guidelines on Gender-Related Persecution). The box is a short summary of the UNHCR Guidelines. See also, *Conclusion No. 73 (XLIV) Refugee Protection and Sexual Violence,* Executive Committee, UNHCR, 44th Session, 1993, para. (d); *Conclusion No. 77 (XLVI) General,* Executive Committee, UNHCR, 46th Session, 1995, para. (g); *Conclusion No. 79 (XLVII) General,* Executive Committee, UNHCR, 47th Session, 1996, para. (o); *Conclusion No. 105 (LVII) Women and Girls at Risk,* ExCom, UNHCR, 57th Session, 2006, para. (n)(iv); *Conclusion No. 39 (XXXVI) Refugee Women and International Protection,* ExCom, UNHCR, 36th Session, 1985. See also, *Recommendation Rec(2002)5 of the Committee of Ministers to Member States on the protection of women against violence,* adopted by the Committee of Ministers of the Council of Europe (CMCE) on 30 April 2002 at the 794th meeting of the Ministers' Deputies, Appendix, Article 72.

[80] *Ibid*., paras. 23–26.

specific factors into account. For example, internal relocation alternative must not be applied in a manner that fails to take account of gender or sex specific factors.[81]

iii) Persecution by non-State actors

Persecution may originate not only from State action, but also from that of non-State actors "under circumstances indicating that the State was unwilling or unable to offer protection against the threatened persecution."[82] In the case of non-State actors, in particular, the causal link must satisfy one of these two tests:

- There is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or
- The risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for Convention reasons.[83]

Box 2. Persecution on grounds of sexual orientation or gender identity

Sexual orientation and gender identity (SOGI)[84] may be relevant to a refugee claim when the person concerned fears persecutory harm on account of it. Guidance on the determination of asylum claims based on these grounds are to be found in the UNCHR *Guidelines on Gender-Related Persecution,*[85] and, more extensively, in the UNHCR *Guidelines on International Protection on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity* and the UNHCR *Guidance*

[81] For detailed information on this concept see: *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1.A.2 of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UNHCR, UN Doc. HCR/GIP/03/04, 23 July 2003 (UNHCR Guideleins on Internal Flight and Relocation Alternative).

[82] UNHCR, *Agents of Persecution, UNHCR Position,* 14 March 2005, para. 4. See also, UNHCR Handbook, *op. cit.*, fn., para. 66; *Concluding Observations on France,* CCPR, Report of the Human Rights Committee to the General Assembly, 52nd Session, Vol. I, UN Doc. A/52/40 (1997), para. 408; *Recommendation 1440 (2000) Restrictions on asylum in the Member States of the Council of Europe and the European Union,* Parliamentary Assembly of the Council of Europe (PACE), para. 6.

[83] See, *UNHCR Guidelines on "Membership of a particular social group", op. cit.*, fn. 76, para. 23.

[84] The definition of sexual orientation and gender identity may be found in the *Yogyakarta Principles, op. cit.*, fn. 26.

[85] *UNHCR Guidelines on Gender-Related Persecution, op. cit.*, fn. 79.

Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.[86]

Discrimination, lack of protection or direct repression of people on grounds of their sexual orientation may amount to persecution, when this comes from the State or the State is unable or unwilling to protect against it. The fear of persecution may result from criminal laws prohibiting, directly or indirectly, same-sex consensual relationships. The law may be persecutory *per se* when it is not in conformity with international human rights standards.[87] Penalisation may also be disguised through "targeted" prosecutions for other criminal offences. If the well-founded fear arose *sur place,* for example because the concerned person has "come out" in the foreign country, that person might qualify for refugee status if he or she can demonstrate a well-founded fear of future persecution in the country of origin. Furthermore, if LGBT persons are consistently denied access to normally available services, such as education, welfare, health, court, etc., or if they feel forced to conceal their own orientation for fear of reprisals, this may give rise to a reasonable fear of persecution.

[86] *UNHCR Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* UNHCR, UN Doc. HCR/GIP/12/09, 23 October 2012 (UNHCR Guidelines on Sexual Orientation and Gender Identity); and *UNHCR Guidance on Refugee Claims Relating to Sexual Orientation and Gender Identity,* UNHCR Protection Policy and Legal Advice Section, Division of International Protection Services, 21 November 2008 (UNHCR Guidance on Sexual Orientation and Gender Identity).

[87] *M.I. v. Sweden,* CCPR, Communication No. 2149/2012, Views of 25 July 2013, para. 7.5: "the existence of such law [criminalizing homosexual acts] by itself fosters the stigmatization of LGTB-individuals and constitutes an obstacle to the investigation and sanction of acts of persecution aginst these persons." The Court of Justice of the European Union, however, took, a divergent position, in relation to the granting of refugee status in *X, Y and Z v. Minister voor Immigratie en Asiel,* CJEU, C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013: "1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group. 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts *per se* does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution. 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation", The International Commission of Jurists and Amnesty International have criticized the ruling of the Luxembourg court. See, http://www.icj.org/eu-court-ruling-a-setback-for-refugees/.

It is important to stress that claims for asylum cannot be dismissed on the basis that the applicant could avoid persecution by changing or concealing his or her sexual orientation or gender identity.

Convention Grounds. Asylum claims based on sexual orientation or gender identity are generally considered under the "membership of a particular social group" ground.[88] The same claims have also been found to be able to fall in certain circumstances under the grounds of "political opinion", particularly in countries where, for example, same sex relationships are viewed as contrary to the core of the country's policy, and "religion" where the attitude of religious authorities towards LGBT people is hostile or discriminatory or where being LGBT is seen as an affront to religious belief.

b) Refugees' rights

The *Geneva Refugee Convention* guarantees a certain number of rights, which reflect human rights law protections, whose applicability differs according to the situation of the refugee in the territory, his or her legal presence or recognition of refugee status. It is important to stress, as will be seen throughout this Guide, that international human rights law grants protection of the rights of asylum-seekers and refugees wider than that of the *Geneva Refugee Convention*. Furthermore, whenever international human rights law affords wider protection, it should prevail, and the provisions of the *Geneva Refugee Convention* should be interpreted in light of rights under international human rights law.

The Convention recognises for all refugees present on the State's territory, regardless of means of entry or status, the prohibition of non-discrimination on the basis of race, religion or country of origin in the application of the Convention (Article 3); the freedom to practice religion and freedom as regards the religious education of children equal to that accorded to the State's nationals (Article 4); the State obligation to issue an identity paper (Article 27); and the protection of the principle of *non-refoulement* (Article 33). To the same group of people apply the right to equal participation in rationing systems (Article 20), and the right to primary education (Article 22.1) on an equal basis with nationals of the State; and property rights (Article 13) and the right to access secondary and tertiary education (Article 22.2) which are equated to the level of protection afforded to non-nationals.

[88] See, *UNHCR Guidance on Sexual Orientation and Gender Identity, op. cit.*, fn. 86, paras. 40–50; and *UNHCR Guidance on Sexual Orientation and Gender Identity, op. cit.*, fn. 86 para. 32.

A limited number of rights under the Convention are accorded to refugees who are lawfully present on the State's territory, albeit not necessarily "resident" or with a durable status, such as might be the case for students or visitors. These are the right to self-employment (Article 18) and the right to freedom of movement (Article 26), which are enjoyed on an equal basis with foreign nationals; and expulsion procedural rights (Article 32), which apply to the refugee.

The majority of rights recognised by the Convention are applicable to refugees who are "lawfully staying" in the State of refugee, or, in the French version, *"résident(s) régulièrement".* This implies a situation of stable and durable residence. These rights are the right to travel documents (Article 27), which is a right specific for refugees; and the right to equal treatment as nationals for the right to public relief and assistance (Article 23) and labour and social security rights (Article 24). Furthermore, the following rights are to be enjoyed on an equal basis with foreign nationals: the right of association, which is limited to non-political and non-profit making associations and trade unions (Article 15); the right to engage in wage-earning employment (Article 17) and in liberal professions (Article 19); and the right to housing (Article 21).

The right to access to courts (Article 16) and artistic and industrial property rights (Article 14) have a peculiar dimension as they must be respected by all Contracting States to the *Geneva Refugee Convention.* Their enjoyment must therefore be guaranteed on an equal footing with nationals by the country of "habitual residence", while all other States must respect them in the same way as they would do with nationals of the country of "habitual residence" of the refugee. The definition of the term "habitual residence" is not clear. It has been interpreted as signifying "more than a stay of short duration, but was apparently not intended necessarily to imply permanent residence or domicile".[89] However, the fact that it has been used residually only in these articles suggests that it does not require "lawful" presence onto the territory. However, it will be difficult to demonstrate "habitual residence" without lawful presence.

c) When a refugee is not a refugee: cessation and exclusion clauses

International refugee law provides for conditions and situations under which a person ceases to be recognised as a refugee or because of which it is forbidden to recognise someone as a refugee. These are called respectively "cessation" and "exclusion" clauses.

[89] Goodwin-Gil, *The Refugee in International Law, op. cit.*, fn. 60, p. 310.

i) Cessation of refugee status

According to Article 1C of the *Geneva Refugee Convention,* the Convention ceases to apply when:

- The refugee has voluntarily re-availed him or herself of the protection of the country of his nationality; or
- Having lost his or her nationality, the refugee has voluntarily reacquired it; or
- The refugee has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
- The refugee has voluntarily re-established him or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- The refugee can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail of the protection of the country of his or her nationality or residence, unless there are compelling reasons arising out of previous persecution for refusing to avail of the protection of the country of nationality or residence.[90]

While the application of the cessation clauses rests with the State,[91] the UNHCR Executive Committee (ExCom) has set forth strict conditions which it considers must apply to their application:

Changes in the country of origin or nationality must be of fundamental character, stable and durable, i.e. of such a profound and enduring nature that international protection becomes uncalled for; [92]

The fundamental character must be established objectively and in a verifiable way and must include the general human rights situation, as well as the particular cause of fear of persecution; [93]

The decision of cessation must be on the individual case. All refugees affected by group or class decisions must have the possibility to have the application of cessation clauses in their cases reconsidered on grounds relevant to their individual case.[94]

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[90] The *OAU Refugee Convention* includes two other reason for cessation of refugee status, taken from the exclusion clauses, which are: (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or (g) he has seriously infringed the purposes and objectives of this Convention (Article 1.4, *OAU Refugee Convention*).

[91] *Conclusion No. 69 (XLIII) Cessation of Status,* ExCom, UNHCR, 43rd Session, 1992, Preamble, para. 2.

[92] *Conclusion No. 65 (XLII) General,* ExCom, UNHCR, 42nd Session, 1991, para. (q).

[93] *Conclusion No. 69,* UNHCR, *op. cit.*, fn. 91, para. (a).

[94] *Ibid*., para. (d). See also, paras. (b) and (c).

The UNHCR documents and the ExCom conclusions and recommendations, although they do carry binding force, provide the only comprehensive and authoritative guidance on refugee status determination procedures (RSDPs), and have been followed in State practice and by national courts, in particular considering that UNHCR has a duty to supervise the application of the *Geneva Refugee Convention* under its Article 35.[95]

ii) Exclusion from refugee status

Article 1F of the *Geneva Refugee Convention* lists grounds for automatic exclusion from recognition of refugee status. These occur when there are serious reasons for considering that:

- The person seeking refugee status has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes (Article 1F(a));[96]
- He or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee (Article 1F(b));
- He or she has been guilty of acts contrary to the purposes and principles of the United Nations (Article 1F(c)).[97]

Although national practice increasingly tends to widen the circumstances in which these criteria apply (a tendency strengthened in the European Union (EU), for example, by Article 12.2 of the EU Qualification Directive[98]; see, Box No. 3 below) it is well established in international standards that the exclusion clauses must be applied "restrictively".[99]

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95 Cecilie Schjatvet, *The making of UNHCR's guidance and its implementation in the national jurisdiction of the United Kingdom, Norway and Sweden,* Hestenes og Dramer & Co., Research report for the Norwegian Directorate of Immigration, 2010, Chapter 3.

96 See, *Convention on the Prevention and Punishment of the Crime of Genocide,* adopted on 9 December 1948; the four 1949 *Geneva Conventions* for the Protection of Victims of War and the two 1977 Additional Protocols; the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 *Charter of the International Military Tribunal* (the London Charter), and most recently the 1998 *Statute of the International Criminal Court* which entered into force on 1 July 2002 (Rome Statute).

97 The *OAU Refugee Convention* adds the exclusion clause of when "he has been guilty of acts contrary to the purposes and principles of the Organisation of African Unity" (Article 1.5(c)).

98 *Directive 2011/95/EC of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees and for persons eligible for subsidiary protection, and for the content of the protection granted (recast),* EU, Official Journal L 337/9, 20/12/2011 ("EU Qualification Directive").

99 *UNHCR Handbook, op. cit.*, fn. 66, para. 149. See also, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Geneva Convention relating to the Status of Refugees,* UNHCR, UN Doc. HCR/GIP/03/05, 4 September 2003 (UNHCR Guidelines on Application of the Exclusion Clauses), para. 2; *Recommendation Rec(2005)6 of the Committee of Ministers to Member States on exclusion from refugee status in the context of Article 1 F of the Convention relating to the Status of Refugees of 28 July 1951,* adopted by the CMCE on 23 March 2005 at the 920th meeting of the Ministers' Deputies, paras.1 (a), (b) and (g), and 2.

On the particular exclusion clause of "non political crime", the UNHCR clarified that, "[i]n determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."[100] It is also important to recall that, "[f]or a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles."[101]

On a procedural level, exclusion decisions should in principle be considered during the regular refugee status determination procedure and not at the admissibility stage or in accelerated procedures. They should be part of a full factual and legal assessment of the whole individual case. The UNHCR has established the rule that "inclusion should generally be considered before exclusion".[102] There may be exceptions to the rule when there is an indictment by an international criminal tribunal; when there is apparent and readily available evidence pointing strongly towards the asylum-seeker's involvement in particularly serious crimes; or in the appeal stage where the application of the exclusion clauses is the issue to be considered.[103] UNHCR has recalled that "[e]xclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned".[104]

Finally, it must be recalled that people who have been denied refugee status under an exclusion clause or whose status has ceased can always avail themselves of the protection from expulsion assured by the principle of *non-refoulement* under the *Geneva Refugee Convention* and international human rights law (see, Chapter 2).

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100 *UNHCR Handbook, op. cit.*, fn. 66, para. 152. See also, *UNHCR Guidelines on Application of the Exclusion Clauses, op. cit.*, fn. 99, paras. 14–16; *Recommendation Rec(2005)6,* CMCE, *op. cit.*, fn. 99, para. 1 (d). For the definition of "group" subject to persecution see, *Recommendation Rec(2004)9 of the Committee of Ministers to member states on the concept of "membership of a particular social group" (MPSG) in the context of the 1951 Convention relating to the status of refugees,* adopted by the CMCE on 30 June 2004, at the 890th meeting of the Ministers' Deputies.

101 See, *UNHCR Guidelines on Application of the Exclusion Clauses, op. cit.*, fn. 99, para. 15.

102 *Ibid*., para. 31.

103 *Ibid*., para. 31.

104 *Ibid*., para. 36 (emphasis in the original text).

Box 3. The Court of Justice of the European Union on exclusion clauses and terrorist acts

In European Union (EU) law, the *Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees and for persons eligible for subsidiary protection, and for the content of the protection granted* ("the Qualification Directive"), like its predecessor *Council Directive 2004/83/EC,* contains the same grounds for exclusion from refugee status as the *Geneva Refugee Convention.*[105] The Directive, however, expands the exclusion ground of "serious non-political crimes", by specifying that "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes".[106]

The Court of Justice of the European Union (CJEU) has held that "terrorist acts" are to be regarded as "serious non-political crimes" and as "acts contrary to the purposes and principles of the United Nations", hence excluding from refugee status people implicated in these acts.[107] The case concerned a question by a German Court asking whether a person who had been a member of an organisation included in the UN Terrorists List, under Security Council resolution 1267(1999), was to be considered as automatically falling within the exclusion clauses for refugee status. The Court held that the mere fact of membership "does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations'".[108]

The Court has furthermore specified that, while the exclusion from refugee status is not "conditional on the person concerned representing a present danger"[109] to the hosting State, the authorities must undertake an "assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down [in the exclusion provisions]

105 Article 12, *EU Qualification Directive, op. cit.*, fn. 98.

106 Article 12.2(b), *ibid.*

107 *Bundesrepublik Deutschland v. B and D,* Court of Justice of the European Union (CJEU), GC, Joined cases C-57/09 and C-101/09, Judgment of 9 November 2010, paras. 81–86.

108 *Ibid*., para. 1.

109 *Ibid*., para. 2.

and whether individual responsibility for carrying out those acts can be attributed to the person concerned".[110]

Finally, the Court held that, in this assessment, the authorities "must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct".[111]

Box 4. Are victims or potential victims of human trafficking refugees?

Victims or potential victims of human trafficking are not entitled to refugee status solely on the grounds that they have been trafficked. In certain cases, however, the fear of trafficking or re-trafficking once returned to one's country of origin might be grounds to claim protection as a refugee, when this fear is linked with one of the *Geneva Refugee Convention* grounds. The principles related to victims or potential victims of trafficking and refugee status are described in the UNCHR *Guidelines on victims of trafficking*.[112]

Human trafficking often involves forms of forced labour, servitude or slavery, and exploitation which would amount to persecution including the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[113] In addition a trafficked person might fear reprisals by traffickers or re-trafficking if returned to his or her country of origin, which might amount to persecution if it involves certain human rights violations or abuses. Trafficked persons might also fear ostracism, discrimination or punishment by their family or the local community or State authorities upon return. A victim's family members might also

110 *Ibid*., para. 1.

111 *Ibid*., para. 97.

112 *UNHCR Guidelines on victims of trafficking, op. cit.*, fn. 71.

113 See, Article 3(a), *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,* adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (UN Trafficking Protocol); and Article 4, C*ouncil of Europe Convention on Action against Trafficking in Human Beings,* adopted on 16 May 2005 (Council of Europe Trafficking Convention).

be subject to reprisals, making the victim's fear of reprisal well-founded.

Important in the case of victims or potential victims of trafficking is the **place of persecution.** To fulfil the refugee definition of the *Geneva Refugee Convention,* the well-founded fear of persecution must be demonstrated with regard to the country of nationality or habitual residence. This may be established when someone has been, or fears to be, trafficked in that country. However, even in cases in which a person's previous experience of trafficking occurred wholly outside of the country of nationality or habitual residence, the structure of the trafficking experience and organisation might mean that their fear of trafficking would also extend to their country of origin.

As trafficking is predominantly a commercial enterprise, the difficulty will lie in establishing a causal link with a **Convention ground,** as the primary motive for the trafficking will be profit. However, it must be recalled that the Convention ground must not necessarily be the sole or the dominant contributing factor to persecution and a causal link will often be established. For example in some situations:

Race, Religion, Nationality, Political opinion: risks of trafficking, re-trafficking and/or reprisals, or a lack of relevant State protection, may arise because a person is a member of a particular racial, ethnic, religious or national group, or holds or is perceived to hold certain political opinions.

Membership of a particular social group: Certain kinds of trafficking might target particular social groups. For example in certain societies, some groups, such as, for example, single women, widows, divorced women, separated and unaccompanied children, orphans or street children, may face an increased risk of trafficking as they are easier targets, while often women may be at risk of trafficking for the purposes of sexual exploitation because of their status as women. Former victims of trafficking may also constitute a social group. In this last case it is the past trafficking experience which would constitute one of the elements defining the group, and not the threat or fear of future persecutions.[114]

[114] See *UNHCR Guidelines on victims of trafficking, op. cit.*, fn. 71, paras. 38–39.

d) Procedure for recognition of refugee status

The *Geneva Refugee Convention* does not contain explicit protections for procedural rights in the recognition of refugee status. Such standards are set out in the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR Handbook)[115] and in conclusions and recommendations of the UNHCR ExCom.

International human rights law imposes few binding obligations in relation to procedures for the determination of refugee status, with the exception of obligations of non-discrimination in such procedures. The procedural human rights protections attaching to decisions to remove from the territory, which may be consequent on refusals of refugee status, are considered in Chapter 3. However, it should also be noted that failure to apply fair procedures in the consideration of an asylum application may lead to violations of the right of *non-refoulement* and the right to an effective remedy in respect of that right. In *Jabari v. Turkey,* the European Court of Human Rights held that the automatic application of a five-day time limit for registering a claim for asylum, which denied the applicant any scrutiny of her fear of ill-treatment following expulsion, and the subsequent failure of the appeal court to consider the substance of those fears, meant that her deportation would violate Article 3 ECHR, as well as the right to an effective remedy under Article 13 ECHR.[116]

The Inter-American Commission on Human Rights has stressed the need for predictable procedures and consistency in decision-making at each stage of the process. It has recognised the right to a hearing to determine whether an asylum seeker meets the criteria for refugee status, and the right to appeal of the first asylum decision.[117] Furthermore, the Commission held, in the case of *John Doe and Others v. Canada,* that to guarantee the right to seek asylum enshrined in the American Declaration (Article XXVII) "every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country's refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. To ensure that a refugee claimant's

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115 *UNHCR Handbook, op. cit.*, fn. 66.

116 *Jabari v. Turkey,* ECtHR, Application No. 40035/98, Judgment of 11 July 2000, paras. 39–42.

117 IACHR, *Report on Canada, op. cit.*, fn. 61, para. 52. See, on the right to have a hearing or interview, *ibid.*, para. 109; *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, para. 153; *John Doe et al. v. Canada,* IACHR, Case 12.586, Report No. 78/11, Merits, 21 July 2011, para. 92: "it is the act of hearing the person that implements the most fundamental element of the right to seek asylum".

right to seek asylum under Article XXVII is preserved, before removing a refugee claimant to a third country, the Member State must conduct an individualized assessment of a refugee claimant's case, taking into account all the known facts of the claim in light of the third country's refugee laws. If there is any doubt as to the refugee claimant's ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country".[118]

The Council of Europe *Guidelines on human rights protection in the context of accelerated asylum procedures,* set out comprehensive standards that apply where both procedural and substantive rights are particularly likely to be jeopardised by fast-track procedures.[119] The Guidelines stipulate that throughout the proceedings, decisions must be taken with due diligence (Guideline VIII) and provide that even in accelerated procedures, asylum seekers must have a reasonable time to lodge their application, and there must be sufficient time to allow for a full and fair examination of the case (Guideline IX).

i) Fair procedures

UNHCR guidance prescribes that all requests for asylum be dealt with objectively and impartially, that the confidential character of asylum requests should be respected. It stipulates that cases should be decided on the merits: failure to comply with formal requirements of the procedure, such as time limits, should not in itself lead to an asylum request being excluded from consideration.[120] Applicants should receive necessary information and guidance on the refugee recognition procedure;[121] and should be informed of their right to legal advice and, where necessary, interpretation.[122] All facilities necessary for submitting the applicant's case to the authorities should be provided, including interpretation and the opportunity, of which applicants should be duly informed, to contact a representative of UNHCR.[123] The applicant should be given a personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee

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118 *John Doe et al. v. Canada,* IACHR, *op. cit.*, fn. 117, para. 94.

119 *Guidelines on human rights protection in the context of accelerated asylum procedures,* adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies (European Guidelines on accelerated asylum procedures).

120 *Conclusion No. 15 (XXX) Refugees Without an Asylum Country,* ExCom, UNHCR, 30th Session, 1979, para. (i).

121 *Conclusion No. 8 (XXVIII) Determination of Refugee Status,* ExCom, UNHCR, 28th Session, 1977, para. (e)(ii); *UNHCR Handbook, op. cit.*, fn. 66, para. 192(ii). See also, *Concluding Observations on Croatia,* CAT, UN Doc. CAT/C/CR/32/3, 11 June 2004, para. 9(i); *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline IV.1.c.

122 *Conclusion No. 8,* UNHCR, *op. cit.*, fn. 121, para. (e)(ii); *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guidelines IV and VIII.3.

123 *Ibid*., para. (e)(iv); *UNHCR Handbook, op. cit.*, fn. 66, para. 192(iv). See also, *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline XIV.

status.[124] A basic principle in the UNHCR guidance is that, whatever restrictive measures States might implement, for example to discourage abusive use of asylum procedures, these should not serve to defeat the purpose of the asylum procedure.[125]

Once a first instance decision is taken, if the asylum seeker is recognised as a refugee, he or she should be informed accordingly and issued with documentation certifying his or her refugee status.[126] UNHCR guidance states that an appeal to an administrative or judicial authority of a refusal of refugee status should be available, that there should be adequate time to lodge such an appeal, and that the applicant should be permitted to remain in the country while the appeal is pending.[127] This latter requirement is reflected in international human rights law requirements that appeals against removals from the jurisdiction should have suspensive effect (see, Chapter 3).

ii) Non-discrimination and special measures

Both international refugee law (Article 3, *Geneva Refugee Convention*) and international human rights law require that the procedure for status determination should not be discriminatory. For example, the Committee on the Elimination of Racial Discrimination has found unreasonable differential treatment in decisions on refugee status as regards persons of different nationalities to be in violation of ICERD.[128] Obligations of non-discrimination and equality, not only require the State refrain from direct discrimination, but also take proactive steps to ensure substantive equality in status determination. As a result procedures must be designed to take account of, and respond to, factors such as the sex, age, and circumstances of particular individuals. For example, as outlined in the UNHCR *Guidelines on Gender-Related Persecution,* particular safeguards must be put in place for women asylum seekers. These include among other things: separate interviews from family members;

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124 *Conclusion No. 30 (XXXIV) The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,* ExCom, UNHCR, 34th Session, 1983, para. (e)(i); *UNHCR Handbook, op. cit.*, fn. 66, para. 190. See also, *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline IV.1.d; *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, para. 155.

125 *Conclusion No. 79,* UNHCR, *op. cit.*, fn. 79, para. (l).

126 *Conclusion No. 8,* UNHCR, *op. cit.*, fn. 121, para. (e)(v); *UNHCR Handbook, op. cit.*, fn. 66, para. 192(v).

127 *Ibid*., para. (e)(vi) and (vii); *UNHCR Handbook, op. cit.*, fn. 66, para. 192(vi) and (vii).

128 See, *Concluding Observations on Costa Rica,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 57th Session, UN Doc. A/57/18 (2002), p. 21, para. 79; *Concluding Observations on Lithuania,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 57th Session, UN Doc. A/57/18 (2002), p. 35, para. 175; *Concluding Observations on Sudan,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 56th Session, UN Doc. A/56/18 (2001), p. 41, para. 215; *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 177–178.

the ability to make separate claims for refugee status; the availability of female interviewers and staff; assurances of confidentiality; open-ended questioning that enables gender or sex-specific issues to emerge; gender-sensitive assessment of credibility and risk; recourse to external and objective expertise and evidence.[129]

The *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* recommend that vulnerabilities related to age, disability or experience of torture, sexual violence or trafficking should be taken into account in deciding whether to impose accelerated asylum procedures, and if they are applied, should condition the manner of their application.[130] UNHCR Guidance states that in procedures for the determination of refugee status, asylum-seekers who may have suffered sexual violence must be treated with particular sensitivity.[131]

iii) The burden and standard of proof

Generally, in an asylum procedure, the **burden of proof** is discharged by the applicant rendering a truthful account of facts relevant to the asylum claim.[132] However, the UNHCR has pointed out that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."[133]

As to the **standard of proof,** UNHCR guidance states that the authorities need to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is **likely** that the claim of that applicant is **credible.**[134] To establish "well-foundedness" of a fear of persecution, persecution must be proved to be reasonably possible.[135]

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[129] Similar recommendations have been made by the Committee on the Elimination of Discrimination Against Women in *Concluding Observations on Belgium,* CEDAW, UN Doc. CEDAW/C/BEL/CO/6, 7 November 2008, para. 37. CEDAW has underlined in its General Comment No. 30 that "female asylum seekers from conflict-affected areas can face gendered barriers to asylum, as their narrative may not fit the traditional patterns of persecution, which have been largely articulated from a male perspective", *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations,* CEDAW, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 56.

[130] *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline III.

[131] *Conclusion No. 73,* UNHCR, *op. cit.*, fn. 79, para. (g).

[132] *Note on Burden and Standard of Proof in Refugee Claims,* UNHCR, Geneva, 16 December 1998, para. 6.

[133] *UNHCR Handbook, op. cit.*, fn. 66, para. 196.

[134] *Note on Burden and Standard of Proof in Refugee Claims,* UNHCR, *op. cit.*, fn. 132, para. 8.

[135] *Ibid*., paras. 16–17.

The authorities should undertake an analysis of the situation in the country of origin in order to determine the well-foundedness of the fear of persecution. The UNHCR Excom considers that the situation must be assessed on an individual level, and that the use of "safe countries" lists must not be blind and automatic.[136]

iv) Minors and particular protection for unaccompanied minors

The CRC is the only universal human rights treaty expressly addressing questions of refugee protection. Under Article 22 of the Convention, States must take particular measures to ensure that asylum procedures provide appropriate protection to children.[137] The Convention recognises the principle of the best interests of the child (Article 3) which must be the primary consideration in any measure which affects or might affect a child's human rights. Unaccompanied minors, in particular, are unlikely to spontaneously file an application for asylum, and procedures must therefore ensure that as soon as it becomes known that the child may have a well-founded fear or be at risk of persecution, they are referred to an asylum procedure.[138] The unaccompanied or separated child will need the assistance of an appointed adult familiar with his or her background who is competent and able to represent the child's best interests (a guardian or legal representative), and should be given access to a qualified legal representative free of charge.[139] Applications by unaccompanied or separated children must be given priority and decisions must be rendered promptly and fairly. The procedure must take into consideration the need of the child to express his or her views freely (Article 12), and always keep as the principal standard of consideration the best interest of the child (Article 3).[140] The Committee on the Rights of the Child has published a detailed General Comment on States' obligations towards unaccompanied or separated children.[141]

2. Other forms of protection under international law

Many States or regional inter-governmental organisations (IGOs) have established, since the adoption of the *Geneva Refugee Convention,* an array of other forms of protection conceived for people who do not sat-

136 *Conclusion No. 87 (L) General,* ExCom, UNHCR, 50th Session, 1999, para. (j).

137 An equivalent obligation is contained in Article 23 ACRWC.

138 *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin,* CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 66. See, also, *General Comment No. 14 on the right of the child to have his or her best interest taken as primary consideration,* CRC, UN Doc. CRC/C/GC/14, 29 May 2013; and, *Unaccompanied children in Europe: issues of arrival, stay and return,* PACE, Resolution No. 1810 (2011), adopted on 15 April 2011.

139 *Ibid*., para. 69.

140 See, *ibid.,* paras. 68–73.

141 See, *ibid.*

isfy the definition of "refugee" under that Convention, or for people who wish to apply for or are potentially able to qualify for asylum, but for whom the circumstances of entry to the State of refuge does not allow them to access immediately the ordinary Refugee Status Determination Procedure (RSDP), as in the case of a mass-influx of asylum-seekers.

In situations of mass influx, the additional protection is necessary, not because of a "deficiency" of refugee protection, but due to factual circumstances, which may prevent the State from providing immediate access to the ordinary procedure for asylum. In these situations, the principle of *non-refoulement* in both refugee and international human rights law (see, Chapter 2) obliges the State to grant some form of **temporary protection,** until the persons concerned can access the refugee status determination procedure.

In some cases, persons are excluded from protection as refugees not by the *Geneva Refugee Convention* itself, but by restrictive interpretation of the Convention in the legislation or practice of the country of refuge.[142] In these cases, the UNHCR ExCom has held that people should be recognised as refugees under the *Geneva Refugee Convention* and that complementary forms of protection should not be used to undermine the Convention protection.[143]

There are, however, other circumstances where persons in need of protection fall outside the definition of refugee in the *Geneva Refugee Convention.*[144] These include people who are victims of the indiscriminate effects of violence in conflict situations,[145] or persons who cannot be expelled from the country of destination in light of the international human rights law principle of *non-refoulement* (see, Chapter 2), but who do not fall within the refugee definition. The UNHCR ExCom defines protection offered to people in these situations as **"complementary forms of protection".**[146]

There are situations where neither international human rights law nor the *Geneva Refugee Convention* requires protection, but where the State has devised systems of protection for "humanitarian" or "compassionate" reasons, such as serious health risks or destitution by ex-

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142 See, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime,* UNHCR, Doc. EC/50/SC/CRP.18, 9 June 2000, paras. 7–9. See also, Ruma Mandal, "Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")", in *UNHCR Legal and Protection Policy Research Series,* Department of International Protection, UNCHR, UN Doc. PPLA/2005/02, June 2005, paras. 19–20, pp. 8–9.

143 See, *Conclusion No. 103 (LVI) Provision on International Protection Including Through Complementary Forms of Protection,* ExCom, UNHCR, 56th Session, 2005, paras. (b) and (k).

144 *Ibid*., para. 2.

145 See *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime,* UNHCR, *op. cit.*, fn. 142, paras. 10–11.

146 See, *Conclusion No. 103,* UNCHR, *op. cit.*, fn. 143.

treme poverty in case of return. Although varied terminology is used in national legislation, these will be referred to as **"discretionary forms of protection".** These forms of protection, although sometimes inspired by international human rights law, are in general not mandated by it and remain at the discretion of the State. However, the existence of crises such as famine, or natural disasters, which have an impact on the enjoyment of economic, social and cultural rights, might trigger the obligations of all States to provide international cooperation for development and thus for the realisation of economic, social and cultural rights[147] which includes providing assistance to refugees and internally displaced persons.[148] These situations might, in certain circumstances, oblige the State to grant some form of temporary protection to the persons affected.

a) Temporary Protection

Temporary protection constitutes, in the words of UNCHR, "a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*",[149] without formally according refugee status. The term "temporary protection" is used in certain States to describe legal regimes including other forms of protection, such as in cases of people fleeing war or other crises. In this Guide, the definitions provided by the UNHCR will be adopted, but the principles described here may also apply to different domestic regimes.

The need for States to apply this protection comes from the obligation of *non-refoulement* both under international refugee law and international human rights law (see, Chapter 2). It is not a complementary form of protection to the *Geneva Refugee Convention.* It is a kind of "interim protection" for people who may *prima facie* qualify as refugees, but whose conditions of arrival mean that they cannot proceed immediately through an ordinary RSDP.

In these situations, the ExCom has established that "persons seeking asylum should always receive at least temporary refuge",[150] and "[t]hey should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity."[151]

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147 See, *General Comment No. 3, The nature of States Parties obligations,* CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 14 December 1990, para. 14.

148 See, *inter alia*, *General Comment No. 12, The right to adequate food,* CESCR, UN Doc. E/C.12/1999/5, 12 May 1999, para. 38; *General comment No. 15, The right to water,* CESCR, UN Doc. E/C.12/2002/11, 20 January 2003, para. 34; CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 40.

149 *Conclusion No. 103,* UNHCR, *op. cit.*, fn. 143, para. l.

150 *Conclusion No. 15,* UNHCR, *op. cit.*, fn. 120, para. (f).

151 *Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situation of Large-Scale Influx,* ExCom, UNHCR, 32nd Session, 1981, para. (II-A-1).

In particular, "they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order".[152]

Box 5. Temporary Protection in the European Union

The *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* ("the Temporary Protection Directive") sets out procedures to provide immediate and temporary protection, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin. In particular, the procedure will be triggered when there is a risk that the asylum system will be unable to process this influx without an adverse effect on its efficient operation, in the interests of the person concerned and other persons requesting protection.[153]

The beneficiaries of this protection are "displaced persons", i.e. "third country nationals or stateless persons who had to leave their country or region of origin or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country and who may fall within the scope of Art. 1A of the Geneva Convention or other international or national instruments giving international protection".[154] This definition includes, amongst others, persons who have fled areas of armed conflict or endemic violence and persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.[155]

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152 *Ibid*., para. (II-B-2(a)).

153 See, Article 2(a), *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,* EU, Official Journal L 212, 07/08/2001 p. 0012–0023 ("EU Temporary Protection Directive").

154 Article 2(c), *ibid.*

155 Article 2(c), *ibid.*

It is the EU institutions, in particular the Council of the European Union, which decides whether a situation of mass influx exists and, by so doing, introduces the obligation for the Member States to grant temporary protection.[156] Once the decision is issued, Member States may grant this protection to additional categories of displaced persons where they are displaced for the same reasons and from the same country or region of origin.[157]

Temporary protection lasts for one year and may be extended automatically by six monthly periods for a maximum of one year unless it is terminated before.[158] The Council can extend the period by up to one more year.[159] This protection provides the same exclusion clauses as apply to refugee status.[160]

b) Complementary Forms of Protection

Several instruments, all of regional scope, provide a definition of "refugee" wider than that in the *Geneva Refugee Convention* and therefore offer protection which is complementary to that of the Convention.

Article 1(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Refugee Convention) extends refugee protection "to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

In the Americas region, the *Cartagena Declaration* includes in the refugee definition "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[161] The Declaration, while not reflecting treaty obligations, has been endorsed

156 Under the Directive, temporary protection is to be applied to a particular situation following a decision of the Council when it determines, by Qualified Majority, on the proposal of the Commission, that a situation of mass influx exists: Article 5, *ibid.*

157 Article 7, *ibid.*

158 Article 4.1, *ibid.*

159 Article 4.2, *ibid.*

160 See, Article 28, *ibid.*

161 *Cartagena Declaration on Refugees,* adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, at Cartagena, Colombia, 19–22 November 1984, para. III.3.

and implemented in national legislation by many Latin American States. It has been endorsed by the Organisation of American States (OAS), by UNHCR's Excom and by the Conference of the States Parties to the *Geneva Refugee Convention.*[162] Certain Asian and African countries, which are parties to the Asian-African Legal Consultative Organisation, may derive elements of their legislation from the *Revised Bangkok Declaration* which includes within its definition of refugee "every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[163] In EU law, the *EU Qualification Directive* (see, Box No. 6) grants complementary protection (known in the Directive as "subsidiary protection") to people facing "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".[164]

Finally, some people, who cannot return to their country because of *non-refoulement* concerns under human rights law, are nonetheless left unprotected by the *Geneva Refugee Convention* or the regional instruments described above. In these situations, certain regional organisations, like the EU, as well as national laws have afforded them other complementary forms of protection.

Box 6. The EU approach: "subsidiary protection"

Within the European Union, the *Directive 2011/95/EC of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees and for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* ("the EU Qualification Directive") establishes that international protection be granted not only to refugees but also to persons eligible for "subsidiary protection". "Subsidiary protection" is granted to third country nationals or stateless persons not qualifying for refugee status "but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless per-

[162] See, *OAS General Assembly Resolution 1273* (XXIV–0/94) of 10 June 1994; Conclusion No. 77, UNHCR, *op. cit.*, fn. 79; *2001 Ministerial Declaration of States Parties to the 1951 Convention and/or 1967 Protocol.*

[163] *1966 Bangkok Principles on Status and Treatment of Refugees,* adopted on 24 June 2001 at the Aalco's 40th session, New Delhi, Article I.2 (Revised Bangkok Declaration).

[164] Article 15, *EU Qualification Directive, op. cit.*, fn. 98.

son, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...], and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".[165] Under the Directive, serious harm includes, first, sentencing to the death penalty or execution; second, torture or inhuman or degrading treatment or punishment in the country of origin; and third, "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".[166]

The first two grounds for subsidiary protection correspond to traditional grounds for *non-refoulement* according to international human rights law, although the limitation of subsidiary protection for torture and inhuman or degrading treatment or punishment to *refoulement* to the country of origin, and not also to third countries where the individual may be at risk, means that it falls short of the protection offered by international law (see, Chapter 3). The third ground corresponds to the grounds for refugee protection provided by the *OAU Refugee Convention and the Cartagena Declaration* (see, supra). It has been interpreted by the Grand Chamber of the European Court of Justice as meaning that "the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances".[167] Furthermore, the Court has specified that "the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place—assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred—reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."[168]

165 Article 2(f), *ibid.*

166 Article 15, *ibid.*

167 *Meki and Noor Elgafaji v. Staatssecretaris van Justitie,* ECJ, GC, Case C-465/07, Judgment of 17 February 2009.

168 *Ibid*.

It is important to stress that there are many situations in which people who in practice are granted complementary forms of protection by national authorities would actually fall within the definition of refugee of the *Geneva Refugee Convention,* as properly understood. The UNHCR has given at least three examples:

- Persons who fear persecution by non-State actors and who are asylum-seekers in countries which do not recognise refugee status for this kind of persecution;
- Persons who flee persecution from conflict areas and are treated as victims of indiscriminate violence when in reality the conflict or the violence is rooted in one of the Convention's grounds;
- Persons who suffer gender-related or sexual orientation based persecution where the State does not recognise such grounds as valid under the Convention.[169]

This list is not exhaustive, but demonstrates that in many cases complementary protection may be used or abused to bypass the State's obligations under the *Geneva Refugee Convention.* In these cases, the UNHCR ExCom has held that people should be recognised as refugees under the *Geneva Refugee Convention* and that complementary forms of protection should not be used to undermine the Convention protection.[170] Indeed, if a State does not recognise as a refugee a person who would satisfy the requirements for refugee status according to the *Geneva Refugee Convention* and the UNHCR guidance, but instead grants him or her only a complementary form of protection, failure to afford that person the same rights and guarantees provided to recognised refugees, would lead to a breach of the *Geneva Refugee Convention*.

Furthermore, in such situations, where complementary forms of protection are applied instead of *Geneva Refugee Convention* protection in cases of gender or sex specific forms of persecution or other persecution which predominantly affects women (such as persecution originating from non-State actors), the acknowledgment of weaker protection to those afforded complementary protection, may violate the principle of non-discrimination in the enjoyment of the right of asylum[171] and the right of equal protection of the law[172] under international human rights law.

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169 See, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime,* UNHCR, *op. cit.*, fn. 142, para. 8.

170 See, *Conclusion No. 103,* UNHCR, *op. cit.*, fn. 143, paras. (b) and (k).

171 Article II read together with Article XXVII ADRDM; Article 1.1 read together with Article 22.7 ACHR; Article 2 read together with Article 12.3 ACHPR; Article 4.2(g), *Protocol to the ACHRP on the Rights of Women in Africa.*

172 Article 26 ICCPR; Article 15.1 CEDAW; Article 24 ACHR; Article 3 ACHPR; Article 8, *Protocol to the ACHRP on the Rights of Women in Africa;* Article 1 of Protocol 12 ECHR (ratified by only 18 States at 9 February 2011)

Persons granted complementary protection must benefit from guarantees under international human rights law applicable to non-nationals.[173] In this regard, the UNHCR ExCom has encouraged States, "in granting complementary forms of protection to those persons in need of it, to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles".[174]

As to the procedure to determine whether someone is entitled to complementary protection, the UNCHR ExCom has recommended establishing a comprehensive procedure to assess both refugee status and other international protection needs, so that refugee protection would not be undermined by the granting of complementary protection.[175] Regarding the cessation of complementary protection, the same body recommended that States draw guidance from the refugee criteria, and "adopt criteria which are objective and clearly and publicly enunciated".[176]

c) Discretionary Forms of Protection

Some States have provisions allowing them to grant in a discretionary way protection for "humanitarian" or "compassionate" reasons. In certain cases they may arise from the obligations of States under Article 1(C)(5) of the *Geneva Refugee Convention* which excludes the cessation of the application of the Convention for "a refugee [...] who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality".[177] In other cases, they are used by the State as systems of protection for those situations of impossibility of expulsion or rejection of the person on international human rights law grounds (see, Chapter 2, Section III), when those situations are not expressly considered by the domestic system of complementary protection. Finally, these forms of protection are also used to cover situations which generally do not rely on an international law obligation for their application. In such cases, the need for protection might be inspired by international human rights law, but the granting is at the discretion of the State. These last situations may occur, for example, in cases of serious threats to the health of the person.

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173 See, *Conclusion No. 103,* UNHCR, *op. cit.*, fn. 143, para. n. See also Ruma Mandal, *op. cit.*, fn. 142, p. xiii.

174 *Ibid*., para. m.

175 *Ibid*., para. q.

176 *Ibid*., para. o.

177 Article 1C(5), *Geneva Refugee Convention*.

Under international law, these kinds of protection cannot be used by States to bypass or provide a substitute for refugee, supplementary, or complementary protections. This principle is particularly important since "humanitarian" or "compassionate" protection is generally at the discretion of the national authorities and does not offer the same guarantees against its cessation as other forms of protection.[178]

3. Family reunification and the right to respect for family life

When a migrant reaches a relatively stable condition of residence in a foreign State, he or she may wish to bring family members to that State. Migration of family members raises issues of the right to respect for family life and family reunification. The *Universal Declaration of Human Rights* (UDHR) provides that the family "is entitled to protection by society and the State".[179]

a) Family reunification in international law

Express obligations of international legal protection for family reunification in the destination State are relatively scant. The *Geneva Refugee Convention* does not specifically recognise a right of refugees to family reunification, although the *Final Act of the Conference of Plenipotentiaries* which adopted the Convention proclaimed that "the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee".[180]

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178 See, *Conclusion No. 103,* UNHCR, *op. cit.*, fn. 143, para. j.

179 Article 16.3 UDHR; The same principle of human rights law is enshrined in Article 23.1 ICCPR; Article 10.1 ICESCR; Article 44.1 ICRMW; Paragraph X, Preamble, CRPD; Article 16 ESC(r); Article 17.1 ACHR; Article 15.1, *Protocol of San Salvador;* Article 18.1 ACHPR; Articles 18.1 and 25 ACRWC. The principle is also recognised by the UN General Assembly in, *inter alia*, resolutions No. 49/182, UN Doc. A/RES/49/182, 2 March 1995, Article 2; No. 50/175, UN Doc. A/RES/50/175, 27 February 1996, Article 2; No. 51/89, UN Doc. A/RES/51/89, 7 February 1997, Article 2; No. 52/121, UN Doc. A/RES/52/121, 23 February 1998, Article 2; No. 53/143, UN Doc. A/RES/53/143, 8 March 1999, Article 2; No. 57/227, UN Doc. A/RES/57/227, 26 February 2003; No. 59/203, UN Doc. A/RES/59/203, 23 March 2005, Article 2; No. 61/162, UN Doc. A/RES/61/162, 21 February 2007, Article 2. As for the Council of Europe, the principle was recognized by the Committee of Ministers in *Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification,* adopted by the Committee of Ministers of the Council of Europe on 26 March 2002 at the 790th meeting of the Ministers' Deputies, Preamble; and by *Recommendation R(1999)23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection,* adopted by the Committee of Ministers of the Council of Europe on 15 December 1999 at the 692nd meeting of the Ministers' Deputies, Preamble; *Resolution (78) 33 on the Reunion of Families of Migrant Workers in Council of Europe Member States,* adopted at by the Committee of Ministers on 8 June 1978 at the 289th meeting of the Ministers' Deputies, Preamble.

180 Family Unity has been considered as a fundamental principle of international refugee law by the UNHCR Executive Committee in, *inter alia*, its *Conclusion No. 1 (XXVI) Establishment of the Subcommittee and General,* ExCom, UNHCR, 26th Session, 1975, para. (f); *Conclusion No. 7 (XXVIII) Expulsion,* ExCom, UNHCR, 28th Session, 1977, para. (a); *Conclusion No. 24 (XXXII) Family Reunification,* ExCom, UNHCR, 32nd Session, 1981, para. 1.

With regard to migrant workers in a regular situation, ICRMW establishes that "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers [in a regular situation] with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children." In the European human rights system, according to the *European Social Charter (revised)* (ESC(r)), Member States, which accept to be bound by Article 19 of the Charter, have an obligation to "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory".[181] This obligation must include "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."[182]

Declarations also provide guidance for some measures of family reunification, in particular for people who have been granted international protection. The UNHCR ExCom recommended that States facilitate the admission to their territory of the spouse or dependent children of persons granted temporary refuge or durable asylum.[183] The ExCom, along with the Committee on the Rights of the Child and the Council of Europe Committee of Ministers, has also recommended that these persons should be granted the same legal status and facilities as the principal refugee.[184] In the case of requests of family reunion by family members of refugees or persons in need of international protection, the Committee of Ministers of the Council of Europe recommended that applications be treated "in a positive, humane and expeditious manner" and stipulated that "[w]here applications for family reunion by such persons are rejected, independent and impartial review of such decisions should be available."[185]

b) The right to respect for family life and family reunification

In international human rights law, the right to respect for family life[186] will sometimes require States to allow members of migrants' fami-

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181 Article 19.6 ESC(r).

182 Appendix to the ESC(r), Part II. See also, Scope, Articles 2 and 3.

183 *Conclusion No. 15,* UNHCR, *op. cit.*, fn. 120, para. (e); *Conclusion No. 85 (XLIX) International Protection,* ExCom, UNHCR, 49th Session, 1998, para. (w).

184 See, *Conclusion No. 24,* UNHCR, *op. cit.*, fn. 180, para. 8; *Conclusion No. 88 (L) Protection of the Refugee's Family,* ExCom, UNHCR, 50th Session, 1999, para. (b)(iii); *Concluding Observations on Estonia,* CRC, Report of the Committee on the Rights of the Child on its 32nd Session, UN Doc. CRC/C/124, 23 June 2003, para. 56. *Recommendation Rec(2002)4,* CMCE, *op. cit.*, fn. 179, Article II; *Recommendation R(1999)23,* CMCE, *op. cit.*, fn. 179, Article 3.

185 *Recommendation R(1999)23,* CMCE, *op. cit.*, fn. 179, Article 4.

186 Articles 17 and 23 ICCPR; Article 9 CRC; Article 8 ECHR; Article 11 ACHR; Article V ADRDM; Article 18 ACHPR; Articles 21 and 33 ArCHR.

lies—a category which is broadly defined (see below)—to enter and remain in the destination country, irrespective of refugee or other status. The circumstances in which this will be the case have been considered most comprehensively[187] by the European Court of Human Rights, applying the right to respect for private and family life under Article 8 ECHR.[188] The obligation arises only in limited circumstances, in light of the principle of State control of entry to its territory, and the Court has emphasised that Article 8 does not require States to respect choice of matrimonial residence or authorise family reunion in their territory.[189] Under Article 8 there will however be a positive obligation on the State of destination to facilitate family reunification on its territory where there is an **insurmountable objective obstacle** preventing the migrant already with its jurisdiction from realising his or her family life rights in any other place.[190]

The Court will take into consideration the reasons why one family member left his or her State of origin or residence without other members of the family. Fleeing war and/or seeking asylum might be strong arguments that hinder the development of family life outside of the country of destination.[191] As between two adults, it will be difficult to plead the existence of an insurmountable obstacle against living together in the

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187 *Gül v. Switzerland,* ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, para. 38. See also, *Tuquabo-Tekle and Others v. the Netherlands,* ECtHR, Application No. 60665/00, Judgment of 1 December 2005, para. 42; *Sen v. the Netherlands,* ECtHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31; *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43; *Ahmut v. the Netherlands,* ECtHR, Case No. 73/1995/579/665, Judgment of 26 October 1996, para. 64; *Hode and Abdi v. the United Kingdom,* ECtHR, *op. cit.*, fn. 59; *Osman v. Denmark,* ECtHR, Application No. 38058/09, Judgment of 14 June 2011; *Haydarie and Others v. the Netherlands,* ECtHR, Application No. 8876/04, Admissibility Decision, 25 October 2005, The Law; *Benamar v. the Netherlands,* ECtHR, Application No. 43786/04, Admissibility Decision, 5 April 2005, The Law; *Chandra and Others v. the Netherlands,* ECtHR, Application No. 53102/99, Admissibility Decision, 13 May 2003, The Law.

188 Although it has not decided on this situation, the Human Rights Committee has found that the right of family reunification was protected under Article 23 ICCPR in *Ngambi and Nébol v. France,* CCPR, Communication No. 1179/2003, Views of 16 July 2004, para. 6.4. Concerns about family reunification have been also raised by the *Concluding Observations on Denmark,* CESCR, UN Doc. E/C.12/1/Add.102, 14 December 2004, paras. 16 and 24; *Concluding Observations on Hungary,* CESCR, UN Doc. E/C.12/HUN/CO/3, 16 January 2008, paras. 21 and 44; *Concluding Observations on Austria,* CCPR, UN Doc. CCPR/C/AUT/CO/4, 30 October 2007, para. 19; *Concluding Observations on France,* CCPR, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, para. 21.

189 *Gül v. Switzerland,* ECtHR, *op. cit.*, fn. 187, para. 38. See also, *Tuquabo-Tekle and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, para. 43; *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 68; *Haydarie and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, The Law; *Benamar and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, The Law; *Chandra and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187.

190 See, *Benamar and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, The Law. See also, *Gül v. Switzerland,* ECtHR, *op. cit.*, fn. 187, paras. 38–42; *Sen v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, para. 31.

191 See, *Tuquabo-Tekle and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, para. 47.

country of origin, unless the person in the country of destination is there as a refugee or beneficiary of international protection.[192]

Obstacles to or conditions for family reunification will violate the right to respect for family life where they can be shown to be **unreasonable.** The Court did not consider unreasonable a requirement of demonstrating sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of the family members with whom reunion is sought.[193]

Finally, a rule that discriminates as to family reunification (whether detrimentally or preferentially) based on the gender of the person settled in the country of destination, whether a marriage between a refugee and his or her spouse took place before or after fleeing the country of origin, or presumably other prohibited grounds, would breach the prohibition of discrimination in connection with the right to family life.[194]

i) What is a family?

For the purposes of the right to respect for family life and in cases where family reunification is sought, how is "family" defined? The European Court's definition is a broad one, which has developed over time in accordance with changing ideas of family, and is likely to continue to do so in light of evolving social attitudes.[195] The Court has addressed two broad categories of relationships: relationships between children and their parents; and partnerships between adults.[196]

In the context of relationships between minor children and their parents, family life will always be considered to exist between a child and

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192 See, on the negative outcome, *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, paras. 66–69.

193 *Haydarie and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, The Law. Also previously held by the Committee of Ministers of the Council of Europe in *Resolution (78) 33,* CMCE, *op. cit.*, fn. 179, Article B.1(b)(iii). See, *Concluding Observations on Switzerland,* CCPR, Report of the Human Rights Committee to the General Assembly, 52nd Session, Vol. I, UN Doc. A/52/40 (1997), paras. 103 and 114: the Human Rights Committee found that a rule prohibiting family reunification for foreign workers until 18 months after the obtaining of a temporary residence permit was not in compliance with Article 23 ICCPR (children's rights), as the possibility of reunification should be given "shortly after" obtaining the permit. The Committee of Ministers in 1978 stressed that the waiting period should be reduced to a minimum and not exceed twelve months: *Resolution (78) 33,* CMCE, *op. cit.*, fn. 179, Article B.1(b)(i).

194 See, *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, paras. 74–83. See also, *Mauritian Women Case,* CCPR, *op. cit.*, fn. 55. On the question of time of marriage in relation to family reunifaction as a prohibited ground of discrimination, see, *Hode and Abdi v. the United Kingdom,* ECtHR, *op. cit.*, fn. 59, paras. 42–56.

195 *Schalk and Kopf v. Austria,* ECtHR, Application No. 30141/04, Judgment of 24 June 2010, paras. 93–95.

196 See restatement of the Court's jurisprudence in *Onur v. United Kingdom,* ECtHR, Application No. 27319/07, Judgment of 27 February 2009, paras. 43–45. See also, *Konstatinov v. the Netherlands,* ECtHR, Application No. 16351/03, Judgment of 26 April 2007, para. 52.

the parent(s) with whom the child cohabits. Where a child's parents are married or cohabiting, this family relationship will continue to exist even where, due to parental separation, the child ceases to live with one of the parents.[197] Where a child's parents have never been married or cohabiting, other factors may serve to demonstrate that the child's relationship with the parent with whom the child does not live, amounts to a family relationship. These factors will include the nature and duration of the parents' relationship prior to the birth of the child, and in particular whether they had planned to have a child, contributions made to the child's care and upbringing, and the quality and regularity of contact. In a case concerning migration, the European Court held that for adult parents and adult children, an additional element of dependence is normally required to give rise to the protection of the right to a family life.[198]

In the context of adult partnerships, family life will be held to exist in relation to both opposite-sex and same-sex[199] marital relationships and stable and committed cohabiting non-marital relationships.[200] When deciding whether a relationship amounts to family life, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.[201]

The Human Rights Committee has affirmed that "the term "family", for purposes of the Covenant, must be understood broadly to include all those comprising a family as understood in the society concerned. The protection of such family is not obviated by the absence of formal marriage bonds, especially where there is a local practice of customary or common-law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect."[202]

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197 *Ciliz v. the Netherlands,* ECtHR, Application No. 29192/95, Judgment of 11 July 2000, para. 59. See also, *Boughanemi v. France,* ECtHR, *op. cit.*, fn. 43, para. 35.

198 The dependency must be a strong one: *A.W. Khan v. United Kingdom,* ECtHR, Application No. 47486/06, Judgment of 12 January 2010, para. 32; *Osman v. Denmark,* ECtHR, *op. cit.*, fn. 187, para. 55.

199 *Schalk and Kopf v. Austria,* ECtHR, *op. cit.*, fn. 195, para. 94; *P.B. and J.S. v. Austria,* ECtHR, Application No. 18984/02, Judgment of 22 July 2010, para. 30.

200 *Elsholz v. Germany,* ECtHR, GC, Application No. 25735/94, Judgment of 13 July 2000, para. 43; *Hoffmann v. Germany,* ECtHR, Application No. 34045/96, Judgment of 11 October 2001, para. 34. See also, *Marckx v. Belgium,* ECtHR, Plenary, Application No. 6833/74, Judgment of 13 June 1979, p. 14, para. 31; *Keegan v. Ireland,* ECtHR, Application No. 16969/90, Judgment of 26 May 1994, p. 17, para. 44; *Kroon and Others v. the Netherlands,* ECtHR, Application No. 18535/91, Judgment of 27 October 1994, pp. 55–56, para. 30.

201 *X, Y and Z v. United Kingdom,* ECtHR, GC, case No. 75/1995/581/667, Judgment of 20 March 1997, para. 36.

202 *Ngambi and Nébol v. France,* CCPR, *op. cit.*, fn. 188, para. 6.4.

Box 7. Family reunification in EU law

The *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification* recognised such rights for the spouse of a third country national residing lawfully in a Member State, as well as for the minor, unmarried children, including adopted, of the non-national and of the spouse; and those of the non-national only and those of the spouse only, including adopted.[203]

The Directive, furthermore, allows, but does not oblige, Member States to extend this right in their legislation to first-degree relatives in the direct ascending line of the third country national or of the spouse, where they are dependent on them and do not enjoy proper family support in the country of origin. The same applies for adult unmarried children, where they are objectively unable to provide for their own needs on account of their state of health.[204]

States also may, but are not required to, apply the protection of the Directive to the unmarried partner, being a third country national, with whom the primary migrant is in a duly attested stable long-term relationship, or to a third country national who is bound to him or her by a registered partnership, and to the children of these partnerships, on the same conditions as outlined above.[205]

In case of polygamous marriages, the Directive allows for the reunification with only one spouse, and the choice on whether to admit the children of the other spouse is at discretion of the Member State.[206]

The same regime applies for family reunification when the primary migrant is a refugee, except that in cases of refugees the State has no discretion to impose conditions for integration on the entry of children over 12 years old. In addition, the State may authorise family reunification of refugees for a wider range of family members than those listed in the Directive, if they are dependant on the refugee.[207]

It is notable that the scope of application of the Directive is considerably narrower than the definition of family as it has

[203] Article 4.1, *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,* EU, OJ L 251, 3.10.2003, p. 12–18 (EU Family Reunification Directive).

[204] Article 4.2, *ibid.*

[205] Article 4.3, *ibid.*

[206] Article 4.4, *ibid.*

[207] Article 10, *ibid.*

evolved in international human rights law, although the preamble refers to Article 8 ECHR and states that the Directive should be applied " without discrimination on the basis of [...] sexual orientation".[208] In order to comply with their international human rights law obligations, EU Member States would need to interpret and apply the provisions of the Directive in accordance with the broader meaning of family life established by the European Court of Human Rights, considered above.

c) Particular considerations in family reunification between children and parents

The CRC was the first international human rights treaty to recognise specific rights connected to family reunification, which applies in both asylum and other migration situations. Article 9.1 CRC provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." Thus, in any decision making process regarding expulsion of a child's parent(s), the principle of the best interests of that child must be paramount.

In terms of an application to enter a country for the purposes of family reunification, Article 10.1 CRC spells out the State's obligations:

- applications by a child or his or her parents to enter or leave a
- State Party for the purpose of family reunification must be dealt with by States Parties in a positive, humane and expeditious manner;

States Parties must further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.[209]

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208 Preamble, paras. 2 and 5, *ibid.*

209 The Committee on the Rights of the Child repeatedly reminded States of this obligation in its Concluding Observations, in particular concerning the length of the family reunification procedure. See, *inter alia*, *Concluding Observations on Belgium,* CRC, Report of the Committee on the Rights of the Child to the General Assembly, 51st Session, UN Doc. A/51/41 (1996), p. 86, para. 595; *Concluding Observations on Estonia,* CRC, *op. cit.*, fn. 184, paras. 56–57; *Concluding Observations on Finland,* CRC, Report of the Committee on the Rights of the Child on its 25th Session, UN Doc. CRC/C/100, 14 November 2000, p. 8, paras. 61–62; *Concluding Observations on France,* CRC, UN Doc. CRC/C/15/Add.240, 30 June 2004, paras. 31–32; *Concluding Observations on Sweden,* CRC, UN Doc. CRC/C/15/Add.248, 20 March 2005, paras. 41–42; *Concluding Observations on Ireland,* CRC, UN Doc. CRC/C/IRL/CO/2, 29 September 2006, paras. 30–31; *Concluding Observations on Sweden,* CRC, UN Doc. CRC/C/SWE/CO/4, 12 June 2009, paras. 64–65.

In deciding whether there is a positive obligation of the State under Article 8 ECHR with regard to family reunification between adults and their children, the European Court will have regard to the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents.[210] In one case, the European Court of Human Rights found that an "insurmountable obstacle" to living a family life outside of the country of residence existed because the mother seeking family reunification with her child who had been left in the country of origin, also had a second child in the country of destination who had grown up there. In this case, the Court found that the reunification in the country of destination would have been the most adequate solution to develop a family life, considering the difficulties that a resettlement of the whole family in the country of origin would have caused to the second child.[211]

d) Unaccompanied minors and family reunification

The CRC obliges States "to provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist a refugee child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."[212] As the Committee on the Rights of the Child has clarified, "tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which the tracing is conducted, would be contrary to the best interest of the child or jeopardize fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee".[213] The UNHCR Executive Committee also found that "every effort should be made to trace the parents or other close relatives of unaccompanied minors".[214] The *African Charter on the Rights and Welfare of the Child*

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210 See, *Tuquabo-Tekle and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, paras. 44–50; *Sen v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, para. 37;

211 See, *Sen v. the Netherlands,* ECtHR, *op. cit.*, fn. 187, paras. 40–41.

212 Article 22.2 CRC.

213 *CRC, General Comment No. 6, op. cit.*, fn. 138, para. 80.

214 *Conclusion No. 24,* UNHCR, *op. cit.*, fn. 180, para. 7; *Conclusion No. 84 (XLVIII) on Refugee Children and Adolescent,* ExCom, UNHCR, 48th session, 1997, para. (b)(i). See also, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum,* UNHCR, February 1997.

also requires States to cooperate with international organisations in their efforts to protect and assist the child and to trace the child's parents or other relatives.[215]

In respect of tracking, the use of DNA tracking systems should not create additional obstacles to family reunification, should require prior informed consent of the applicant, and should be used only when necessary.[216]

Even when the family is identified through tracking, or in any other case of family reunification, the Committee on the Rights of the Child has warned that "family reunification in the country of origin is not in the best interest of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations [...]. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalised violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation."[217]

i) Discrimination and access to the territory

The situation of unaccompanied minors, whether seeking asylum or not, warrants special consideration, due both to their vulnerability to exploitation and abuse and to their incapacity to cope with systems and institutions designed to address adult migration. Under the CRC, children enjoy particular protection against discrimination. The CRC provides that children's rights must be protected without discrimination of **any kind,**[218] including discrimination due to their nationality, immigration status or statelessness.[219] Furthermore, "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guard-

[215] Article 23.2 ACRWC.

[216] See, *Concluding Observations on Denmark,* CCPR, UN Doc. CCPR/CO/70/DNK, 15 November 2000, para. 15; *Concluding Observations on France,* CCPR, *op. cit.*, fn. 188, para. 21.

[217] CRC, *General Comment No. 6, op. cit.*, fn. 138, paras. 82–83. The General Comment provides with even more detailed information on considerations and procedural requirements towards unaccompanied children.

[218] Article 2.1 CRC.

[219] See CRC, *General Comment No. 6, op. cit.*, fn. 138, paras. 12, 16 and 18. See also, Office of the United Nations High Commissioner for Human Rights, *Study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration,* UN Doc. A/HRC/15/29, 5 July 2010 (OHCHR Study), paras. 21–22.

ians, or family members."[220] A child should, therefore, not be discriminated against on the basis, for example, of his or her parents' irregular entry onto the national territory.

In any decision concerning children the primary consideration must be the **best interests of the child.**[221] The Committee on the Rights of the Child has affirmed that this overarching consideration as to what is the best interest of a child requires a clear and comprehensive assessment of the child's identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs, "allowing the child access to the territory is a prerequisite to this initial assessment process".[222] The Committee identifies an obligation to appoint a competent guardian and, if needed, to provide legal representation.[223] In relation to entry, therefore, unaccompanied or separated children[224] are always to be granted access under the "best interests" principle.

Further authoritative guidance on these principles is set out in the Committee on the Rights of the *Child's General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin.*[225]

e) Problems linked with family reunification: dependency

In many countries the residence permit of a person who enters a country for the purposes of family reunification is premised on either (a) the existence and validity of the permit, whether for work or international protection reasons, of a primary permit holder, i.e. usually someone who migrated there first, or (b) his or her family relationship with a citizen of the country. In both cases the migrant's residence will depend on the stability of the relationship with that person. In some countries, those who migrate for purposes of family reunion have no right to work, and the fact that their residence in the destination State is so strongly linked to the person holding the primary permit or the national family member may lead them to a situation of dependency, where they are unable to exercise or claim protection for their human rights. In case of divorce or separation from the principal residence permit holder, they may find themselves at risk of deportation or, in the absence of a valid residence

220 Article 2.2 CRC. See also, *OHCHR Study, op. cit.*, fn. 219, paras. 21–22.

221 Article 3.1 CRC.

222 See, CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 20 (emphasis added).

223 See, *ibid.*, para. 21.

224 "Unaccompanied children" are children who have been separated from their parents and other relatives and are not cared for by an adult responsible, by law or custom, for them. A "separated child" is separated from the parents or any legal or customary caregiver, but not necessarily from other relatives. Definitions provided for by the CRC in *ibid.*, paras. 7 and 8.

225 See, *ibid.*

permit, face increased vulnerability to exploitation. These situations can give rise to a range of human rights issues for those concerned, and in particular women migrants who enter the country for purposes of marriage or family reunification.[226] For example, they may be unable or unwilling to seek protection from domestic violence or to leave abusive relationships because their legal right to remain in a country is premised on the relationship concerned. The limited rights often associated with family-reunification permits significantly can limit the ability of holders to seek educational and/or employment opportunities, which in the case of women who migrate for family reunification can perpetuate stereotyped gender-roles and give rise to integration difficulties. On the other hand, women who are the primary permit-holder may be at risk of particular violence if they seek to end relationships with partners whose residency rights are wholly connected with the relationship.[227]

As discussed at greater length in Chapter 6, similar risks can arise for migrants whose residency permit is linked to a particular employer, and who may face heightened risks of violence and abuse at work and/or may be unable or unwilling to seek legal protection. Indeed, CEDAW provides in Article 2(f) that "when residency permits of women migrant workers are premised on sponsorship of an employer or spouse, States parties should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or spouse or is fired for complaining about abuse".[228]

As for the family members of a migrant worker, Article 50 ICRMW establishes that, "[i]n the case of death of a migrant worker or dissolution of marriage, the State of employment [of the migrant worker] shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State".

In recognition of the particular risks of human rights violations and abuses which may arise in these contexts, the Council of Europe, the Committee of Ministers has recommended to Member States that, "after a period of four years of legal residence, adult family members should be granted an autonomous residence permit independent of that of the principal", and that, "in the case of divorce, separation or death of the principal, a family member having been legally resident for at least one year may apply for an autonomous residence permit. Member States

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226 See, CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 22.

227 E.g. see facts of *Yildirim v. Austria,* CEDAW, Communication No. 6/2005, Views of 6 August 2007.

228 See CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(f).

should give due consideration to such applications. In their decision, the best interest of the children concerned shall be a primary consideration".[229]

Dependency on a principal resident permit holder may also hinder the access of the migrant to an effective remedy to prevent, or to seek reparation for, of a human rights violation committed by their sponsor, relative or spouse. This is problematic, as States may infringe their obligation to provide individuals with an effective remedy for human rights violations (see, Chapter 2, Section 4). On the particular situation of women migrant victims of violence, the Committee of Ministers of the Council of Europe has recommended that States "ensure that all services and legal remedies available for victims of domestic violence are provided to immigrant women upon their request"[230] and that they should "consider, where needed, granting immigrant women who have been/are victims of domestic violence an independent right to residence in order to enable them to leave their violent husbands without having to leave the host country".[231]

Box 8. Mandatory residence assignment for refugees cannot impair their family life

The European Court of Human Rights has recently held that an asylum programme which assigns mandatory residence in one particular region of the country, thereby making very difficult the maintenance of family links between two refugees, is in breach of their right to family life under Article 8 ECHR, as no legitimate reason of equitable distribution of refugees within the country for economic reason can override the refugees' right to family life. The case originated in the practice of Switzerland to assign refugees to a particular canton outside of which they cannot reside.[232]

4. Victims of Trafficking

Each year many people are trafficked by organisations that by use of force or other forms of coercion, deception or abuse, gain control over them and arrange their transfer abroad, for various exploitative purpos-

229 *Recommendation Rec(2002)4,* CMCE, *op. cit.*, fn. 179, Article III.

230 *Recommendation Rec(2002)5,* CMCE, *op. cit.*, fn. 79, Article 24.

231 *Ibid*., Article 59.

232 *Mengesha Kimfe v. Switzerland,* ECtHR, Application No. 24404/05, Judgment of 29 July 2010.

es including forced labour. Migrants may fall victim to traffickers either in their country of origin, often under the promise of transport and work, or in the course of their journey to the destination State. Under certain treaties, victims of trafficking have rights to some protective measures in light of their situation. While many of the additional protections granted to them by international instruments are related to their role as witnesses in related prosecutions, some are also designed to protect their human rights.[233]

Human Trafficking is a crime under international law[234] and both the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (UN Trafficking Protocol) and the *Council of Europe Convention on Trafficking in Human Beings* (Council of Europe Trafficking Convention) require States Parties to criminalise the practice in national law. Depending on the circumstances, human trafficking may involve several international crimes, including crimes against humanity and, in armed conflict, war crimes.[235] Trafficking can entail multiple violations of the human rights of trafficked persons, including the prohibition on slavery, servitude and forced or compulsory labour, and the right to liberty. The European Court of Human Rights has recognised that all human trafficking falls within the prohibition of slavery, servitude or forced or compulsory labour.[236]

Under both the *UN Trafficking Protocol* and the *Council of Europe Trafficking Convention,* States must take steps to prevent and combat trafficking, through the civil and criminal law and law enforcement.[237] In addition, the European Court has found that there is a duty to investigate allegations of violation of the prohibition on slavery, servitude or forced labour, as a result of trafficking, as well as obligations to establish and enforce both criminal and civil law measures to counter trafficking and to protect the rights of victims of trafficking.[238] This should include regulating businesses often used as a cover for human trafficking and

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233 See, *inter alia*, Kristina Touzenis, *Trafficking in Human Beings, Human rights and transnational criminal law, developments in law and practices,* UNESCO, Migration Studies 3, 2010, France; *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence,* International Council on Human Rights Policy, Geneva, 2010.

234 See, fn. 113.

235 See, Articles 7.1(c), 7.1(g), 7.2(c), and 8.2(xxii), *Rome Statute,* which refer to "enslavement", "sexual slavery" and "enforced prostitution" under war crimes and crimes against humanity.

236 *Rantsev v. Cyprus and Russia,* ECtHR, Application No. 25965/04, Judgment of 7 January 2010, para. 282.

237 Articles 5 and 9–11, *UN Trafficking Protocol;* Chapters II and IV, *Council of Europe Trafficking Convention.* See also, Article 6 CEDAW; Articles 34 and 35 CRC; *General Recommendation No. 19, Violence Against Women,* CEDAW, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.II), 1989, paras. 13–16 and 24(g).

238 *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 284.

addressing concerns relating to encouragement, facilitation or tolerance of trafficking in immigration rules.[239]

a) Who is a victim of trafficking

A trafficked person is someone who has been recruited, transported, transferred, harboured or received, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[240] The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered "human trafficking" even if this does not involve any of the means previously listed.[241] Under both the *UN Trafficking Protocol* and the *Council of Europe Trafficking Convention,* exploitation includes, but is not limited to sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[242]

b) Obligations of States

The general duty of States to combat trafficking of human beings is well established in international human rights law treaties.[243] Connected to this, States may also have particular treaty or human rights law obligations related to the victims or potential victims of human trafficking.

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239 *Ibid*., para. 284.

240 Human trafficking is "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation", Article 3, *UN Trafficking Protocol;* Article 4, *Council of Europe Trafficking Convention:* "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"; "The consent of a victim of trafficking in persons to the intended exploitation [...] shall be irrelevant where any of the means" described in the definition have been used. The Human Rights Committee finds that human trafficking is a violation of Articles 3 (gender equality), 8 (forced labour) and 24 (children rights) ICCPR: *Concluding Observations on Greece,* CCPR, UN Doc. CCPR/CO/83/GRC, 25 April 2005, para. 10. The Committee against Torture finds that "human trafficking for the purpose of sexual and labour exploitation" falls under the practices prohibited by Article 16 (cruel, inhuman or degrading treatment or punishment) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT): *Concluding Observations on Spain,* CAT, UN Doc. CAT/C/ESP/CO/5, 9 December 2009, para. 28. See also, *Conclusion No. 90 (LII) General,* ExCom, UNHCR, 52nd session, 2001, para. (s).

241 Article 3(c), *UN Trafficking Protocol;* Article 4(c), *Council of Europe Trafficking Convention.*

242 Article 3(a), *UN Trafficking Protocol;* and Article 4(a), *Council of Europe Trafficking Convention.*

243 Article 6 CEDAW; Article 35 CRC; Article 6.1 ACHR; Article 2, *Convention of "Belem do Para";* Article 29 ACRWC; Article 4.2(g), *Protocol to the ACHPR on the Rights of Women in Africa.*

States must protect an individual at risk of being trafficked or subject to forced or compulsory labour. The European Court has found that such a duty arises if the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or is at real and immediate risk of being, trafficked or exploited, or subject to slavery, servitude or forced or compulsory labour.[244] The duties to protect and to investigate apply to all States through which the trafficking occurs, from the country of origin to the destination State. Where a State is unable or unwilling to protect those at risk of trafficking, the protections of the Refugee Convention or principle of *non-refoulement* may apply (see, above, Box No. 4).

In some cases, international law requires States to allow victims of trafficking to remain in the territory. According to the *UN Trafficking Protocol,* to protect against trafficking, States should "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases".[245] The *Council of Europe Convention on*

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244 *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 284. See also, *Concluding Observations on Republic of Korea,* CESCR, UN Doc. E/C.12/KOR/CO/3, 20 November 2009, para. 23; *Concluding Observations on Azerbaijan,* CEDAW, Report of the Committee on the Elimination of Discrimination against Women to the General Assembly, 53rd Session, UN Doc. A/53/38/Rev.1 (1998), para. 75; *Concluding Observations on Bangladesh,* CEDAW, Report of the Committee on the Elimination of Discrimination against Women to the General Assembly, 52nd Session, UN Doc. A/52/38/Rev.1 (1997), para. 457; *Concluding Observations on the Netherlands,* CEDAW, Report of the Committee on the Elimination of Discrimination against Women to the General Assembly, 56th Session, UN Doc. A/56/38 (2001), para. 212; *Concluding Observations on Lebanon,* CEDAW, UN Doc. CEDAW/C/LBN/CO/3, 8 April 2008, paras. 28–29; *Concluding Observations on Spain,* CEDAW, UN Doc. CEDAW/C/ESP/CO/5, 7 July 2004, para. 337; *Concluding Observations on Singapore,* CEDAW, UN Doc. CEDAW/C/SGP/CO/3, 10 August 2007, paras. 21–22; *Concluding Observations on Guatemala,* CEDAW, UN Doc. CEDAW/C/GUA/CO/7, 10 February 2009, paras. 23–24; *Concluding Observations on Spain,* CEDAW, UN Doc. CEDAW/C/ESP/CO/6, 7 August 2009, paras. 21–22; *Concluding Observations on Switzerland;* CEDAW, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, paras. 29–30; *Concluding Observations on Greece,* CCPR, *op. cit.*, fn. 240, para. 10; *Concluding Observations on Thailand,* CCPR, UN Doc. CCPR/CO/84/THA, 8 July 2005, para. 20; *Concluding Observations on Spain,* CAT, *op. cit.*, fn. 240, para. 28; Principle 1 of the *OHCHR Recommended Principles on Human Rights and Human Trafficking,* adopted on 20 May 2002, UN Doc. E/2002/68/Add.1 (OHCHR Trafficking Principles).

245 Article 7.1, *UN Trafficking Protocol.* This position is reiterated by the CEDAW in *Concluding Observations on Spain,* CEDAW, 2004, *op. cit.*, fn. 244, para. 337; *Concluding Observations on Pakistan,* CEDAW, UN Doc. CEDAW/C/PAK/CO/3, 11 June 2007, para. 30 (victims of trafficking should be shielded from prosecutions on illegal migration); *Concluding Observations on Singapore,* CEDAW, *op. cit.*, fn. 244, paras. 21–22; *Concluding Observations on Lebanon,* CEDAW, *op. cit.*, fn. 244, paras. 28–29; *Concluding Observations on Denmark,* CEDAW, UN Doc. CEDAW/C/DEN/CO/7, 7 August 2009, paras. 32–33. See Principles 3 and 7 of the *OHCHR Trafficking Principles, op. cit.*, fn. 244: "3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers"; "7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."

Trafficking provides that when the authorities have reasonable grounds to believe that a person may be a victim of trafficking, the person must not be removed from the territory until there has been a process to determine whether the person is a victim, and pending the conclusion of that process, must be afforded measures of protection and support.[246] Furthermore, where there are reasonable grounds to believe that the person concerned is a victim, they have the right to an additional period of 30 days, to recover and reflect, in order to escape from the influence of the traffickers. During this period, no expulsion can be enforced.[247]

States must provide social and psychological assistance for victims. The *UN Trafficking Protocol* provides that States parties "shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons" and, in particular, the provision of appropriate housing; counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; medical, psychological and material assistance; and employment, educational and training opportunities.[248] The *Council of Europe Trafficking Convention* includes a direct obligation to adopt "legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery."[249] In addition, States must provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help;[250] and adopt rules under which such victims may have access to the labour market, to vocational training and education.[251] Finally, States Parties must ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.[252]

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246 Article 10.2, *Council of Europe Trafficking Convention.*

247 Article 13, *Council of Europe Trafficking Convention.*

248 Article 6.3, *UN Trafficking Protocol.* See also Article 39 CRC; *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child,* CRC, UN Doc. CRC/GC/2003/4, 1 July 2003, para. 37; *General comment No. 3: HIV/AIDS and the rights of the child,* CRC, UN Doc. CRC/GC/2003/3, 17 March 2003, para. 36.

249 Article 12.1, *Council of Europe Trafficking Convention.* See also, *Recommendation R(1991)11 of the Committee of Ministers to Member States concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults,* adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies, Article D(3); *Recommendation Rec(2001)16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation,* adopted by the Committee of Ministers on 31 October 2001 at the 771st meeting of the Ministers Deputies, Article 34; *Recommendation R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation,* adopted by the Committee of Ministers on 19 May 2000, at the 710th meeting of the Ministers' Deputies, Appendix, Articles II(2), and V(34) and (35); *Recommendation 1325(1997) on traffic in women and forced prostitution in Council of Europe Member States,* PACE, Article 6(v); *Recommendation 1545 (2002) Campaign against trafficking in women,* PACE, Article 10(ix)(g).

250 Article 12.3, *Council of Europe Trafficking Convention.*

251 Article 12.4, *ibid.*

252 Article 12.6, *ibid.*

5. Smuggled persons

An even higher number of migrants attempting of reach a destination State are forced to make use of smuggling organisations.

Under the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (Smuggling Protocol), smuggling means "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[253] Smuggled persons are distinguished from trafficked persons in that their participation in the illegal entry process is voluntary, though they may nevertheless in the course of the process be subjected to coercion, ill-treatment or other violations of their human rights. In contrast to trafficking, smuggling involves at least a moment in which the migrant undertakes an informed and voluntary decision to participate.

Given their particular vulnerability, obligations under human rights law to take measures to protect individuals who the authorities know or ought to know will be at risk of violations of their human rights, are of particular relevance to smuggled persons. As regards specific protection, since smuggled persons are not perceived as victims of crime in the same way as trafficked persons, but as willing participants, such limited special protection as they enjoy arises from international criminal law, and is aimed at facilitating their collaboration with the prosecutorial system in order to arrest, prosecute and dismantle the smuggling network.

Under the *Smuggling Protocol,* States have the obligation to "preserve and protect the rights of persons who have been the object of [human smuggling] as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment."[254] They must afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of human smuggling, and must provide appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of human smuggling.[255] In particular, "States Parties shall take into account the special needs of women and children."[256]

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253 *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000,* Article 3(a) (UN Smuggling Protocol).

254 Article 16.1, *UN Smuggling Protocol.*

255 Article 16.2-3, *ibid.*

256 Article 16.4, *ibid.*

Finally, the *Smuggling Protocol* provides that "[m]igrants shall not become liable to criminal prosecution [...] for the fact of having been the object of [smuggling]".[257]

6. Migrants Rescued at Sea

Every year thousands of migrants try to reach their country of destination by sea,[258] many losing their lives in the process as they often, or almost exclusively, travel on boats that are not fit for the amount of people that they are transporting. The international law of the sea, as well as international human rights law and refugee law, provide relevant frameworks for the rescue, protection and status of such migrants.

Article 98 of the *1982 UN Convention on the Law of the Sea* (UNCLOS) codifies into law a long-observed principle of maritime tradition: the obligation of shipmasters to render assistance to any person found at sea in danger of being lost and to proceed to the rescue of persons in distress, if informed of their need of assistance.[259] This obligation of rescue was also provided for by the *1974 International Convention for the Safety of Life at Sea* (SOLAS).[260]

While shipmasters have an obligation of immediate assistance, coastal States have the obligation to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose".[261] The *1979 International Convention on Maritime Search and Rescue* (SAR) obliges States to "[...] ensure that assistance be provided to any person in distress at sea [...] regardless of the nationality or status of such a person or the circumstances in which the person is found".[262] In order to implement this obligation, States parties to the Convention have established in common agreements search and rescue zones (SAR zones).[263]

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257 Article 5, *ibid.*

258 See UNHCR website, http://www.unhcr.org/pages/4a1d406060.html.

259 Article 98.1, *United Nations Convention on the Law of the Sea,* adopted on 10 December 1982 (UNCLOS): "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:(a) to render assistance to any person found at sea in danger of being lost;(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.".

260 See Chapter V, Regulation 33.1 of the *International Convention for the Safety of Life at Sea,* 1974 (SOLAS).

261 See, Article 98.2 UNCLOS. The same obligation is recalled in Chapter V, Regulation 7 SOLAS.

262 *International Convention on Maritime Search and Rescue,* 1979 (SAR), Chapter 2.1.10.

263 See, Chapter 2.1.4-8 SAR.

Under international human rights law, the duty to search and rescue people in distress at sea may be derived from States' positive obligations to protect the life of those subject to their jurisdiction. In territorial waters, the State has jurisdiction and is plainly obliged by international human rights law to take steps to protect the lives of those present there.

In the high seas, under international law, jurisdiction will attach to the State of the flag, i.e. the State where the rescuing boat is registered.[264] In addition, the State responsible for a particular SAR zone has obligation to rescue or co-ordinate rescue and protection measures.[265] Under international human rights law, a boat will in addition be within the jurisdiction of the State where the State's authorities exercise effective control or have authority over the boat (at minimum from the moment of interception or rescue and arguably from the moment when rescue is possible), or the zone of the sea concerned.[266]

The Facilitation Committee of the International Maritime Organisation (IMO) has issued a set of principles aimed at fostering the respect of human rights and refugee law in rescue operations.[267] They stress that, "[i]f a person rescued expresses a wish to apply for asylum, great consideration must be given to the security of the asylum seeker. When communicating this information, it should therefore not be shared with his or her country of origin or any other country in which he or she may face threat".[268] The Committee specified "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."[269]

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264 Article 92 with 94 UNCLOS. See also, *Medvedyev v. France,* ECtHR, *op. cit.*, fn. 51, para. 65.

265 Article 3, *Principles relating to administrative procedures for disembarking persons rescued at sea,* adopted on 22 January 2009, Doc. No. FAL.3/Circ.194 (Disembarking Principles). See also, *Guidelines on the Treatment of Persons Rescued at Sea,* Maritime Safety Committee, IMO, Resolution MSC.167(78) (IMO Rescued Guidelines), adopted on 20 May 2004; and, *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases,* IMO Assembly, Resolution A.871(20), adopted on 27 November 1997 (IMO Stowaway Guidelines). See also, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants,* PACE, Resolution No. 1821(2011), approved on 21 June 2011; *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009,* CPT, Doc. No. CPT/Inf (2010) 14, 28 April 2010, para. 34.

266 See *J.H.A. v. Spain,* CAT, Communication No. 323/2007, Views of 21 November 2008, para. 8.2; *Xhavara and Fifteen Others v. Italy and Albania,* ECtHR, *op. cit.*, fn. 46; *Medvedyev v. France,* ECtHR, *op. cit.*, fn. 51, paras. 66–67; *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.* fn. 46, paras. 77-82.

267 See fn. 265.

268 Article 2, *Disembarking Principles.* See also, *IMO Rescued Guidelines;* and, *IMO Stowaway Guidelines.*

269 *IMO Rescued Guidelines,* para. 6.17. See also, *IMO Stowaway Guidelines.* See also, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009,* CPT, *op. cit.*, fn. 265, para. 36.

The UNHCR ExCom has also stated that States have an obligation "to ensure that masters of vessels sailing under their flag scrupulously observed established rules regarding rescue at sea, and to take all necessary action to rescue refugees and displaced persons leaving their country of origin on boats in order to seek asylum and who are in distress."[270] Furthermore, "[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum".[271] The ExCom guidance states that interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.[272] In cases of large-scale influx, "asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."[273]

7. Stateless persons

Persons who lack any national status as provided by internationally recognised States are known as "stateless persons". The UNHCR estimates that there are 12 million such people, although it is impossible to provide accurate statistics.[274] Not all stateless persons are migrants, but those migrants that are stateless face particular difficulties in accessing their rights (see, for example in relation to detention, Chapter 4).

The *Convention relating to the Status of Stateless Persons* of 1954 (Statelessness Convention) defines as stateless "a person who is not considered as a national by any State under the operation of its law".[275] This definition has arguably attained the status of customary interna-

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270 *Conclusion No. 14 (XXX) General,* ExCom, UNHCR, 30th Session, 1979, para. (d). See also, *Practical Guidelines for Shipowners, Their Agents and Shipmasters Relating to Stowaways Asylum-Seekers,* UNHCR, January 1992 (UNHCR Stowaways Guidelines).

271 *Conclusion No. 15,* UNHCR, *op. cit.*, fn. 120, para. (c). See also, *Conclusion No. 23 (XXXII) Problems Related to the Rescue of Asylum-Seekers in Distress at Sea,* ExCom, UNHCR, 32nd Session, 1981, para. (1); *Conclusion No. 38 (XXXVI) Rescue of Asylum-Seekers in Distress at Sea,* ExCom, UNHCR, 36th Session, 1985, para. (a).

272 See, *Conclusion No. 97 (LIV) Protection Safeguards in Interception Measures,* ExCom, UNHCR, 54th Session, 2003, para. (a)(iv).

273 *Conclusion No. 23,* UNHCR, *op. cit.*, fn. 271, para. (3).

274 UNHCR Webpage at http://www.unhcr.org/pages/49c3646c15e.html (last visited on 11 October 2010).

275 Article 1.1, *Convention relating to the Status of Stateless Persons,* adopted on 28 September 1954 (Statelessness Convention).

tional law.[276] Persons falling within this definition are commonly referred to as *de jure* stateless persons. The definition of statelessness includes persons either outside or within their country of habitual residence or origin[277] as well as refugees who have been deprived of nationality in their country of origin, and to whom the *Geneva Refugee Convention* applies.[278] While the definition seems to require verification that an individual lacks the nationality of any State, in fact it is only required that such checks be made as regards States with which the individual enjoys a relevant link (in particular birth on the territory, descent, marriage or habitual residence).[279] Failing these, he or she should be recognised as a stateless person.

The *Statelessness Convention* provides the stateless person with some specific rights which States Parties must guarantee, and that are, for the most part, identical to those included in the *Geneva Refugee Convention*. Most of the rights establish an equality of treatment to aliens, such as the right to property (Article 13), the right of association (Article 15), the right to wage-earning employment (Article 17), the right to self-employment (Article 18), the right to practice liberal professions (Article 19), the right to housing (Article 21), the right to education other than elementary (Article 22.2), the right to freedom of movement (Article 26). For other rights, the enjoyment by stateless persons is equated with that of nationals: the right to freedom of religion (Article 4), the right to artistic rights and industrial property (Article 14), the right of access to courts (Article 16), the right to equal treatment to nationals in rationing systems (Article 20), the right to elementary education (Article 22.1), the right to public relief (Article 23), the right to healthy and fair working conditions and the right to social security (Article 24), the right to equal treatment to nationals in the imposition of fiscal charges (Article 29). Finally, the *Statelessness Convention* guarantees stateless persons some specific rights: a particular right of non-discrimination on the basis of race, religion or country of origin (Article 3), the right to a personal status (Article 12), the right to identity papers and to travel documents (Articles 27 and 28), and specific rights and guarantees connected to expulsion procedures (Article 31). However, the *Statelessness Convention* has been at present ratified by only 65 States, thereby limiting the universal effect of its provisions.

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[276] *The Concept of Stateless Persons under International Law,* Summary Conclusions of the Expert Meeting organised by the Office of the UNHCR, Prato, Italy, 27–28 May 2010, para. 2. Report of the International Law Commission, *Text of the draft articles on diplomatic protection adopted by the Commission on first reading: commentary on article 8,* General Assembly, Fifty-ninth session, Supplement No. 10 (A/59/10), 2004, at p. 46.

[277] *Ibid*., para. 4.

[278] *Ibid*., para. 5.

[279] *Ibid*., paras. 14 and 22.

As noted above, the definition of statelessness has customary international law status, thus binding all States, regardless of whether they are parties to the *Statelessness Convention*. While the same is not established in respect of the obligations on treatment of stateless persons arising from the same Convention, stateless persons are entitled to the broad range of rights enshrined under international human rights law which flow from presence in the State's jurisdiction, without discrimination as to status, rather than on nationality.

At the time of the creation of the refugee and statelessness protection regimes, people who were typically not granted external (diplomatic or consular) protection by their country of nationality were referred to as *de facto* stateless. Subsequently, the notion has been applied more widely. As outlined in the conclusions of an expert meeting on the subject, while there is some disagreement on the question, the notion of *de facto* statelessness refers to a person who does not possess the effective nationality of any State and is unable or for valid reasons unwilling to avail himself or herself of the protection of any State. Persons who are stateless *de facto* but not *de jure* are not covered by the *Statelessness Convention* definition of statelessness. The *Final Act of the Convention on Reduction of Statelessness* of 1961 nevertheless recommended that "persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality."[280] The problem is that there is no binding international law obligation to do so and that a definition of statelessness has not yet been provided in international law.[281] It is important for the practitioner to keep in mind that this classification is not yet agreed internationally and it may also be contested domestically. Where a domestic system recognises some protection for stateless persons, it is however useful to put forward these principles. It should also be borne in mind that the rights of persons who are *de facto* stateless, though

[280] Article I, *Final Act of the Convention on the Reduction of Statelessness,* adopted on 30 August 1961.

[281] The most authoritative definition, at present, is that of a UNHCR Expert Meeting which defined *de facto* stateless persons as "persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality." *The Concept of Stateless Persons under International Law, op. cit.*, fn. 276, para. II(2). However, this definition is controversial in that it restricts the definition of *de facto* statelessness to those outside the country of their nationality: Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons,* London, July 2010, pp. 63–64. See also, *Recommendation Rec(2009)13 on the Nationality of Children,* CMCE, Doc. CM/Rec(2009)13, paras. 7–8; and, *Explanatory Memorandum to Recommendation on the Nationality of Children,* CMCE, principle 7, para. 21. The Inter-American Court adopted the approach of the "effective nationality" in *The Girls Yean and Bosico v. the Dominican Republic,* IACtHR, Series C No. 130, Judgment of 8 September 2005 (Yean and Bosico Case), para. 142.

they are not subject to any specific international law protection, are protected by international human rights law. Of particular relevance are obligations of non-discrimination, and the principle that rights must be guaranteed in ways that are practical and effective.[282]

The UNHCR expert meeting also recognised that "irregular migrants who are without identity documentation may or may not be unable or unwilling to avail themselves of the protection of the country of their nationality."[283] As a rule there should have been a request by the migrant for protection and a refusal by the State of nationality, before he or she can be declared *de facto* stateless. However, prolonged non-cooperation by the country of nationality in the identification procedure or other proceedings can also be considered a refusal of protection, thus making the migrant *de facto* stateless.[284] Similarly, this condition may also be satisfied in a situation where a country is unable to exercise diplomatic or consular protection.

Several treaties impose obligations on States aimed at reducing statelessness, reflecting the right to nationality, enshrined in Article 15 of the *Universal Declaration of Human Rights*.[285] These are the 1961 *Convention on the Reduction of Statelessness,* the *European Convention on Nationality,* and the *2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession.*[286] An important safeguard concerning children is set out in Article 7 CRC which requires that a child "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents [...] in particular where the child would otherwise be stateless."[287] Of particular interest to the situation of migrants is Article 7 of the *1961 Convention on the Reduction of Statelessness,* which deal with obliga-

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282 See, for example, CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 10; and Article 2.3 ICESCR, which prohibits at least developed States from discriminating between nationals and non-nationals.

283 *The Concept of Stateless Persons under International Law, op. cit.*, fn. 276, para. II(10).

284 See, also, an analysis of Statelessness as lack of effective nationality in the Equal Rights Trust, *Unravelling Anomaly, op. cit.*, fn. 281; and Hugh Massey, "UNHCR and *de facto* statelessness", in *UNHCR Legal and Protection Policy Research Series,* Department of International Protection, UNHCR, UN Doc. LPPR/2010/01, April 2010.

285 See also, Article 7 CRC and Article 24.3 ICCPR.

286 The *Convention on the Reduction of Statelessness,* 1961, (Statelessness Convention) provides specific obligations on States in order to prevent statelessness as a result of the circumstances of a person's birth (Articles 1–4); in cases of marriage, termination of marriage, legitimation or adoption, (Article 5–6); or due to loss or renunciation of nationality, or naturalisation procedures, departure, residence abroad, failure to register or any other similar ground (Article 7) or in cases of transfer of State territory to another State (Article 10). It provides that no person or group may be deprived of their nationality on racial, ethnic, religious or political grounds (Article 9).

287 Article 7 CRC. The obligation is reflected also in Article 6 ACRWC; Article 20 ACHR, Article XIX ADRDM, Article 2, *Convention on the Reduction of Statelessness,* 1961.

tions to prevent statelessness in case of loss, change or deprivation of nationality. It provides that a "national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground".[288]

Finally, it is important to note that both the *Geneva Refugee Convention* and the *Statelessness Convention* provide that a State "shall as far as possible facilitate the assimilation and naturalization of refugees [and of stateless persons]. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[289]

[288] Article 7.3, *Convention on the Reduction of Statelessness,* 1961. Exceptions to this principle apply under Article 7.4 to a naturalized person "on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality".

[289] Article 35, *Geneva Refugee Convention*; and Article 32, *Statelessness Convention.*

CHAPTER 2: HUMAN RIGHTS IMPEDIMENTS TO EXPULSION

This Chapter analyses the limitations set by international human rights and refugee law to the general rule, which derives from the principle of territorial sovereignty, that a State has a right to expel non-nationals from its territory.[290] International human rights law has developed powerful tools to constrain the exercise of States' discretion in expulsions. These include both procedural rules (which will be considered in Chapter 3) and substantive limitations, addressed in this Chapter.

Human rights law can in certain circumstances be used to pre-empt or overturn any order for the removal of a non-national (or indeed a national) from the territory. This can apply to any type of involuntary transfer from the territory, however the transfer is described in the national system, whether as a deportation, removal, extradition, or in any other terms.

Human rights law may place substantive limitations on expulsion in two types of situations:

1. Where there is a risk of human rights violations following return (the principle of **non-refoulement**). The principle of *non-refoulement* prohibits the transfer of a person to a country where he or she faces a real risk of a serious violation of human rights, or of further transfer to a third state where there would be a real risk of such violations. Although responsibility for the potential violation lies with the sending State, the focus is on the human rights situation of the receiving country and the potential for violation of rights following return there.
2. Where the removal from the sending state would itself violate rights enjoyed in that state. The removal from the sending state may also be challenged as violating rights which the individual enjoys in that State. Here, the human rights situation in the receiving country is secondary to the issue of whether the expulsion itself irreversibly prejudices the expellee's rights.

I. The principle of non-refoulement

The principle of *non-refoulement*, prohibiting States to transfer anyone to a country where he or she faces a real risk of persecution or serious violations of human rights, is a fundamental principle of international law and one of the strongest limitations on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty.

[290] See, fn. 43.

It has its origin in international refugee law[291] and international regulations on extradition.[292] In refugee law, the principle has existed since 1933 and it is now clearly a provision of customary international law binding all States.[293] In international human rights law, the legal basis of the principle of *non-refoulement* lies in the obligation of all States to recognise, secure and protect the human rights of all people present within their jurisdiction,[294] and in the requirement that a human rights treaty be interpreted and applied so as to make its safeguards practical and effective.[295]

1. Non-refoulement in international refugee law

Regarding refugees, whether a formal determination of refugee status has been made by the destination country, or whether they are still in the determination process, or intending to apply for asylum, Article 33.1 of the *Geneva Convention relating to the Status of Refugees* of 1951 prohibits the State to "expel or return *("refouler")* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[296] This principle

[291] Article 33, *Geneva Refugee Convention*; and Article II.3, *OAU Refugee Convention.*

[292] See, among others, Article 9, *International Convention Against the Taking of Hostages,* adopted on 17 December 1979 by G.A. Res. 146 (XXXIV), UN GAOR, 34th Session, Supp. No. 46, UN Doc. A/34/46; Article 3, *European Convention on Extradition,* adopted on 13 July 1957; Article 5 of the *European Convention on the Suppression of Terrorism,* adopted on 27 January 1977; Article 4, *Inter-American Convention on Extradition,* adopted on 25 February 1981; and Article 3, *UN Model Treaty on Extradition.*

[293] See, Article 3, *Convention relating to the International Status of Refugees,* League of Nations, adopted on 28 October 1933, Treaty Series Vol. CLIX No. 3663; Article 4, *Provisional Arrangement concerning the status of refugees coming from Germany of 4 July 1938;* Article 5, *Convention concerning the status of refugees coming from Germany,* League of Nations, adopted on 10 February 1938. On the customary nature of *non-refoulement* see, UNHCR, *The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 Bvr 1953/93, 2 BvR 1954/93,* 31 January 1994; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,* 26 January 2007, para. 15. See also, *Conclusion No. 6 (XXVIII) Non-refoulement*, ExCom, UNHCR, 28th Session, 1977, para. (a).

[294] See, Article 1 ECHR, Article 2 ICCPR, Article 1 ACHPR, and Article 1 ACHR. The *Convention against Torture* expressly provides for the principle of *non-refoulement* in its Article 3.

[295] See, for example, *Soering v. United Kingdom,* ECtHR, Plenary, Application No. 14038/88, 7 July 1989, para. 87; *Ahorugeze v. Sweden,* ECtHR, Application No. 37075/09, Judgment of 27 October 2011, para. 85: "[i]t would hardly be compatible with the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subject to torture or inhuman or degrading treatment or punishment".

[296] See *Conclusion No. 79,* UNHCR, *op. cit.*, fn. 79, para. (j). See also, *Conclusion No. 81 (XLVIII) General,* ExCom, UNHCR, 48th Session, 1997, para. (i); *Conclusion No. 82 (XLVIII) on Safeguarding Asylum,* ExCom, UNHCR, 48th Session, 1997, para. (d–i). See also, *Concluding Observations on Portugal,* CCPR, UN Doc. CCPR/CO/78/PRT, 17 September 2003, para. 83.12. The *OAU Refugee Convention* refers to threat to physical integrity or liberty for all the refugees falling in the extended definition it provides. See, Article 2.3, *OAU Refugee Convention.* The *OAU Refugee Convention* does not admit exceptions to the principle of *non-refoulement*.

has also been upheld by several international law instruments.[297] It is not subject to derogation.[298]

The refugee law principle of *non-refoulement* applies both to refugees present on the territory of the State and as well as at the border.[299] The principle of *non-refoulement* also applies to extradition procedures[300] and it must be observed in all situations of large-scale influx.[301] This flows from the same wording of Article 33.1 which refers to *refoulement* "in any manner whatsoever", thereby including all forms of transfer of a person from the territory of asylum or where asylum is sought. The principle of *non-refoulement* also bears consequences for temporary or discretionary protections (see, Chapter 1).

The definition of *refoulement* of Article 33.1, unlike the definition of refugee, refers to risks arising in any country where the person concerned might be sent, and not necessarily in the country of origin or habitual residence. This includes third States which might transfer the person to an unsafe country (indirect *refoulement*). The "threat to life or freedom" is also broader than, and includes, the refugee definition. It has, indeed, been read as encompassing circumstances of generalised violence which pose a threat to the life or freedom of the person but which do not give rise to persecution.[302]

Nevertheless, the *Geneva Refugee Convention* provides for a restriction on the principle which may not "be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."[303]

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297 See, Articles III and V, *Revised Bangkok Declaration;* Article 3, *Declaration on Territorial Asylum* of 1967, UNGA resolution 2132(XXII), 14 December 1967; Article II.3, *OAU Refugee Convention;* Article 22.8 ACHR; *Cartagena Declaration on Refugees,* Section III, para. 5.

298 *Conclusion No. 79,* UNHCR, *op. cit.*, fn. 79, para. (i). See also, *UNGA resolution 51/75,* UN Doc. A/RES/51/75, 12 February 1997, para. 3.

299 *Conclusion No. 6,* UNHCR, *op. cit.*, fn. 293, para. (c). See also, *Conclusion No. 17 (XXXI) Problems of Extradition Affecting Refugees,* ExCom, UNHCR, 31st Session, 1980, para. (b). The need to admit refugees into the territories of States includes no rejection at frontiers without fair and effective procedures for determining status and protection needs: see, *Conclusion No. 82,* UNHCR, *op. cit.*, fn. 296, para. (d-iii).

300 See, *Conclusion No. 17,* UNHCR, *op. cit.*, fn. 299, paras. (c) and (d).

301 See *Conclusion No. 19 (XXXI) Temporary Refuge,* ExCom, UNHCR, 31st Session, 1980, para. (a); *Conclusion No. 22,* UNHCR, *op. cit.*, fn. 151, para. (II-A-2).

302 See UNHCR, *Note on Non-refoulement (Submitted by the High Commissioner),* UN Doc. EC/SCP/2, 23 August 1977, para. 4; and, Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*: Opinion, 20 June 2001, pp. 124–125, paras. 128–133.

303 Article 33.2, *Geneva Refugee Convention*. The *OAU Refugee Convention* does not provide with exceptions to the principle of *non-refoulement* which is therefore absolute in Africa.

The restriction to the refugee law principle of *non-refoulement* focuses, therefore, on the refugee representing a "danger" to the security or to the community of the country. This is a higher threshold than that of Article 1F for exclusion from refugee status, as in this case it is limited only to *future* threats coming from the person and not to past activities.

The first restriction—the danger to national security—must concern a danger in the future and not be only based on past conduct. It must be a danger to the country of refuge. While the authorities have a certain discretionary latitude in identifying the danger, they must conduct an individual assessment on whether there are "reasonable grounds" for considering the refugee a danger to national security, based on the principles of necessity and proportionality. In this regard, the authorities will have to consider: the seriousness of the danger for national security; the likelihood of the realisation of the danger and its imminence; whether the danger to the security would be diminished significantly or eliminated by the removal of the individual; the nature and seriousness of the risks to the individual from *refoulement*; and whether other avenues may be found whether in the country of refuge or in a third safe country.[304]

The second restriction refers to a danger to the "community", which is to be considered as the safety and well-being of the population in general, unlike national security which refers to the interests of the State.[305] The requirement of "having been convicted by a final judgement of a particularly serious crime" must be read consistently with the exclusion clause in Article 1F(b) which applies to those having committed a serious non-political crime outside the country of refuge prior to their admission in the country as a refugee. It follows that, in order not to repeat the provision of exclusion, Article 33.2 necessarily refers only to particularly serious crimes committed subsequent to the admission as a refugee.

Contrary to the *Geneva Refugee Convention*, EU *Directive 2011/95/EC* (Qualification Directive) conflates the restriction grounds of the refugee law principle of *non-refoulement* with the exclusion clauses for refugee status, by including among the grounds for revocation, ending or refusal to grant or renew refugee status[306] and among the exclusion clauses for subsidiary protection[307] persons constituting a danger to the community or the security of the State of refuge or of protection. This difference suggests a rather extensive interpretation of these grounds

304 See, Lauterpacht/Bethlehem, *op. cit.*, fn. 302, pp. 137–138, para. 178.

305 See, *ibid.*, p. 140, para. 192.

306 Article 14.4–5, *EU Qualification Directive, op. cit.*, fn. 98.

307 Article 17.1(d), *ibid.*

for exclusion from refugee status, which would not necessarily be in line with the *Geneva Refugee Convention*.

2. Non-refoulement in international human rights law

a) General principles

The principle of *non-refoulement* is now well established in international human rights law, where it applies to all transfers of nationals or non-nationals, including migrants, whatever their status, as well as refugees. While only the *Convention against Torture* explicitly states the principle, it is implicit in the obligation of States to protect certain rights of people within their jurisdiction which will otherwise be violated in another jurisdiction.[308] For the principle of *non-refoulement* to apply, the risk faced on return must be real, i.e. be a foreseeable consequence of the transfer, and personal, i.e. it must concern the individual person claiming the *non-refoulement* protection.[309]

To date, the principle of *non-refoulement* has been found by international courts and tribunals to apply to risks of violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment; of violations of the right to life; and of flagrant denial of justice and of the right to liberty. It is also likely that the prohibition applies to other serious violations of other human rights. The Human Rights Committee has found that *non-refoulement* covers risk of human rights violations, including, but not limited to, violations of the right to life or the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[310] The European Court of Human Rights has held that *non-refoulement* protects "the fundamental values of democratic societies"[311] amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the

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308 See, for example, *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, paras. 87 and 90. The European Court has derived the principle of *non-refoulement* from the obligation of States to "secure" human rights to all people subject to their jurisdiction (Article 1 ECHR). In particular, the Court considered the ECHR's "special character as a treaty for the collective enforcement of human rights and fundamental freedoms", the requirement that "that its provisions be interpreted and applied so as to make its safeguards practical and effective".

309 CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 12; *Na v. United Kingdom,* ECtHR, Application No. 25904/07, Judgment of 17 July 2008, paras. 109, 113; *Saadi v. Italy,* ECtHR, GC, Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Nnyanzi v. United Kingdom,* ECtHR, Application No. 21878/06, Judgment of 8 April 2008, para. 51; *Cruz Varas and Others v. Sweden,* ECtHR, Plenary, Application No. 15576/89, Judgment of 20 March 1991, para. 69; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 74; *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, paras. 85–91.

310 *Ibid*., para. 12.

311 *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 127; *Chahal v. the United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 79.

right to life,[312] and fundamental aspects of the rights to a fair trial[313] and to liberty.[314]

The jurisprudence on *non-refoulement* has been developed most thoroughly in the context of *refoulement* to torture and to cruel, inhuman or degrading treatment or punishment. However, a number of general principles can be identified, which apply to all *non-refoulement* cases, regardless of whether they involve risks of torture or CIDT. These are considered below.

Box 9. Women as group at risk for non-refoulement purposes

The European Court of Human Rights held in a recent case that the expulsion of an Afghan woman to her native country would have violated the principle of *non-refoulement* on grounds of ill-treatment. The Court found that "women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system".[315] The Court considered that even the fact of having lived for almost six years in Sweden, added to the fact that she had tried to divorce her husband, would expose her to "various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society".[316]

b) Source of the risk: acts of non-State actors

In many cases, persons threatened with deportation may face risks on their return from non-State actors—including family members, criminals, business enterprises or armed groups—rather than from the State. It is widely accepted that the risk of serious human rights abuses does not necessarily have to come from State agents in order to trigger the

312 *Bader and Kanbor v. Sweden,* ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48 (finding that deportation of the applicant to face execution would violate Article 2 ECHR as well as Article 3 ECHR).

313 See, *Othman (Abu Qatada) v. the United Kingdom,* ECtHR, Application No. 8139/09, Judgment of 17 January 2012; *Al-Moayad v. Germany,* ECtHR, Application No. 35865/03, Admissibility Decision, 20 February 2007, paras. 100–102.

314 See, for example, *Othman (Abu Qatada) v. the United Kingdom,* ECtHR, *op. cit.*, fn. 313; *Z and T v. United Kingdom,* ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006, The Law.

315 *N. v. Sweden,* ECtHR, Application No. 23505/09, Judgment of 20 July 2010, para. 55.

316 *Ibid*., para. 62.

protection of *non-refoulement*, it can also originate from non-State actors when the State is unwilling or unable to protect the person at risk. This flows from the importance of the rights at stake[317] and from the principles applicable in international refugee law.[318]

The Committee against Torture is the only international human rights body which has distanced itself from this principle, due to the limited definition of torture provided for by the *Convention against Torture,* which excludes the conduct of non-state actors.[319] However, even in this context, the Committee accepted that in cases of war-torn countries, where non-State factions have the control of a part of the territory, the risk of being subject to torture by these non-State actors, who exercise a quasi-governmental function, can trigger the protection of the principle of *non-refoulement*.[320] The Committee construes this exemption strictly and it must be considered exceptionally applicable to "failed States".[321]

c) Standard of proof: substantial grounds for belief

To demonstrate that a risk to an individual subject to transfer is "real", the standard of proof is that **substantial grounds have been shown for believing**[322] that the person **risks being subject** to a serious violation of his or her human rights. This must be assessed on grounds

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317 *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 110. See also *H.L.R. v. France,* ECtHR, *op. cit.*, fn. 43, para. 40; *Salah Sheekh v. the Netherlands,* ECtHR, Application No. 1948/04, Judgment of 11 January 2007, paras. 137, 147; *N. v. Finland,* ECtHR, Application No. 38885/02, Judgment of 26 July 2005, paras. 163–165; *M.E. v. France,* ECtHR, Application No. 50094/10, Judgment of 6 June 2013, paras. 47–53; *Auad v. Bulgaria,* ECtHR, Application No. 49390/10, Judgment of 11 October 2011, para. 98: "What is relevant in this context is whether the applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her".

318 UNHCR, *Agents of Persecution, op. cit.,* fn. 82, para. 4. See also, *UNHCR Handbook, op. cit.*, fn. 66, para. 65; *Naveed Akram Choudhary v. Canada,* CCPR, Communication No. 1898/2009, Views of 28 October 2013, paras. 9.7–9.8; *Concluding Observations on France,* CCPR, *op. cit.*, fn. 82, para. 408; *Recommendation 1440 (2000),* PACE, *op. cit.*, fn. 82, para. 6.

319 *G.R.B. v. Sweden,* CAT, Communication No. 83/1997, Views of 15 May 1998, para. 6.5. See also, *M.P.S. v. Australia,* CAT, Communication No. 138/1999, Views of 30 April 2002, para. 7.4; *S.V. et al. v. Canada,* CAT, Communication No. 49/1996, Views of 15 May 2001, para. 9.5.

320 *Sadiq Shek Elmi v. Australia,* CAT, Communication No. 120/1998, Views of 25 May 1999, para. 6.5.

321 *H.M.H.I. v. Australia,* CAT, Communication No. 177/2001, Views of 1 May 2002, paras. 6.4–6.6.

322 *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, paras. 109, 113; *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 125; *Nnyanzi v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 51; *Cruz Varas and Others v. Sweden,* ECtHR, *op. cit.*, fn. 309, para. 69; *Chahal v. the United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 74; *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, paras. 85–91. See also, *Haydin v. Sweden,* CAT, Communication No. 101/1997, Views of 16 December 1998, para. 6.5; *C.T. and K.M. v. Sweden,* CAT, Communication No. 279/2005, Views of 22 January 2007, para. 7.3; and *A.R.J. v. Australia,* CCPR, Communication No. 692/1996**, Views of 11 August 1997, para. 6.14.

that go beyond mere theory or suspicion. More precisely, the risk need not be highly probable, but it must be personal and present.[323]

To establish that the risk following transfer is "personal" it must be shown that the applicant risks as an individual to be subject to a serious violation of his or her human rights if transferred. However, the person does not have to demonstrate that he or she is being individually targeted. While the demonstration of the individual risk *per se* might be very onerous, there are two types of situations where the risk will be easier to prove.

Where it can be shown that the State to which the person is to be transferred violates the rights of (or fails to protect from such violations) other people in similar circumstances, e.g. members of the same religion, ethnic minority, political party or association, suspected terrorists, detainees (if he or she risks being subject to detention once repatriated), or persons who applied for asylum in other States. In such cases, it will be necessary to demonstrate a widespread or general practice against the group and a link between the person to be expelled and the group. The link must be close. Mere membership of a group at risk might not be sufficient, if only certain categories of members of the group are generally targeted, e.g. senior members of an opposition political party.[324] However, risk may sometimes be identified in respect of large or general groups, for example, all those detained and accused of criminal offences,[325] or all those facing a prison sentence.[326]

In addition, international human rights bodies may, in exceptional circumstances, recognise *non-refoulement* protection for mere general situations of violence in the country of destination. This will occur only where there is a real risk simply by virtue of an individual being exposed

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323 *Haydin v. Sweden,* CAT, *op. cit.*, fn. 322, para. 6.5. See also, *C.T. and K.M. v. Sweden,* CAT, *op. cit.*, fn. 322, para. 7.3. This is in contrast, for example, with the practice followed in the USA of applying a "more likely than not" standard in *non-refoulement* procedures, which the Human Rights Committee considered not to be in compliance with the principle of *non-refoulement* under Article 7 ICCPR. See, *Concluding Observations on USA,* CCPR, UN Doc. CCPR/C/USA/CO/3, 15 September 2006.

324 *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, Communications Nos. 1461, 1462, 1476 & 1477/2006*, Views of 31 July 2008, para. 12.5; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, paras. 116–117. See also, *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 132. *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, para. 148; *Isakov v. Russia,* ECtHR, Application No. 14049/08, Judgment of 8 July 2010, para. 109; *Yuldashev v. Russia,* ECtHR, Application No. 1248/09, 8 July 2010, para. 83 (detainees); *S.H. v. United Kingdom,* ECtHR, Application No. 19956/06, Judgment of 15 June 2010 (where the Court found that the closeness of the Bhutanese Government in addition with policies of discrimination against the Nepalese ethnicity would be sufficient to enhance the *non-refoulement* protection); *M.S.S. v. Belgium and Greece,* ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011, paras. 296–297.

325 *Khodzhayev v. Russia,* ECtHR, Application No. 52466/08, Judgment of 12 May 2010.

326 *Kolesnik v. Russia,* ECtHR, Application No. 26876/08, Judgment of 17 July 2010, para. 72.

to such violence on return.[327] In the case of *Sufi and Elmi v. the United Kingdom,* the European Court of Human Rights held that the threshold of Article 3 ECHR "may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there".[328] The Court in the specific case identified the following non-exhaustive criteria to establish a situation of general violence: "first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting".[329]

In considering the individual's situation in cases of torture or ill-treatment, evidence of previous human rights violations suffered by the applicant will reinforce the case for *non-refoulement*, in particular when they are relatively recent. International human rights bodies will take into consideration medical reports to assess whether the applicant suffered post-traumatic stress or mental disorders due to such practices.[330] The "substantial grounds" for believing that return or expulsion would expose the applicant to the risk of serious violations of his or her human rights may be based not only on acts committed in the country of origin,

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[327] *Sufi and Elmi v. United Kingdom,* ECtHR, Applications Nos. 8319/07 and 11449/07, Judgment of 28 June 2011, para. 218; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 115, and see paras. 113–114; *K.A.B. v. Sweden,* ECtHR, Application No. 886/11, Judgment of 5 September 2013, paras. 72–91 ; *Haydin v. Sweden,* CAT, *op. cit.*, fn. 322, para. 6.3. See also, *inter alia*, *C.T. and K.M. v. Sweden,* CAT, *op. cit.*, fn. 322, para. 7.2; *G.R.B. v. Sweden,* CAT, *op. cit.*, fn. 319, para. 6.3; *Mortesa Aemei v. Switzerland,* CAT, Communication No. 34/1995, Views of 29 May 1997, para. 9.4.

[328] *Ibid*., para. 226.

[329] *Ibid*., para. 241.

[330] See *B.S.S. v. Canada,* CAT, Communication No. 183/2001, Views of 17 May 2004, para. 11.4, where the Committee that "even if it were assumed that the complainant was tortured by the Punjabi police, it does not automatically follow that, thirteen years after the alleged events occurred, he would still be at risk of being subjected to torture if returned to India." However, also see, *Dadar v. Canada,* CCPR, Communication No. 258/2004, Views of 5 December 2005, para. 8.6, where the Committee did not exclude the risk of torture for the fact that the applicant's detention occurred between 1979 and 1987, because the applicant was still active in the opposition movements to the Government of Iran. See, *A.F. v. Sweden,* CAT, Communication No. 89/1997, Views of 8 May 1998, para. 6.5. The mere demonstration of instances of past torture or ill-treatment may, however, not be sufficient: *I. v. Sweden,* ECtHR, Application No. 61204/09, Judgment of 5 September 2013, para. 62: "the Court considers that where an asylum seeker, like the first applicant, invokes that he or she has previously been subjected to ill-treatment, whether undisputed or supported by evidence, it may nevertheless be expected that he or she indicates that there are substantial and concrete grounds for believing that upon return to the home country he or she would be exposed to a risk of such treatment again, for example because of the asylum seeker's political activities, membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities, a pending arrest order, or other concrete difficulties with the authorities concerned".

in other words **before** his flight from the country, but also on activities undertaken by him in the receiving country.[331]

The risk posed to the person awaiting transferral, as regards both the general and the specific situation he or she may encounter in the State of destination, is to be assessed according to what "was known, or should have been known, to the State Party's authorities at the time of the complainant's removal".[332] However, if the removal has not been carried out at the time the international human rights body is examining the dispute, the situation in the country of expulsion will be assessed in light of the information available at the time of the dispute.[333]

While international human rights bodies generally leave to the national courts the evaluation of facts, in the case of *non-refoulement* they will verify whether the national authorities properly evaluated the evidence brought before them to claim the *non-refoulement* protection.[334] All the relevant evidence will be taken into consideration, that which concerns the personal risk of the individual and evidence supporting a general situation of violence or the fact that the group of which the applicant is a member is subject to serious violations of their human rights, including if the State is unable or unwilling to protect the applicant from such violations.[335] The assessment must be comprehensive and not only analytic.[336]

The State cannot rely simply on the evaluation of its own national authorities, without addressing the allegations brought by the applicant. In particular, the State must demonstrate that the authorities decided the case by fully and independently considering all the elements which might demonstrate the risk. Cases which have been dismissed on mere procedural grounds or on blind reliance of governmental assess-

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331 *Mortesa Aemei v. Switzerland,* CAT, *op. cit.*, fn. 327, para. 9.5. In *S.F. and Others v. Sweden,* ECtHR, Application No. 52077/1, Judgment of 15 May 2012, the European Court of Human Rights held that the country of return (in this case Iran) had the technology and practice (internet surveillance) to identify the applicants and their political activities and that this gave rise to substantial grounds to believe that a risk of torture or inhuman or degrading treatment or punishment upon return existed (see, paras. 68–71).

332 *Agiza v. Sweden,* CAT, Communication No. 233/2003*, Views of 24 May 2005, para. 13.4; *Nnyanzi v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 56; *Vilvarajah and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 107; *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, para. 12.4.

333 *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, para. 136; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 112; *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 133; *Cruz Varas and Others v. Sweden,* ECtHR, *op. cit.*, fn. 309, para. 76.

334 *Nakrash and Qifen v. Sweden,* CCPR, Communication No. 1540/2007*, Views of 19 November 2008, para. 7.3. See also, *Tarlue v. Canada,* CCPR, Communication No. 1551/2007**, Views of 28 April 2009, para. 7.4; *Dadar v. Canada,* CCPR, *op. cit.*, fn. 330, para. 8.8. See also, *Singh Sogi v. Canada,* CAT, Communication No. 297/2006, Views of 29 November 2007, para. 10.3; *Rubin Byahuranga v. Denmark,* CCPR, Communication No. 1222/2003, Views of 9 December 2004, para. 110.

335 *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, para. 12.4.

336 *Na v. The United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 130.

ment of the risk will most probably fail to provide an effective defence for the State to demonstrate that it fully complied with its obligations of *non-refoulement*.[337] In this regard, the European Court of Human Rights has acknowledged that, "owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies."[338]

In order to assess other relevant factors, such as the general situation of the country, the exposure to the risk of a particular group or the inexistence of State protection, reference will be made to other State parties reports, judicial decisions, international organisations and agencies, such as the UNHCR, international human rights bodies and reliable NGO reports.[339] The European Court of Human Rights has explained that, in relying on country information in *non-refoulement* cases, "consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations. [...] [C]onsideration must [also] be given to the presence and reporting capacities of the author of the material in the country in question."[340] In their assessment, international human rights bodies will consider the material put before them by the parties but will also obtain information *proprio motu* if necessary.[341]

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337 *Rubin Byahuranga v. Denmark,* CCPR, *op. cit.*, fn. 334, paras. 11.2–11.4; *Hussain Khan v. Canada,* CAT, Communication No. 15/1994, Views of 18 November 1994, para. 12.3; *Mortesa Aemei v. Switzerland,* CAT, *op. cit.*, fn. 327, para. 9.8: "In the present case, the refusal of the competent Swiss authorities to take up the author's request for review, based on reasoning of a procedural nature, does not appear justified in the light of article 3 of the Convention."

338 *S.A. v. Sweden,* ECtHR, Application No. 66523/10, Judgment of 27 June 2013, para. 43; *K.A.B. v. Sweden,* ECtHR, *op. cit.*, fn. 327, para. 70; *A.A. and Others v. Sweden,* ECtHR, Application No. 14499/09, Judgment of 28 June 2012, para. 73.

339 *Arkauz Arana v. France,* CAT, Communication No. 63/1997, Views of 5 June 2000, para. 11.4; *Mutombo v. Switzerland,* CAT, Communication No. 13/1993, Views of 27 April 1994, para. 9.5. See also, *Karoui v. Sweden,* CAT, Communication No. 185/2001, Views of 25 May 2002, para. 9; *Mortesa Aemei v. Switzerland,* CAT, *op. cit.*, fn. 327, para. 9.9; *Paku Kisoki v. Sweden,* CAT, Communication No. 41/1996, Views of 8 May 1996, para. 9.5; *Pelit v. Azerbaijan,* CAT Communication No. 281/2005, Views of 29 May 2007 para. 11; *X, Y and Z v. Sweden,* CAT, Communication No. 61/1996, Views of 6 May 1998, para. 11.5; *Na v. The United Kingdom,* ECtHR, *op. cit.*, fn. 309, paras. 119, 122; *Dbouba v. Turkey,* ECtHR, Application No. 15916/09, Judgment of 13 July 2010, paras. 42–43; *M.B. and Others v. Turkey,* ECtHR, Application No. 36009/08, Judgment of 15 June 2010, paras. 32–33.

340 *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, paras. 120–121.

341 *Ibid*., para. 119. *Nnyanzi v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 52; *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, paras. 128–130.

International jurisprudence on torture has established the principle that non-ratification or signature of international instruments protecting against or preventing the violation of the particular right at risk of violation in the destination country may reinforce the existence of such risk, when a risk for the applicant has been established.[342] However, even where domestic laws exist or the State has ratified international instruments protecting human rights this will not be sufficient if reports demonstrate resort to or tolerance of these human rights violations by the national authorities.[343] In the case of *Hirsi Jamaa and Others v. Italy,* the European Court of Human Rights ruled that "the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".[344] Furthermore, the Court held that a State "cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with [the return State]. Even if it were to be assumed that those agreements made express provision for the return to [the State of return] of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States."[345]

The fact that the expulsion or asylum case "received wide publicity" might be a corroborating factor of the need to prevent *refoulement*, if there is evidence that this publicity would trigger the anger of State agents or private actors, in particular where the applicants have not themselves been the main means of generating the publicity.[346]

In the particular case of establishing the risk of the death penalty in the receiving country, the Human Rights Committee has recalled that "it is not necessary to prove, as suggested by the State Party, that the author "will" be sentenced to death [...] but that there is a "real risk" that the death penalty will be imposed on her. It does not accept the State Party's apparent assumption that a person would have to be sentenced to death to prove a "real risk" of a violation of the right to life."[347] It has

342 *Mutombo v. Switzerland,* CAT, *op. cit.*, fn. 339, para. 12.5.

343 *Muminov v. Russia,* ECtHR, Application No. 42502/06, Judgment of 11 December 2008, para. 96; *Saadi v. Italy, op. cit.*, fn. 309 para. 147; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 353; *Yakubov v. Russia,* ECtHR, Application No. 7265/10, Judgment of 8 November 2011, para. 93.

344 *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.,* fn. 46, para. 128.

345 *Ibid*., para. 129.

346 *Sadiq Shek Elmi v. Australia,* CAT, *op. cit.*, fn. 320, para. 6.8; *N. v. Finland,* ECtHR, *op. cit.*, fn. 317, para. 165.

347 *Kwok Yin Fong v. Australia,* CCPR, Communication No. 1442/2005*, Views of 23 November 2009; para. 9.6.

also specified that, particularly in cases not involving extradition, "a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases."[348]

d) Burden of proof

As is common in international human rights mechanisms, the burden to present an arguable case is on the individual applicant. However, once the applicant has submitted sufficient information that could have been verified by the authorities, the burden shifts to the State Party to explain the refusal of the *non-refoulement* protection.[349]

It must be kept in mind that the burden of proof is linked to the standard of proof. An applicant will therefore have to present sufficient information demonstrating the existence of a risk that is probable—real, personal and foreseeable. It will then be up to the State to refute the evidence presented or adduce new information supporting the inapplicability of the *non-refoulement* protection. When the receiving State has previously granted refugee status and has subsequently withdrawn it, it will be for the State to demonstrate that the original well-founded fear of persecution has ceased to exist.[350]

Furthermore, if the risk that the transferred person might be exposed to serious violations of his or her human rights is known or ought to be known by the State, the fact that the person did not voice such concern is no excuse not to examine whether the principle of *non-refoulement* is applicable.[351] Indeed, in the case of *Hirsi Jamaa and Others v. Italy,* the Grand Chamber of the European Court of Human Rights held that, despite the allegations by Italy that the migrants intercepted in the high seas did not formulate a request for international protection, "it was for the national authorities, faced with a situation in which human rights were being systematically violated [...] to find out about the treatment to which the applicants would be exposed after their return [...]. Having regard to the circumstances of the case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3."[352]

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348 *G.T. v. Australia,* CCPR, Communication No. 706/1996**, Views of 4 December 1997, para. 8.4.

349 *A.S. v. Sweden,* CAT, Communication No. 149/1999, Views of 15 February 2001, para. 8.6; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, paras. 110 and 111.

350 *C. v. Australia,* CCPR, Communication No. 900/1999, Views of 13 November 2002, para. 8.5.

351 See, *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 346–359.

352 *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.,* fn. 46, para. 133. See also, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009,* CPT, *op. cit.*, fn. 265, para. 32.

e) Absolute rights and the obligation of non-refoulement

It is well-established that, where the right which may be violated following transfer is an absolute right (such as freedom from torture or other cruel, inhuman or degrading treatment or punishment), the principle of *non-refoulement* is equally absolute and is not subject to any exceptions, whether in law or in practice.[353] This rule applies to all expulsions, regardless of considerations of national security, or other strong public interests, economic pressures or heightened influx of migrants.[354] In this the protection of the human rights principle of *non-refoulement* is broader than that of its refugee law equivalent.[355] There is no human rights law equivalent to the limitations contained in Article 33.2 of the *Geneva Refugee Convention*, excluding from protection persons who are a security threat or who have committed a serious crime (see, above, Section 1). Consequently, if the expulsion proceedings address only whether the applicant can claim to be a victim of persecution according to the *Geneva Refugee Convention*, this will not be sufficient for the purposes of international human rights law, as the national authorities must directly address the issue of real risk of serious human rights violations in the country of destination, regardless of the potential refugee status of the applicant.[356] As is also clear from the jurisprudence of the European Court of Human Rights, what matters are not the reasons for expulsion, but **only** the risk of serious violations of human rights in the country of destination.[357] The Court held in *Saadi v. Italy* that, consistently with the absolute nature of Article 3 rights, protection of

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353 *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, para. 12.4; *Tapia Paez v. Sweden,* CAT, Communication No. 39/1996, Views of 28 April 1997, para. 14.5; *Tebourski v. France,* CAT, Communication No. 300/2006, Views of 11 May 2007, paras. 8.2 and 8.3: "Once this person alludes to a risk of torture under the conditions laid down in article 3, the State Party can no longer cite domestic concerns as grounds for failing in its obligation under the Convention to guarantee protection to anyone in its jurisdiction who fears that he is in serious danger of being tortured if he is returned to another country". See also, *Dadar v. Canada,* CCPR, *op. cit.*, fn. 330, para. 8.8; and *Concluding Observations on Slovenia,* CAT, Report of the Committee against Torture to the General Assembly, 55th Session, UN Doc. CAT A/55/44, p. 34 (2000), para. 206; *Toirjon Abdussamatov and Others v. Kazakhstan,* CAT, Communication no. CAT/C/48/D/444/2010, Views of 1 June 2012, para. 13.7; *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 127; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 79.

354 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 223–224.

355 *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 138; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 80.

356 *Ryabikin v. Russia,* ECtHR, Application No. 8320/04, Judgment of 19 June 2008,. para. 120; *Sidikovy v. Russia,* ECtHR, Application No. 73455/11, Judgment of 20 June 2013, para. 149 ("the protection afforded by Article 3 of the Convention is in any event broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees"); *Toirjon Abdussamatov and Others v. Kazakhstan,* CAT, *op. cit.*, fn. 353, paras. 13.7–13.9 where the Committee held that an examination by national courts under the *Geneva Refugee Convention* was insufficient to satisfy the State's obligations under Article 3 CAT.

357 *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para.138

national security could not justify a more ready acceptance of a risk of torture or inhuman or degrading treatment.[358]

f) Diplomatic assurances

A State will sometimes seem to circumvent its obligations of *non-refoulement* by the use of diplomatic assurances, through which the expelling State requests and receives written guarantees by the authorities of the destination State that the person to be sent will not be subject to certain practices. They range from simple undertakings by the receiving State that the individual concerned will not be subjected to torture or ill-treatment or to other violations of human rights, to more elaborate agreements including arrangements for the monitoring of the transferred person in custody. Diplomatic assurances are often regarded as an acceptable means to avert a risk of imposition of the death penalty, where they are verifiable and provided by a reliable government authority. However, such assurances are considerably more problematic where they are used to justify deportation or extradition to countries where there is a risk of torture or other ill-treatment, given that torture is almost always an illicit and clandestine practice. The efficacy of these assurances must also be called into question by the fact that they are never enforceable, as they do not typically have legal effect and are not justiciable. They are normally sought from States which necessarily disregard even binding legal obligations to prevent torture and ill-treatment.[359]

Jurisprudence of the international human rights courts, treaty bodies and expert mechanisms establishes that the existence of such assurances cannot bypass the *non-refoulement* principle and cannot au-

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[358] *Ibid*., para.140. This was further underlined by the Court in subsequent cases including *Ismoilov and Others v. Russia,* ECtHR, Application No. 2947/06, Judgment of 24 April 2008, para. 126; and *Baysakov and Others v. Ukraine,* ECtHR, Application No. 54131/08, Judgment of 18 February 2010, para. 51; *Auad v. Bulgaria,* ECtHR, *op. cit.*, fn. 317, para. 101.

[359] See, Manfred Nowak, UN Special Rapporteur on Torture, *Annual Report to the General Assembly,* UN Doc. A/60/316, 30 August 2005 (Nowak Report 2005); UN High Commissioner for Human Rights, Louise Arbour, *Statement to the Council of Europe's Group of Experts on Human Rights and the Fight against Terrorism,* 29–31 May 2006; EU Network of Independent Experts on Fundamental Rights, *The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ("Extraordinary Renditions"),* Opinion No. 3-2006, Doc. No. CFR-CDF.Opinion3.2006, 25 May 2006; European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,* 14 February 2007, Resolution no P6_TA (2007)0032; *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners,* Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion No. 363/2005, CoE Doc. CDL-AD(2006)009, 17 March 2006; Council of Europe Commissioner for Human Rights, Thomas Hammarberg, *Viewpoint: 'The protection against torture must be strengthened',* 18 February 2008; CPT, 15th General Report, 22 September 2005, paras. 38-40.

tomatically permit a transfer which would otherwise be prohibited.[360] Whether the assurances are effective and sufficient to permit a transfer is to be assessed on the facts of each particular case. However, as the European Court of Human Rights has repeatedly held, such assurances are highly unlikely to be sufficient to allow a transfer to countries where there are reliable reports that the authorities resort to or tolerate torture or other ill-treatment or when they are not given by an authority of the destination State empowered to provide them and the destination State does not have an effective system of torture prevention.[361]

In the case *Othman (Abu Qatada) v. the United Kingdom,* the European Court of Human Rights for the first time provided precise indications as to the highly restrictive conditions that must be satisfied for the acceptance of diplomatic assurances in cases of risk of torture or inhuman or degrading treatment or punishment. The Court clarified that, when considering the reliability of diplomatic assurances, it "will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, *inter alia,* to the following factors:

(i) whether the terms of the assurances have been disclosed to the Court [...];

(ii) whether the assurances are specific or are general and vague [...];

(iii) who has given the assurances and whether that person can bind the receiving State [...];

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360 *Concluding Observations on France,* CCPR, *op. cit.*, fn. 188, para. 20; *Concluding Observations on Russia,* CCPR, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 17. The Committee against Torture has categorically stated that "under no circumstances must diplomatic guarantees be used as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return", *Concluding Observations on Spain,* CAT, *op. cit.*, fn. 240, para. 13; *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, paras.147–148; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 353–354; *Sidikovy v. Russia,* ECtHR, *op. cit.*, fn. 356, para. 150.

361 *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, paras. 147–148; *Ryabikin v. Russia,* ECtHR, *op. cit.*, fn. 356, para. 119; *Gafarov v. Russia,* ECtHR, Application No. 25404/2009, Judgment of 21 October 2010; *Ben Khemais v. Italy,* ECtHR, Application No. 246/07, Judgment of 24 February 2009, para. 61; *Ismoilov and Others v. Russia,* ECTHR, *op. cit.*, fn. 358, para. 127; *Soldatenko v. Ukraine,* ECtHR, Application No. 2440/07, Judgment of 23 October 2008, para. 74; *Ryabikin v. Russia,* ECtHR, *op. cit.*, fn. 356, para. 119; *Makhmudzhan Ergashev v. Russia,* ECtHR, Application No. 49747/11, 16 October 2012, paras. 74–76. However, the Court specified in *Othman (Abu Qatada) v. the United Kingdom,* ECtHR, *op. cit.*, fn. 313, para. 193 that "the Court has never laid down an absolute rule that a State which does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances; the extent to which a State has failed to comply with its multilateral obligations is, at most, a factor in determining whether its bilateral assurances are sufficient. Equally, there is no prohibition on seeking assurances when there is a systematic problem of torture and ill-treatment in the receiving State."

(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them [...];

(v) whether the assurances concerns treatment which is legal or illegal in the receiving State [...]

(vi) whether they have been given by a Contracting State [...];

(vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances [...];

(viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers [...];

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible [...];

(x) whether the applicant has previously been ill-treated in the receiving State [...]; and

(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State [...]".[362]

To date, no UN treaty body has approved a transfer on the basis of diplomatic assurances against torture, including where elaborate monitoring mechanisms are purported to be in place.[363] However, they have not in principle ruled out that such assurances could be sufficient, when it can be assured that there is a concrete mechanism for monitoring their enforcement and arrangements to assure their effective implementation are present. The Human Rights Committee, in rejecting diplomatic assurances with monitoring mechanisms in cases before it, have indicated that to be acceptable, a monitoring mechanism would, at a minimum, have to begin to function promptly after the arrival of the concerned person in the destination State, allow private access to the detainee by an independent monitor, and allow independent forensic and medi-

362 *Othman (Abu Qatada) v. the United Kingdom,* ECtHR, *op. cit.*, fn. 313, para. 189

363 In only one case, *Attia v. Sweden,* CAT, Communication No.199/2002, Views of 24 November 2003, the Committee against Torture found diplomatic assurances subject to monitoring to be sufficient to protect against ill-treatment; however in the later related case of *Agiza v. Sweden,* CAT, *op. cit.*, fn. 332, the Committee found that its decision in *Attia* had been based on incomplete information, and that the assurances considered in that case had not in fact prevented the torture of the applicant in *Agiza*. In *Agiza* the CAT found that "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk [of ill-treatment]."

cal expertise, available at any moment.[364] The monitoring undertaken would have to be, "in fact and in the concerned person's perception, objective, impartial and sufficiently trustworthy."[365] Even where such high levels of safeguards do apply, the former UN Special Rapporteur on Torture affirmed that "diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and *refoulement*."[366]

g) Place of transfer: indirect refoulement and internal relocation

The principle of *non-refoulement* applies both to transfers to a State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of further transfer to a third country where the person will be at risk (indirect *refoulement*).[367] The Grand Chamber of the European Court of Human Rights, in *Hirsi Jamaa and Others v. Italy,* clarified that the sending State must "ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced".[368] The Court stressed that, including in cases of indirect *refoulement*, the State "is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in [the intermediary country of return]. It reiterates that the [State] authorities [should ascertain] how the [intermediary country] authorities fulfilled their international obligations in relation to the protection of refugees."[369]

In considering whether there is a breach of the principle of *non-refoulement*, the exact location within a country to which the person is to be transferred may be important. If a person can be safely relocated in one part of the country, without incurring the risk of violation, the obligation of *non-refoulement* will not be violated.[370] The federal or unitary

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364 *Alzery v. Sweden,* CCPR, Communication No. 1416/2005, Views of 10 November 2006, para. 11.5; *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, paras. 12.5–12.6; *Concluding Observations on Denmark,* CCPR, UN Doc. CCPR/C/DNK/CO/5, 16 December 2008, para. 10.

365 *Pelit v. Azerbaijan,* CAT, *op. cit.*, fn. 339, para. 11.

366 Nowak, *Report 2005, op. cit.*, fn. 359, para. 32.

367 CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 12; *General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22,* CAT, UN Doc. A/53/44, annex IX, 21 November 1997, para. 2; *Hamayak Korban v. Sweden,* CAT, Communication No. 88/1997, Views of 16 November 1998, para. 7; *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, para. 141; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 342.

368 *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, para. 147.

369 *Ibid*., para. 157.

370 *B.S.S. v. Canada,* CAT, *op. cit.*, fn. 330, para. 11.5.

character of the State of destination and whether the actors from whom the violation is feared are under the control of the central government or of the federated States are points to be taken into consideration. However, the transfer to one safe zone of the country must not in itself put the person at risk of being subject to such treatment. If the person cannot travel to the area concerned, gain admittance and settle there, without being free from the risk of violations or ending up in a part of the country where he could be subject to them, the *non-refoulement* concern will persist.[371]

In the case *Sufi and Elmi v. the United Kingdom,* the European Court of Human Rights established a set of criteria to assess when internal relocation would comply with the principle of *non-refoulement*: "as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment [...]".[372] In a case of relocation within Iraq, the Court underlined that "[o]ne factor possibly weighing against the reasonableness of internal relocation is that a person is persecuted by a powerful clan or tribe with influence at governmental level. However, if the clan or tribe in question is not particularly influential, an internal flight alternative might be reasonable in many cases."[373]

Box 10. The Dublin III Regulation

The European Union *Regulation 604/2013* ("Dublin III Regulation"), which replaced *Regulation 343/2003* ("Dublin II Regulation"), holds that only one Member State may examine the application for international protection of a third country national. The Regulation sets for a number of criteria to be used to identify which Member State is responsible for such protection. By way of exception, a State retains the discretion to examine an application lodged with it, regardless of the regulation's criteria, and, in this case, becomes the State responsible for the application.[374]

371 *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, para. 141.

372 *Sufi and Elmi v. the United Kingdom,* ECtHR, *op. cit.*, fn. 327, para. 266; *D.N.M. v. Sweden,* ECtHR, Application No. 28379/11, Judgment of 27 June 2013, para. 54.

373 *S.A. v. Sweden,* ECtHR, *op. cit.* fn. 338, para. 53.

374 *Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast),* EU, OJ L 180/31, 29.6.2013, Article 17 (EU Dublin Regulation).

The Regulation provides a hierarchy of criteria for determining the Member State responsible for the examination of the application for international protection, which must be assessed on the basis of the situation when the application was first lodged.[375] The hierarchy is the following:

1. Family members presence: the State where a family member of the applicant is already a beneficiary of or an applicant for international protection is responsible.[376]
2. State of visa or residence document: the State which gave the applicant for international protection one of these documents is responsible.[377]
3. Irregular entry: the State where the applicant for international protection entered irregularly is responsible until 12 months after the entry took place.[378]
4. Five months stay or longer: if the applicant for international protection has lived for at least five months in a State, that State is responsible. If the applicant has lived in more than one Member state, the last State where the applicant lived for more than five months is responsible.[379]
5. Entry with visa waiver: the State which allowed entry with a visa waiver is responsible.[380]
6. Application in airport's international transit area: the State which has jurisdiction in the area is responsible.[381]
7. First State of application: where none of the other criteria apply, the State in which the application was first lodged is responsible.[382]

For unaccompanied minors, the criterion which overrides all others in determining the Member State responsible for examining the application is where a State hosts a sibling or a relative, who is, legally present in that State, that State will be responsible, provided it is in the best interest of the minor.

375 *Ibid*., Article 7(2).
376 *Ibid*., Article 9 and 10.
377 *Ibid*., Article 12.
378 *Ibid*., Article 13(1).
379 *Ibid*., Article 13(2).
380 *Ibid*., Article 14.
381 *Ibid*., Article 15.
382 *Ibid*., Article 3(2).

In the absence of a family member, a sibling or a relative, the Member State responsible is that where the minor has lodged his or her application for international protection.[383] The new Dublin III Regulation also includes an exception for vulnerable persons who are dependent on the assistance of their child, sibling or parent legally resident in one Member State, in which case that Member State becomes responsible for the application for international protection.[384] The exception also extends to the case in which "his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant".[385]

The country responsible must take charge of the applicant and the asylum application, and take back the applicant for international protection, if he or she is present in another Member State.[386]

The European Court of Human Rights held in the case *M.S.S. v. Belgium and Greece* that States may not avoid their international responsibility under the principle of *non-refoulement* simply by relying on the requirements of the Dublin II Regulation. The Court ruled that, whenever an automatic transfer to a third country in implementation of the Dublin Regulation might risk breach of the principle of *non-refoulement*, States must avail themselves of the "sovereignity clause" of then Article 3.2 of the Regulation (currently Article 17) in order to avoid breaching their obligations under the European Convention of Human Rights.[387] The Court stressed that "[w]hen they apply the Dublin Regulation [...] the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces"[388] of being subjected to a serious violation of human rights.

In a line of subsequent cases, the Court of Justice of the European Union has held that pursuant to Article 4 of the EU Charter of Fundamental Rights, prohibiting of inhuman and degrading treatment "Member States, including the nation-

383 *Ibid*., Article 8.

384 *Ibid*., Article 16.

385 *Ibid*., Article 16.

386 *Ibid*., Article 18 and following.

387 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 339–340.

388 *Ibid*., para. 342. See also, *Mohammed v. Austria,* ECtHR, Application No. 2283/12, Judgment of 6 June 2013, para. 93; *Sharifi v. Austria,* ECtHR, Application No. 60104/08, Judgment of 5 December 2013.

> al courts, may not transfer an asylum seeker to the 'Member State responsible' [...] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. Subject to the right itself to examine the application [...], the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in [the Dublin Regulation], entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application. The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application [...]".[389]
>
> The new Dublin III Regulation has incorporated this approach in Article 3(2): "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in the risk of inhuman or degrading treatment within the meaning of Artice 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the [other] criteria […] in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to

[389] *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister of Justice, Equality and Law Reform,* CJEU, Cases C-411/10 and C-493/10, Judgment of 21 December 2011, ruling, para. 2. See also, *Migrationsverket v. Nurije Kastrati and Others,* CJEU, Case C-620/10, Judgment of 3 May 2012; *Bundesrepublik Deutschland v. Kaveh Puid,* CJEU, Case C-4/11, Judgment of 14 November 2013; *CIMADE and GISTI v. Ministre de l'Interieur, de l'Outre-mer, des Collectivités territoriales e de l'Immigration,* CJEU, Case C-179/11, Judgment of 27 September 2012; *K v. Bundesasylamt,* CJEU, Case C-245/11, Judgment of 6 November 2012; *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet,* CJEU, Case C-528/11, Judgment of 30 May 2013; *MA, BT and DA v. Secretary of State for the Home Department,* CJEU, Case C-648/11, Judgment of 6 June 2013; *Shamso Abdullahi v. Bundesasylamt,* CJEU, Case C-394/12, Judgment of 10 December 2013.

> this paragraph to any Member State designated on the basis of the criteria [...] or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible".[390]

h) Extraterritorial application of the principle of non-refoulement

The obligation of *non-refoulement* applies in unmodified form to a State exercising extra-territorial jurisdiction—for example, an occupying power, a military base abroad or a state operating an extra-territorial detention centre—as has been authoritatively affirmed regarding obligations under CAT, the ICCPR, and the ECHR,[391] and the Refugee Convention[392] as well as by the Inter-American Commission on Human Rights.[393] For a general analysis of extra-territorial jurisdiction, see Chapter 1.

3. What rights implicate obligations of non-refoulement?

As noted above, the range of rights, the risk of whose violation may entail an obligation on States not to return someone, is not fully settled. A risk of the most serious violations of a wide range of human rights has the potential to impose obligations of *non-refoulement*. The rights in relation to which such obligations have to date been indicated by international courts and tribunals are analysed below. However, the jurisprudence regarding the range of rights and situations where *non-refoulement* applies continues to develop, and, in practice, the principle of *non-refoulement* could have a wide application.

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390 The *EU Dublin Regulation,* Article 3(2).

391 See, *inter alia*, *Hirsi Jamaa and Others v. Italy,* ECtHR, *op. cit.,* fn. 46; *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, Application No. 61498/08, Admissibility Decision, 30 June 2009; *Concluding Observations on USA,* CAT, *op. cit.*, fn. 46, para. 20; *Concluding Observations on USA,* CCPR, *op. cit.*, fn. 323. Consider also CAT, *General Comment No. 2, op. cit.*, fn. 31, paras. 7, 16 and 19; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary,* New York City: Oxford University Press, 2008, p. 129, para. 4; p. 147, para. 72 and p. 199, para. 180-1; and the approach adopted by the Human Rights Committee in its CCPR, *General Comment No. 31, op. cit.*, fn. 46, paras. 10–11; *Concluding Observations on United Kingdom,* UN Doc. CAT/C/CR/33/3, 10 December 2004, paras. 4(b) and 5(e). See also, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009,* CPT, *op. cit.,* fn. 265, para. 40.

392 Lauterpacht/Bethlehem, *op. cit.*, fn. 302, paras. 62–67, concludes that: "the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs,* whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc." See also, *ibid.*, para. 242. See further UNHCR, *Advisory Opinion on the Extraterritorial Application, op. cit.*, fn. 293.

393 See, *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 163, 168 and 171.

a) Non-refoulement for torture and other cruel, inhuman or degrading treatment or punishment

No State can "expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[394] All treaties containing this norm and their jurisprudence affirm the absolute nature of this principle, and jurisprudence supports an equal prohibition on expulsion to face cruel, inhuman or degrading treatment or punishment, as to face torture.[395] The Human Rights Committee has stated that the principle of *non-refoulement* applies to all treatment prohibited by Article 7 ICCPR.[396] The *Convention against Torture* makes explicit the obligation of *non-refoulement* only for torture as defined in Article 1 of CAT. However, the Committee against Torture has not addressed *refoulement* to face a risk of other ill-treatment prohibited by Article 16 CAT.[397] The danger of torture and ill-treatment can also arise

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394 *Rubin Byahuranga v. Denmark,* CCPR, *op. cit.*, fn. 334, para. 11.2; *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment,* CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 10 March 1992, para. 9.

395 Article 7 ICCPR; Article 5(b) ICERD; Article 3 ECHR; Article 5 ACHPR; Article I ADRDM; Article 5 ACHR; Article 8 ArCHR. For jurisprudence see, *inter alia*, *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, paras. 69, 127; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, paras. 74 and 79; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 109; *Nnyanzi v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 51; *Cruz Varas and Others v. Sweden,* ECtHR, *op. cit.*, fn. 309, para. 69; *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, paras. 85–91; *Rafael Ferrer-Mazorra et al. v. USA,* IACHR, Case 9.903, Report No. 51/01, Merits, 4 April 2001, para. 177; *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 168 and 171; *Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Angola,* ACommHPR, Communication No. 292/2004, 43rd Ordinary Session, 7–22 May 2008, paras. 79 and 84; *Zimbabwe Lawyers for Human Rights (ZLHR) and the Institute for Human Rights and Development (IHRD) (on behalf of Andrew Barclay Meldrum) v. Republic of Zimbabwe,* ACommHPR, Communication No. 294/2004, 6th Extraordinary Session, 30 March–3 April 2009, p. 34, para. 93; *Concluding Observations on Argentina,* CERD, UN Doc. CERD/C/65/CO/1, 10 December 2004, para. 13; *Concluding Observations on the Netherlands,* CERD, UN Doc. CERD/C/64/CO/7, 10 May 2004, para. 14; *Concluding Observations on Azerbaijan,* CERD, UN Doc. CERD/C/AZE/CO/4, 14 April 2005, para. 13; *Concluding Observations on Georgia,* CERD, UN Doc. CERD/C/GEO/CO/3, 27 March 2007, para. 17; *Concluding Observations on Lithuania,* CERD, UN Doc. CERD/C/LTU/CO/3, 11 April 2006, para. 14; *Concluding Observations on Uzbekistan,* CERD, UN Doc. CERD/C/UZB/CO/5, 4 April 2006, para. 14; *Concluding Observations on Tanzania,* CERD, UN Doc. CERD/C/TZA/CO/16, 27 March 2007, para. 17; *Concluding Observations on Kazakhstan,* CERD, UN Doc. CERD/C/65/CO/3, 10 December 2004, para. 15.

396 CCPR, *General Comment No. 31, op. cit.*, fn. 46, para.12

397 Article 3 CAT. The Committee against Torture has not addressed the question whether the transfer of a person to a country could put the person at a risk of cruel, inhuman or degrading treatment or punishment, according to Article 16 of the Convention. The Committee has dealt with the issue of whether the decision of the transfer would **in itself** constitute an act of cruel, inhuman or degrading treatment or punishment. In its jurisprudence the Committee found that neither "the aggravation of the complainant's state of health possibly caused by his deportation", nor the fact "that the complainant's deportation to [the State of destination] may give rise to subjective fears" amount to the type of cruel, inhuman or degrading treatment. See, *B.S.S. v. Canada,* CAT, *op. cit.*, fn. 330, para. 10.2; *David v. Sweden,* CAT, Communication No. 220/2002, Views of 17 May 2005, para. 7.2.

through practices linked to the imposition of the death penalty, which will be addressed below.

Within the threshold of torture or other cruel, inhuman or degrading treatment or punishment fall not only acts that cause severe physical pain or actual bodily injury but also acts that cause intense mental suffering, fear, anguish or feelings of inferiority to the victims, or humiliate or debase them.[398] Whether the threshold for conduct that amounts to such treatment or punishment has been passed may depend on the sex, age or health of the victim.[399] In addition to physical ill-treatment during arrest or interrogation,[400] examples of acts which international human rights mechanisms have found to amount to such treatment include:

- corporal punishment[401] or other cruel punishment[402] whether imposed as a result of a judicial order or not;
- acts of sexual violence, including but not limited to rape;[403]
- prolonged *incommunicado* detention;[404]
- harmful practices against women and girls such as female genital mutilation;[405]
- unnecessarily prolonged or repeated solitary confinement;[406]
- very poor prison conditions or prison overcrowding, or failure to provide adequate medical attention in detention, having regard

398 *Raninen v. Finland,* ECtHR, Case No. 52/1996/771/972, Judgment of 16 December 1997, para. 167; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 219; CCPR, *General Comment No. 20, op. cit.*, fn. 394, para. 5.

399 *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 309, para. 134.

400 *Ribitsch v. Austria,* ECtHR, Application No. 18896/91, Judgment of 4 December 1995, para. 38.

401 CCPR, *General Comment No. 20, op. cit.*, fn. 394, para. 5; *Tyrer v. United Kingdom,* ECtHR, Application No. 5856/72, Judgment of 25 April 1978; *Costello-Roberts v. United Kingdom,* ECtHR, Application No. 13134/87, Judgment of 25 March 1993.

402 *Ryabikin v. Russia,* ECtHR, *op. cit.*, fn. 356, para. 121; *Jabari v. Turkey,* ECtHR, *op. cit.*, fn. 116, paras. 41–42.

403 *C.T. and K.M. v. Sweden,* CAT, *op. cit.*, fn. 322, para. 7.5; *M.C. v. Bulgaria,* ECtHR, Application No. 39272/98, Judgment of 4 December 2003; *Aydin v. Turkey,* ECtHR, Case No. 57/1996/676/866, Judgment of 25 September 1997, paras. 83–86.

404 *Concluding Observations on USA,* CAT, *op. cit.*, fn. 46, para. 17; *General Comment No. 20,* CCPR, *op. cit.*, fn. 394, para. 6; Theo Van Boven, UN Special Rapporteur on Torture, *Report on the Special Rappoerteur's visit to Spain*, UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, para. 34.

405 *Kaba and Kaba v. Canada,* CCPR, Communication No. 1465/2006, Views of 25 March 2010, para. 10.1.

406 CCPR, *General Comment No. 20, op. cit.*, fn. 394, para. 6; *Kuznetsov v. Ukraine,* ECtHR, Application No. 39042/97, Judgment of 29 April 2003; *R. v. Denmark,* ECommHR, Plenary, Application No. 10263/83, Admissibility Decision, 11 March 1985; *McFeeley v. United Kingdom,* ECommHR, Plenary, Application No. 8317/78, Admissibility Decision, 15 May 1980.

to the cumulative effects of the conditions, and to the length of detention (see, further, Chapter 4 on detention);[407]

- repeated or unnecessarily intrusive strip searches;[408]
- domestic violence;[409]
- the most severe forms of race discrimination.[410]
- time spent on "death row" awaiting execution (see below).

This is by no means an exhaustive list. For example, the European Court of Human Rights has held in the landmark case *D v. United Kingdom* that the expulsion of a non-national diagnosed in the terminal phase of AIDS would have amounted to inhuman treatment, as he would not have had access to the medical and palliative treatment available in the UK in the receiving country.[411] Nevertheless, the Court has cautioned that such cases should be viewed as exceptional. The principle "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."[412]

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407 *Peers v. Greece,* ECtHR, Application No. 28524/95, Judgment of 19 April 2001, paras. 67–75; *Ilascu and Others v. Russia and Moldova,* ECtHR, GC, Application No. 48787/99, Judgment of 8 July 2004; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 366–368; *Conteris v. Uruguay,* CCPR, Communication No. 139/1983, Views of 17 July 1985.

408 *Van der Ven v. the Netherlands,* ECtHR, Application No 50901/99, Judgment of 4 February 2003; *Valasinas v. Lithuania,* ECtHR, Application No. 44558/98, Judgment of 24 July 2001.

409 *Z and Others v. United Kingdom,* ECtHR, GC, Application No. 29392/95, Judgment of 10 May 2001.

410 *Cyprus v. Turkey,* ECtHR, GC, Application No. 25781/94, Judgment of 10 May 2001; *East African Asians v. United Kingdom,* ECommHR, Applications nos 4403/70-4419/70 and others, Report of 14 December 1973.

411 *D. v. United Kingdom,* ECtHR, Application No. 30240/96, Judgment of 2 May 1997, paras. 49–54.

412 *N. v. United Kingdom,* ECtHR, GC, Application No. 26565/05, Judgment of 27 May 2008, para. 45; *Ahorugeze v. Sweden,* ECtHR, *op. cit.* fn. 295, paras. 88–95: *Nacic and Others v. Sweden,* ECtHR, Application No. 16567/10, Judgment of 15 May 2012, paras. 49–56, *S.H.H. v. the United Kingdom,* ECtHR, Application No. 60367/10, Judgment of 29 January 2013 (where a case of disability of a returnee to Afghanistan did not meet the threshold of Article 3 ECHR). In *Yoh-Ekale Mwanje v. Belgium,* ECtHR, Application No. 10486/10, 20 December 2011, paras. 82–86, a majority of the judges appended a partially concurring opinion stating that "*un seuil de gravité aussi extrême—être quasi-mourant—est difficilement compatible avec la lettre et l'esprit de l'article 3, un droit absolu qui fait partie des droits les plus fondamentaux de la Convention et qui concerne l'intégrité et la dignité de la personne. A cet égard, la différence entre une personne qui est sur son lit de mort ou dont on sait qu'elle est condamnée à bref délai nous paraît infime en termes d'humanité. Nous espérons que la Cour puisse un jour revoir sa jurisprudence sur ce point",* partially concurring opinion, para. 6. See also, CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 50: "In the view of the Committee, this principle covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life."

In the case of *M.S.S. v. Belgium and Greece,* the Court held that a situation in which a State, through its inaction, leads an asylum-seeker to live in the street for several months, with no resources or access to sanitary facilities and without means to provide for his or her essential needs, combined with a prolonged uncertainty on the outcome of the asylum procedure, attains the level of inhuman or degrading treatment.[413] It also held that a State expelling a person to a country where he or she risks to be subject to this situation would breach its obligations under the principle of *non-refoulement*.[414] In the case of *Sufi and Elmi v. the United Kingdom,* in assessing whether situations of humanitarian crisis could reach the threshold of inhuman or degrading treatment for the application of the principle *non-refoulement*, the Court applied the *M.S.S.* test, "which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame".[415] The Court decided to apply this test because it was "clear that, while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict"[416] in the country of return. However, it also warned that, if "the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought", the more stringest test "in *N. v. the United Kingdom* may well have been considered to be the appropriate one".[417]

The Human Rights Committee found, in the case of *X.H.L. v. the Netherlands,* that, in respect of an unaccompanied minor, State authorities had breached the child's rights to protection (Article 24 ICCPR) linked with the right not to be subject to cruel, inhuman or degrading treatment (Article 7 ICCPR) because they had failed to take into consideration, before returning him to his country of origin, of the best interest of the child. "[W]ithout a thorough examination of the potential treatment that [he] may have been subjected to as a child with no identified relatives and no confirmed registration",[418] he would be impeded from "prov[ing] his identity or access any social assistance services"[419] in the country of origin.

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413 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 263.

414 *Ibid*., paras. 366–368.

415 *Sufi and Elmi v. the United Kingdom,* ECtHR, *op. cit.*, fn. 327, para. 283.

416 *Ibid*., para. 282.

417 *Ibid*..

418 *X.H.L. v. the Netherlands,* CCPR, Communication No. 1564/2007, 22 July 2011, para. 10.3.

419 *Ibid*., para. 10.2.

b) Enforced disappearances

The principle of *non-refoulement* also applies when there is a risk of enforced disappearance[420] since this practice in itself constitutes "a grave and flagrant violation of human rights and fundamental freedoms"[421] and "an offence to human dignity".[422]

c) Extra-judicial executions and the right to life

Extrajudicial executions constitute a serious violation of the absolute and non-derogable right to life to which the principle of *non-refoulement* applies, as has been clearly affirmed by the Human Rights Committee[423] and in the UN *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,*[424] Article 5 of which states that "no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country".

d) Non-refoulement and the death penalty

Under international human rights law, the transfer of a person to a country where there is a risk of subjection to the death penalty may entail violations of the right to life and/or the freedom from torture or cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee has found that "[f]or countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application [...] if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out".[425] This obligation arises irrespective of whether the expelling State has entered into international treaties prohibiting the death penalty, but merely from the fact that the State has abolished the death penalty domestically.[426] However, the

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420 Article 16, *International Convention for the Protection of All Persons from Enforced Disappearance,* adopted on 20 December 2006 (CPED); Article 8, UN *Declaration on the Protection of all Persons from Enforced Disappearance,* adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992, A/RES/47/133.

421 Article 1, UN *Declaration on the Protection of all Persons from Enforced Disappearance.*

422 *Ibid*.

423 *Baboeram et al. v. Suriname,* CCPR, Communications Nos. 146/1983 and 148–154/1983, Views of 4 April 1985; *Naveed Akram Choudhary v. Canada,* CCPR, *op. cit.,* fn. 318, paras. 9.7–9.8; *General Comment No. 6, The Rights to Life,* CCPR, 30 April 1982, para. 3.

424 See, ECOSOC Resolution No. 1989/65, *Effective prevention and investigation of extra-legal, arbitrary and summary executions,* 15th Plenary meeting, 24 May 1989.

425 *Judge v. Canada,* CCPR, Communication No. 829/1998, Views of 20 October 2003, para. 10.4; reconfirmed in *Kwok Yin Fong v. Australia,* CCPR, *op. cit.*, fn. 347, para. 9.4.

426 This decision constituted a change of jurisprudence of the Committee which had previously not found this obligation to arise. See, *Kindler v. Canada,* CCPR, Communication No. 470/1991*, Views of 18 November 1993; *Ng v. Canada,* CCPR, Communication No. 469/1991*, Views of 7 January 1994; *A.R.J. v. Australia,* CCPR, *op. cit.*, fn. 322.

prohibition of cruel, inhuman or degrading treatment or punishment can also enter into play in cases of transfer with risk of imposition of the death penalty as "the imposition of a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he/she will be executed in violation of article 7 [ICCPR]."[427] Furthermore, the Committee has found that execution by gas asphyxiation did not meet the test of "least possible physical and mental suffering", and was in violation of Article 7 ICCPR.[428]

The European Court of Human Rights has regularly found violations of Article 3 ECHR (freedom from torture and inhuman or degrading treatment or punishment) in cases of *refoulement* to face the death penalty, especially where the penalty would be preceded by time on death row.[429] However, it has also considered such expulsions a violation of the right to life, enshrined in Article 2 ECHR. Thus, it has stated that "in circumstances where there are substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment in the receiving country, Article 2 implies an obligation not to extradite the individual".[430] Even more strongly, the Court has considered that, "if an extraditing State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be near certainty, such an extradition may be regarded as "intentional deprivation of life", prohibited by Article 2 of the Convention".[431]

The European Court has recently stated that, "in respect of those States which are bound by it, the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe."[432] Moreover, the Court has suggested that the high level of ratification of Protocol 13, as well as State Practice in observing the moratorium on capital punishment "are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances."[433]

As to when the death penalty will involve inhuman and degrading treatment or punishment, the European Court has specified that "[t]he man-

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427 *Kwok Yin Fong v. Australia,* CCPR, *op. cit.*, fn. 347, para. 9.4.

428 *Ng v. Canada,* CCPR, *op. cit.*, fn. 426, para. 16.4.

429 *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, *op. cit.*, fn. 391, para. 137.

430 *Kaboulov v. Ukraine,* ECtHR, Application No. 41015/04, Judgment of 19 November 2009.

431 *Ibid*., para. 99.

432 *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, *op. cit.*, fn. 391, para. 118. 42 of the 47 Council of Europe Member States have ratified Protocol 13, and another three have signed it thereby engaging not to act in a way that defeats the object and purpose of the treaty until ratification (*Vienna Convention on the Law of Treaties* (VCLT), Vienna, 23 May 1969, Article 18).

433 *Ibid*., para. 120.

ner in which [the death penalty] 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 [...] 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 [...]."[434]

The Inter-American Commission on Human Rights found that sending back asylum-seekers to face a risk of being killed subsequent to their attempt to seek asylum abroad constituted a violation of their right to life under Article I of the *American Declaration on Rights and Duties of Man.*[435] This principle also applies to migrants, who are not asylum-seekers *stricto sensu,* but who risk summary, arbitrary or extrajudicial execution in their country of destination. The obligation also arises when the person to be sent has been intercepted on the high seas and returned to the country of departure.[436]

e) The death row phenomenon

On the "death row phenomenon", the Human Rights Committee has stated that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies."[437] In each particular case, "the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent."[438]

In *Soering v. United Kingdom,* the European Court of Human Rights defined its view on the death row phenomenon: "having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legiti-

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434 *Shamayev and Others v. Georgia and Russia,* ECtHR, Application No. 36378/02, Judgment of 12 April 2005, para. 333.

435 *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, para. 168.

436 *Ibid*., para. 169.

437 *Kindler v. Canada,* CCPR, *op. cit.*, fn. 426, para. 15.2.

438 *Ibid*., para. 15.3; See also, *Ng v. Canada,* CCPR, *op. cit.*, fn. 426, para. 16.1.

mate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."[439]

f) Flagrant denial of justice and of the right to liberty

Both the Human Rights Committee and the European Court of Human Rights have held that certain violations of the right to fair trial in the country of destination can trigger the protection of *non-refoulement*. The Human Rights Committee has implied that in certain cases an expulsion could not be carried out if a violation of the right to fair trial under Article 14 ICCPR of the person to be transferred would be a foreseeable consequence of the deportation.[440]

After having repeatedly suggested in its jurispduence that a violation of Article 6 ECHR may arise in cases of extradition or expulsion,[441] the European Court of Human Rights ruled for the first time that this provision had been breached because of the existence of a risk of "suffering a flagrant denial of justice in the requesting country", in the case of *Othman (Abu Qatada) v. the United Kingdom.*[442] The Court clarified that "the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein"[443] and pointed out to a non-exhaustive list of examples where this violation may occur: "conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge [...]; a trial which is summary in nature and conducted with a total disregard for the rights of the defence [...]; detention without any access to an independent and impartial tribunal to have the legality the detention reviewed [...]; deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country [...]".[444] The Court held in this case that the admission of torture evidence in criminal proceedings constituted a flagrant denial of justice for the purposes of Article 6 ECHR and did "not exclude that similar considerations may apply in respect of

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439 *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, para. 111. See also, *Ilascu and Others v. Russia and Moldova,* ECtHR, *op. cit.*, fn. 406, paras. 429–432; *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, Application No. 61498/08, Judgment of 2 March 2010, paras. 123–145.

440 *A.R.J. v. Australia,* CCPR, *op. cit.*, fn. 322, para. 6.15; *Alzery v. Sweden,* CCPR, *op. cit.*, fn. 364, para. 11.9.

441 *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 130; *Mamatkulov and Askarov v. Turkey,* ECtHR, GC, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para. 90; *Baysakov and Others v. Ukraine,* ECtHR, *op. cit.*, fn. 358, para. 61; *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, *op. cit.*, fn. 439, paras. 149–150; and, *Soering v. United Kingdom,* ECtHR, *op. cit.*, fn. 295, para. 113; *Z and T v. United Kingdom,* ECtHR, *op. cit.*, fn. 314, The Law.

442 *Othman (Abu Qatada) v. the United Kingdom,* ECtHR, *op. cit.*, fn. 313, para. 258.

443 *Ibid*., para. 259.

444 *Ibid*.

evidence obtained by other forms of ill-treatment which fall short of torture".[445]

The European Court stressed that the test of "flagrant denial of justice" is "a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice".[446]

With regard to the right to liberty, the Human Rights Committee has suggested that the foreseeable risk of being subject to arbitrary detention in the country of destination as a consequence of the transfer might amount to a violation of Article 9 ICCPR.[447]

After having addressed this principle only superficially in the past,[448] the European Court of Human Rights, in the case of *Othman (Abu Qatada) v. the United Kingdom,* although it did not find on the facts a breach of the right to liberty (Article 5 ECHR) in regard to *non-refoulement*, made clear that "it would be illogical if an applicant who faced imprisonment in a receiving State after a flagrantly unfair trial could rely on Article 6 to prevent his expulsion to that State but an applicant who faced imprisonment without any trial whatsoever could not rely on Article 5 to prevent his expulsion. Equally, there may well be a situation where an applicant has already been convicted in the receiving State after a flagrantly unfair trial and is to be extradited to that State to serve a sentence of imprisonment. If there were no possibility of those criminal proceedings being reopened on his return, he could not rely on Article 6 because he would not be at risk of a further flagrant denial of

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445 *Ibid*., para. 267: "the Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial. The Court does not exclude that similar considerations may apply in respect of evidence obtained by other forms of ill-treatment which fall short of torture".

446 *Ibid*., paras. 260–261. For a recent case where no violation of Article 6 ECHR was found, applying this test, see *Ahorugeze v. Sweden,* ECtHR, *op. cit.*, fn. 295, paras. 113–129.

447 *G.T. v. Australia,* CCPR, *op. cit.*, fn. 348, para. 8.7.

448 *Z and T v. United Kingdom,* ECtHR, *op. cit.,* fn. 314.

justice. It would be unreasonable if that applicant could not then rely on Article 5 to prevent his extradition".[449]

More specifically, the Court indicated that "a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as with Article 6, a high threshold must apply".[450]

g) Freedom of religion or belief

The expulsion of a person to a country where he or she would be at risk of a flagrant denial of his or her freedom of religion is also prohibited.

Freedom of religion or belief guarantees both a right to hold a religious—or equivalent non-religious belief—and a freedom to manifest one's religion or belief not only in community with other people, in public and within the circle of fellow believers, but also alone and in private.[451] However, the right to manifest one's religion or belief, unlike the right to hold a belief or religion, is not an absolute one, and can be restricted, in compliance with the principles of legality, necessity and proportionality, only "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".[452]

The European Court of Human Rights has stated that not all cases in which the freedom to manifest one's religion would not be respected in the receiving country can fall under the protection of the *non-refoulement* principle. The Court has found two situations in which this protection would apply:

- where there is a substantiated claim that they will either suffer persecution for, *inter alia,* religious reasons or will be at risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation;
- in exceptional circumstances, where there was a real risk of flagrant violation of freedom of religion or belief in the receiving State. The Court has, however, noted that it would be difficult to think of a case in which this situation would not also amount to *non-refoulement* for reasons of torture or inhuman or degrading treatment or punishment.[453]

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449 *Othman (Abu Qatada) v. the United Kingdom, op. cit.*, fn. 313, para. 232.

450 *Ibid*., para. 233. In the case at stake, fifty days' detention fell "short of the length of detention required for a flagrant breach of Article 5", para. 235

451 *Z and T v. United Kingdom,* ECtHR, *op. cit.,* fn. 314, The Law; *Kokkinakis v. Greece,* ECtHR, Application No. 14307/88, Judgment of 25 May 1993, p. 17, para. 31.

452 Article 9.2 ECHR; Article 18.3 ICCPR; Article 12.3 ACHR; Article 8 ACHPR allows for restrictions on the basis of law and order; Article 30.2 ArCHR.

453 *Z and T v. United Kingdom,* EctHR, *op. cit.,* fn. 314.

II. Expulsion as a violation of rights enjoyed in the sending State

In addition to *non-refoulement*, human rights law imposes a second type of limitation on the State's ability to transfer non-nationals: where the removal from the country of refuge would in itself, irrespective of where the individual is sent, represent an unjustifiable interference with certain human rights. Although a range of rights could in principle be affected by a removal, the principle has to date primarily been applied by international human rights authorities in relation to the right to respect for family life, the right to respect for private life,[454] and to the right to freedom of religion or belief. In relation to those rights, an interference with rights resulting from a removal will be considered to be justified where it is prescribed by law, necessary and proportionate to a legitimate aim.

1. The right to respect for private and family life

The right to respect for private and family life is enshrined in a number of human rights treaties.[455] This right, unlike the prohibition of torture and cruel, inhuman or degrading treatment or punishment, can be subject to derogation in times of emergency and it allows for restrictions to its enjoyment where they are in accordance with the law; pursue a legitimate aim, are necessary in a democratic society, are proportionate to the aim pursued, and are non-discriminatory.

The meaning of "family" for the purposes of the right to respect for family life is a broad one, which has been progressively extended by the jurisprudence of international courts and tribunals, reflecting changing social values, and may continue to develop in the future. The definition is set out in detail in Chapter 1, Section 3. Even where a relationship is found not to amount to family life, however, the right to respect for private life may apply to prevent the removal of a migrant from the jurisdiction. The right to respect for private life extends to protection of personal and social relationships. The European Court has noted that it protects "the right to establish and develop relationships with other human beings and the outside world [...] and can sometimes embrace aspects of an individual's social identity [and that] it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of

454 *Slivenko v. Latvia,* ECtHR, GC, Application No. 48321/99, Judgment of 9 October 2003, para. 95; *Üner v. the Netherlands,* ECtHR, GC, Application No. 46410/99, Judgment of 18 October 2006, para. 59; *Onur v. United Kingdom,* ECtHR, *op. cit.*, fn. 195, para. 46; *A.W. Khan v. United Kingdom,* ECtHR, *op. cit.*, fn. 198, para. 31.

455 Articles 17 and 23 ICCPR; Article 9 CRC; Article 8 ECHR; Article 11 ACHR; Article V ADRDM; Article 18 ACHPR; Articles 21 and 33 ArCHR.

"private life" within the meaning of Article 8."[456] Therefore, expulsion of a settled migrant, even where he or she has not developed a family life in the jurisdiction, may constitute an interference with his or her private life.

a) Expulsion as interference to the right to respect for family and private life

As noted above, expulsion, as an interference with the right to private and family life, must be **in accordance with the law.** This requires that it must:

- have a basis in domestic law;
- be accessible to the persons concerned;
- be sufficiently precise to enable those concerned to foresee, to a degree that is reasonable and if necessary with appropriate advice—the consequences of their actions.[457]

The expulsion must also **pursue a legitimate aim.** The maintenance and enforcement of immigration control is considered by itself to constitute a legitimate aim for restrictions to the rights of family and private life,[458] as are reasons of national security and public order. Merely claiming that these aims are pursued is not sufficient, however: the action must be shown to truly advance the aim and be necessary to reach it.[459]

The decision to expel must also be **necessary in a democratic society,** which requires that it be **justified by a pressing social need,** and **proportionate to the aim pursued.** The requirement of proportionality means that there must be relevant and sufficient reasons for the measure, that no less restrictive measure is feasible; that adequate safeguards against abuse should be in place; and that the measure should be imposed by way of a fair procedure. The Human Rights Committee has found that "in cases where one part of a family must leave the territory of the State Party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State Party's reasons for the removal of the person concerned and, on the

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456 *Üner v. the Netherlands,* ECtHR, *op. cit.*, fn. 454, para. 59; *Onur v. United Kingdom,* ECtHR, *op. cit.*, fn. 196, para. 46; *A.W. Khan v. United Kingdom,* ECtHR, *op. cit.*, fn. 198, para. 31; *Vasquez v. Switzerland,* ECtHR, Application No. 1785/08, Judgment of 26 November 2013, para. 37.

457 *Onur v. United Kingdom,* ECtHR, *op. cit.*, fn. 196, para. 48.

458 *Nnyanzi v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 76.

459 *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 78.

other, the degree of hardship the family and its members would encounter as a consequence of such removal."[460]

In this regard, for example, conviction for drug-related offences or for offences carrying a considerable prison sentence will more often incline the Committee to find expulsions reasonable, even when that would cause considerable hardship for the applicant's family, in particular when the rest of the family did not join the applicant in the communication before the Committee.[461] However, the decision would be disproportionate if it was "*de facto* impossible [...] to continue family life" outside of the expelling country.[462] In addition, the European Court of Human Rights has held that, when the children are remaining in the expelling country and the expellee has a proven family relationship with them, the children's best interest must be taken into account.[463] Finally, it is important to stress that an expulsion following criminal conviction does not run afoul of the principle of prohibition of double jeopardy, as it is to be considered a measure which is preventive rather than punitive in nature.[464]

In cases where the person is to be expelled as a consequence of committing a criminal offence, the European Court of Human Rights has established guiding criteria to be considered in evaluating whether a measure of expulsion that interferes with private or family life, is necessary in a democratic society and proportionate to the legitimate aim pursued:[465]

1. the nature and seriousness of the offence committed by the applicant;
2. the length of the applicant's stay in the country from which he or she is to be expelled;

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460 *Rubin Byahuranga v. Denmark,* CCPR, *op. cit.*, fn. 334, para. 11.7; *Madafferi and Madafferi v. Australia,* CCPR, Communication No. 1011/2001, Views of 26 August 2004, para. 9.8; *Omojudi v. United Kingdom,* ECtHR, Application No.1820/08, Judgment of 24 November 2009.

461 *Ibid*., para. 11.8.

462 *Amrollahi v. Denmark,* ECtHR, Application No. 56811/00, Judgment of 11 July 2002, paras. 36–44; *Sezen v. the Netherlands,* ECtHR, Application No. 50252/99, Judgment of 31 January 2006; *Jama Warsame v. Canada,* CCPR, Communication No. 1959/2010, Views of 21 July 2011, para. 8.10.

463 *Udeh v. Switzerland,* ECtHR, Application No. 12020/09, Judgment of 16 April 2013, paras. 52–54.

464 *Üner v. the Netherlands,* ECtHR, *op. cit.*, fn. 454, paras. 54–58; *Vasquez v. Switzerland,* ECtHR, *op. cit.*, fn. 456, para. 50 (the duration of the exclusion from the territory is part of the proportionality assessment of the measure).

465 *Boultif v. Switzerland,* ECtHR, Application No. 54273/00, Judgment of 2 August 2001, para. 48. See also, *Hamidovic v. Italy,* ECtHR, Application No. 31956/05, Judgment of 4 December 2012. "[T]he factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged", *A.A. v. the United Kingdom,* ECtHR, Application No. 8000/08, Judgment of 20 September 2011, para. 49.

3. the time elapsed since the offence was committed and the applicant's conduct during that period;
4. the nationalities of the various persons concerned;
5. the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
6. whether the spouse knew about the offence at the time when he or she entered into a family relationship;
7. whether there are children of the marriage, and if so, their age;
8. the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
9. the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
10. the solidity of social, cultural and family ties with the host country and with the country of destination.[466]

Concerning the length of stay, the Court considers that "the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be."[467] Special consideration should be given to situations where non-nationals have spent most, if not all, of their childhood in the host country, were brought up and received education there.[468] The Court has also found a violation of Article 8 when the combined effect of expulsion and custody and access proceedings and the failure to coordinate them have prevented family ties from developing.[469]

The African Commission, moreover, held that a person subject to an expulsion measure who would be separated from family members must be

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[466] Numbers are added. There is no hierarchy implied. On the early application of some of these principles, see *Abdulaziz, Cabales and Balkandali v. United Kingdom,* ECtHR, *op. cit.*, fn. 43.

[467] *Üner v. the Netherlands,* ECtHR, *op. cit.*, fn. 454, para. 58; *Konstatinov v. the Netherlands,* ECtHR, *op. cit.*, fn. 196, para. 49.

[468] In the case of an Algerian national convicted of criminal offences to be expelled by France to his home country, the Court found the decision not proportional, as the applicant was deaf and dumb and capable of achieving a minimum psychological equilibrium only within his family whose members were French nationals with no ties to Algeria: *Nasri v. France,* ECtHR, Application No. 19465/92, Judgment of 13 July 1995, paras. 41 and 46.

[469] *Ciliz v. the Netherlands,* ECtHR, *op. cit.*, fn. 197. The African Commission on Human and Peoples' Rights has also found that an unlawful deportation infringed the State duty to protect and assist the family: see, *Amnesty International v. Zambia,* ACommHPR, Communication No. 212/98, 25th Ordinary Session, May 1999, para. 51; *Modise v. Botswana,* ACommHPR, Communication No. 97/93, 28th Ordinary Session, 23 October–6 November 2000, para. 92.

given a reasonable time to make arrangements for the departure and for continued contact with the other members of the family. In the case *Kenneth Good v. Republic of Botswana,* the Commission found that the time of 56 hours given to a father who had to leave behind his daughter was "clearly inadequate to make sufficient family arrangements" and therefore contrary to family life rights under Article 18 ACHPR.[470]

2. Expulsions and rights to Freedom of Religion or Belief and Freedom of Expression

The right to freedom of religion or belief, protected under the ICCPR as well as regional human rights treaties[471] may prevent the removal of an individual from the country of refuge where the removal itself would violate rights of freedom of religion or belief. As noted above, both the right to hold a religious or other equivalent belief—which is an absolute right—and the right to manifest one's religion in community with other people, in public and within the circle of fellow believers, as well as alone and in private, are protected by international human rights law.[472] Freedom of religion includes the right to proselytise.[473] However, the right to manifest one's religion, unlike the right to hold a thought, belief or religion, is not an absolute right, and can be restricted where prescribed by law, in pursuit of a legitimate aim and in compliance with the principles of necessity and proportionality.

The European Court of Human Rights has held that "deportation does not [...] as such constitute an interference with the rights guaranteed by Article 9 [freedom of religion or belief], unless it can be established that the measure was designated to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers".[474]

As with interferences with the right to respect for family life, measures affecting freedom of religion, including expulsion, must be provided for by law. The law must be accessible, foreseeable, sufficiently precise and must provide a remedy against the arbitrary use by public authorities of such restriction.[475]

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470 *Good v. Republic of Botswana,* ACommHPR, Communication No. 313/05, 47th Ordinary Session, May 2010, para. 213.

471 Article 18 ICCPR; Article 9 ECHR; Article 12 ACHR; Article III ADRDM; Article 8 ACHPR; Article 30 ArCHR.

472 *Z and T v. United Kingdom,* ECtHR, *op. cit.*, fn. 314, The Law; *Kokkinakis v. Greece,* ECtHR, *op. cit.*, fn. 451, para. 31. See also, *Nolan and K. v. Russia,* ECtHR, Application No. 2512/04, Judgment of 12 February 2009, para. 61.

473 *Perry v. Latvia,* ECtHR, Application No. 30273/03, Judgment of 8 November 2007, para. 52.

474 *Nolan and K. v. Russia,* ECtHR, *op. cit.*, fn. 472, para. 62; *Omkarananada and the Divine Light Zentrum v. Switzerland,* ECommHR, Application No. 8118/77, Admissibility Decision, 19 March 1981, p. 118, para. 5.

475 *Perry v. Latvia,* ECtHR, *op. cit.,* fn. 473, para. 62.

Furthermore, the expulsion must be ordered for one of the aims listed in the human rights treaty and must be necessary and proportionate to that aim. Under the ICCPR, ECHR and ACHR, legitimate aims are limited to the interests of public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others.[476] No human rights treaty allows for a restriction on the right to freedom of religion or belief or of manifesting one's religion or belief on grounds of national security.[477]

In a limited but significant line of case-law, the European Court of Human Rights and the African Commission have also held that when someone is prevented from entering a country or expelled merely on grounds of past expressed opinions, and as a result is impaired in imparting information and ideas within that country, this may violate his or her right to freedom of expression.[478] In one case, the African Commission found an expulsion based on grounds of opinion to be a "flagrant violation" of the freedom of expression.[479] The same principles that apply to the right to freedom of religion and belief also apply in this situation, except that the right to freedom of expression can be restricted on grounds of national security and public order.

3. Expulsion and the "effectiveness" of the right to a remedy

Widely recognised under general principles of law and by major human rights treaties, where an individual's rights have allegedly been violated, he or she has the right to an effective remedy at the national level.[480] The remedy's purpose is to "enforce the substance of the [human rights treaty] rights and freedoms in whatever form they might happen to

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476 Article 9.2 ECHR; Article 18.3 ICCPR; Article 12.3 ACHR; Article 8 ACHPR allows for restrictions on the basis of law and order; Article 30.2 ArCHR.

477 *Nolan and K. v. Russia,* ECtHR, *op. cit.*, fn. 472, para. 73.

478 *Cox v. Turkey,* ECtHR, Application No. 2933/03, Judgment of 20 May 2010; *Women on Waves and Others v. Portugal,* ECtHR, *op. cit.*, fn. 46; and, *Piermont v. France,* ECtHR, Applications No. 15773/89 and 15774/89, Judgment of 27 April 1995; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, p. 66, paras. 196–200.

479 *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, p. 66, paras. 196–200.

480 Article 8 UDHR, Article 2.3 ICCPR, Article 8.2 CPED, Article 83 ICRMW, Article 13 ECHR, Article 25 ACHR, Article 25 *Protocol to the ACHPR on the Rights of Women in Africa,* Article 23 ArCHR. See further, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* adopted by the Commission on Human Rights, Resolution E/CN.4/RES/2005/35 of 19 April 2005 and by the General Assembly Resolution A/RES/60/147 of 16 December 2005 by consensus. A thorough analysis of the right to a remedy is to be found in International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations—A Practitioners' Guide,* Geneva, December 2006 (ICJ Practitioners' Guide No. 2).

be secured in the domestic legal order".[481] International human rights bodies agree that the remedy must be prompt, effective, accessible, impartial and independent, must be enforceable, and lead to cessation of or reparation for the human rights violation concerned.[482] In certain cases, the remedy must be provided by a judicial body,[483] but, even if it is not, it must fulfil the requirements of effectiveness and independence, set out above. The remedy must be effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.[484]

The right to a remedy has procedural implications for the expulsion process—addressed in the next Chapter. In addition, however, where a migrant, who is alleged to have suffered human rights violations in the country in which he or she is resident as a non-national, is to be expelled, such expulsion or the threat of it may hinder his or her access to a remedy for that human rights violation. A migrant might, for example, have been subject to violations of his or her labour rights, right to education or other economic, social or cultural rights. They might have been subject to ill-treatment, forced labour or situations of arbitrary deprivation of liberty, as may be the case for example for domestic workers.[485] The Inter-American Court of Human Rights has stressed the importance of the right to a remedy for undocumented migrant workers, noting that it is impermissible to take measures "denying them the possibility of filing a complaint about violations of their rights before the competent authority."[486]

The ICRMW establishes a general principle that "expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her".[487] However, such provision is limited to migrant workers and members of the family and, moreover, speaks only of rights "acquired under the law of the State", narrowing the scope of the protection. The Committee on Migrant Workers has held that, where a migrant worker is to be expelled, "States parties should, whenever

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481 *Al-Nashif v. Bulgaria,* ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 132. See also, *Omkarananada and the Divine Light Zentrum v. Switzerland,* ECommHR, *op. cit.*, fn. 474, p. 118, para. 9.

482 See, generally, ICJ, *Practitioners' Guide No. 2, op. cit.*, fn. 480, pp. 46–54.

483 *Ibid*., pp. 49–54.

484 *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 100; *Isakov v. Russia,* ECtHR, *op. cit.*, fn. 324, para. 136; *Yuldashev v. Russia,* ECtHR, *op. cit.*, fn. 324, paras. 110–111; *Garayev v. Azerbaijan,* ECtHR, Application No. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.

485 See, *General Comment No. 1 on migrant domestic workers,* CMW, UN Doc. CMW/C/GC/1, 23 February 2011, para. 17.

486 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, para. 170.

487 Article 22.9 ICRMW. See, on labour rights, Article 25.3 ICRMW.

possible, grant migrant workers and their family members a reasonable period of time prior to their expulsion to claim wages and benefits. States parties should also consider time-bound or expedited legal proceedings to address such claims by migrant workers. In addition, States parties should conclude bilateral agreements so that migrant workers who return to their State of origin may have access to justice in the State of employment to file complaints about abuse and to claim unpaid wages and benefits".[488]

The Committee on the Elimination of Discrimination Against Women has repeatedly held that, under the CEDAW, States must "provide migrant workers with easily accessible avenues of redress against abuse by employers and permit them to stay in the country while seeking redress".[489] The Committee on the Elimination of Racial Discrimination has stated that States must "ensure the right of all migrant workers, regardless of their status, to obtain effective protection and remedies in case[s] of violation of their human rights".[490] Similar observations have been made by the CMW.[491]

CEDAW is the treaty monitoring body that has dealt most extensively with the issue of access to a remedy. It has addressed this in the specific context of undocumented women migrant workers, recognising that such women face particular difficulties in access to justice for violations of their human rights due to fear of denunciation and subsequent deportation.[492] CEDAW has repeatedly held that States must "provide migrant workers with easily accessible avenues of redress against abuse by employers and permit them to stay in the country while seeking redress".[493] This implies that States have to "[r]epeal or amend laws on loss of work permit, which results in loss of earnings and possible deportation by immigration authorities when a worker files a complaint of exploitation or abuse and while pending investigation".[494]

The analysis of CEDAW can also be applied to all other categories of migrants. According to this approach, expulsion has both direct and indirect effects on migrants' right to a remedy:

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488 CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 55.

489 *Concluding Observations on Malaysia,* CEDAW, UN Doc. CEDAW/C/MYS/CO/2, 31 May 2006, paras. 25–26; *Concluding Observations on China,* CEDAW, UN Doc. CEDAW/C/CHN/CO/6, 25 August 2006, paras. 41–42; *Concluding Observations on Bhutan,* CEDAW, UN Doc. CEDAW/C/BTN/CO/7, 7 August 2009, paras. 29–30.

490 *Concluding Observations on Republic of Korea,* CERD, UN Doc. CERD/C/KOR/CO/14, 17 August 2007, para. 18.

491 *Concluding Observations on Mexico,* CMW, UN Doc. CMW/C/MEX/CO/1, 20 December 2006, paras. 33–34.

492 CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, paras. 21–22.

493 See, fn. 489.

494 CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(f)(ii).

- **Direct effect:** the expulsion, once carried out, can render the remedy meaningless or ineffective, as the person, once expelled, may not have access to it, or access to it might be impracticable due to the situation in the country to which they have been expelled. In this case, an important factor will be whether the State provides the migrant with effective mechanisms to claim his or her remedy once abroad.
- **Indirect effect:** The threat of expulsion constitutes a powerful deterrent for migrants to decide to access a remedy against their human rights violations. As all rights must be interpreted so as to make their protection meaningful and effective, States must create conditions for both regular and undocumented migrants to avail themselves of a remedy, without fear of expulsion.

CHAPTER 3: EXPULSION PROCEDURES

This Chapter considers the procedural protection afforded by international human rights law to persons threatened with expulsion. These standards have become particularly significant in recent years, as more countries introduce expedited or simplified expulsion procedures which may undermine procedural safeguards normally available under national law. They often provide insufficient time for migrants to prepare their case, and allow only for non-suspensive appeals of decisions to expel, meaning that the decision can only be challenged after the expulsion has taken place. An additional and growing concern in recent years has been the use of special procedures in expulsion cases where issues of national security arise, allowing insufficient disclosure or limiting judicial scrutiny of the reasons for expulsion. Human rights obligations place constraints on the application of all such special procedures.

Human rights procedural guarantees in expulsion vary as between international and regional human rights bodies, in contrast to the universally strong and relatively consistent protections of substantive human rights in expulsion, considered in Chapter 2. This Chapter, after considering the international law definition of expulsion, addresses the safeguards that international human rights law attaches to all expulsion procedures, irrespective of the substantive rights engaged. It then analyses the procedural guarantees linked to the right to a remedy, and, finally, procedural rights under the *Geneva Refugee Convention*.

I. When is someone "expelled"?

The notion of expulsion in international law "is an autonomous concept which is independent of any definition contained in domestic legislation [...]. With the exception of extradition, any measure compelling an alien's departure from the territory where he was lawfully resident constitutes an "expulsion".[495] Expulsion includes rejection at the border, withdrawal of the visa of a lawful resident who seeks re-entry to his or her country of residence,[496] and any other form of transfer, deportation, removal, exclusion, or return. Extradition proceedings, which are often covered by specific provisions contained in multilateral and bilateral extradition agreements, and may concern nationals as well as non-nation-

[495] *Nolan and K. v. Russia, op. cit.*, fn. 472, para. 112. See also, *Bolat v. Russia,* ECtHR, Application No. 14139/03, Judgment of 5 October 2006, para. 79. The Human Rights Committee also includes as expulsions "all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise", CCPR, *General Comment No. 15, op. cit.*, fn. 30, para. 9. See also, *Explanatory Report to Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* ETS No. 117, para. 10.

[496] *Ibid*.

als, are beyond the scope of this Guide. However, it should be noted that the substantive human rights obligations considered in Chapter 2 apply to extradition in the same way as to any other removal from the territory.

As noted by the ILC Special Rapporteur on expulsion of aliens, Maurice Kamto, "expulsion does not necessarily presuppose a formal measure, but it can also derive from the conduct of a State which makes life in its territory so difficult that the alien has no choice other than to leave the country".[497] As will be seen below, practices of harassment, incentives or any other practice of the authorities which leave the alien with no other choice but to leave the country, amount to expulsion.

II. What procedural protections apply to expulsion?

In international human rights law, the general procedural protection applicable to expulsion procedures varies considerably depending on the human rights treaty. There are two approaches. The ICCPR and the ECHR omit the applicability of general fair hearing protection to expulsion proceedings, but provide specific procedural guarantees to non-nationals "lawfully in the territory of a State Party", leaving undocumented migrants relatively unprotected (ICCPR, ECHR Protocol 7). Article 26.2 of the *Arab Charter on Human Rights* (ArCHR) also provides procedural guarantees for non-nationals lawfully on the territory of a State Party. The African and the Inter-American systems provide that expulsion procedures must observe the guarantees provided for by the right to a fair trial to all those potentially subject to expulsion measures (ACHR, IADRDM, ACHPR). Even where fair hearing standards are not applicable, however, some procedural rights may be derived from the principle of *non-refoulement*, the right to respect for family life, or other substantive rights that may be engaged by the expulsion, as well as from the right to an effective remedy.

A common principle is that expulsions must not discriminate in purpose or effect on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[498] Under international human rights treaties, the obligation derives from the principle of non-discrimination read together with the guarantees of

[497] Maurice Kamto, UN Special Rapporteur of the International Law Commission, *Sixth report on the expulsion of aliens,* UN Doc. A/CN.4/625, 19 March 2010 (ILC Sixth Report"), para. 37. See also, paras. 38–39, and fn. 23 and 24, citing international arbitral awards of the *Iran-USA Claims Tribunal* and the *Eritrea-Ethiopia Claims Commission* upholding this definition of expulsion.

[498] CCPR, *General Comment No. 15, op. cit.*, fn. 30, paras. 9–10.

procedural rights in expulsion procedures.[499] Articles 5(a) and 6 ICERD prohibit discrimination in expulsion proceedings on grounds of race, colour, descent, or national or ethnic origin.[500] Discrimination on grounds of sex is specifically prohibited by Article 3 ICCPR read together with Article 13, and Article 15.1 CEDAW; and discrimination on grounds of disability by Article 5 CRPD.[501]

In addition, Articles 22 and 23 of the *International Convention on the Rights of Migrant Workers and Their Families* (ICRMW) provide universal and detailed rights in expulsion procedures and apply to both regular and undocumented migrant workers. These provisions have been applied regularly in the observations of the Committee on the Rights of Migrant Workers.[502] However, it should be noted that at the time of writing only 47 States were parties to the Convention and that few of the more developed countries most likely to be destination States for migrants have acceded to it.

1. Specific due process guarantees in expulsion

As noted in the previous paragraphs, the Human Rights Committee[503] and the European Court of Human Rights[504] have explicitly rejected arguments that expulsion procedures are subject to the full protection of the right to fair trial and its consequent guarantees. However, Article 13 of the ICCPR and Article 1 of *Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*[505],

499 Under the ICCPR it derives from the right to equal protection of the law enshrined in Article 2.3 ICCPR read together with Article 13 ICCPR, and Article 26 ICCPR; Article 7 read together with Article 22 ICRMW; Article 14 ECHR, read together with Article 1 of Protocol 7 ECHR, and, separately, Article 1 of Protocol 12 ECHR, which enshrines a free-standing right to non-discrimination but to date has been ratified only by 18 States (9 February 2011). Article 1 ACHR read together with Article 22.6 ACHR and Article 24 ACHR; Article 2 read together with Article 12.4 ACHPR and Article 3 ACHPR; and Articles 3 read together with Article 26.2 ArCHR, and Article 11.

500 *Concluding Observations on Dominican Republic,* CERD, UN Doc. CERD/C/DOM/CO/12, 16 May 2008, para. 13.

501 Article 6 of the Convention enshrines specific protection against discrimination for women with disabilities and Article 7 for children with disabilities.

502 See, CMW, *General Comment No. 2, op. cit.*, fn. 2, paras. 49–58; *Concluding Observations on Mexico,* CMW, *op. cit.*, fn. 491, para. 13; *Concluding Observations on Ecuador,* CMW, UN Doc. CMW/C/ECU/CO/1, 5 December 2007, para. 26; *Concluding Observations on Bolivia,* CMW, UN Doc. CMW/C/BOL/CO/1, 29 April 2008, para. 30; *Concluding Observations on Colombia,* CMW, UN Doc. CMW/C/COL/CO/1, 22 May 2009, para. 28.

503 *See Zundel v. Canada,* CCPR, Communication No. 1341/2005, Views of 4 April 2007, para. 6.8. See also, *Ahani v. Canada,* CCPR, Communication No. 1051/2002, Views of 15 June 2004, para. 10.9; *Surinder Kaur v. Canada,* CCPR, Communication No.1455/2006*, Views of 18 November 2008, paras. 7.4–7.5; *P.K. v. Canada,* CCPR, Communication No. 1234/2003, Views of 3 April 2007, paras. 7.4–7.5.

504 *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 126; *Mamatkulov and Askarov v. Turkey,* ECtHR, *op. cit.*, fn. 441, para. 82; *Maaouia v. France,* ECtHR, *op. cit.*, fn. 53, paras. 39–40.

505 Only Germany, the Netherlands, Turkey and the United Kingdom are not parties to Protocol 7 ECHR (as of 10 January 2014).

respectively, guarantee procedural rights in expulsion proceedings in terms similar to Article 32 of the *Geneva Refugee Convention*. They require that a non-national lawfully in the territory of a State (ICCPR) or "lawfully resident" there (Protocol 7 ECHR) may be expelled only in pursuance of a decision reached in accordance with law. In addition, the non-national must be allowed, prior to expulsion, to submit reasons against expulsion and to have his or her case reviewed by, and be represented before, the competent authority or a person or persons especially designated by the competent authority. Exceptions to these guarantees are provided in case of national security or public order, as described in Section II.1.f below.

Protection under Article 13 ICCPR, Article 1 of Protocol 7 ECHR and Article 26.2 ArCHR excludes migrants unlawfully present on the territory. Article 13 ICCPR applies to non-nationals "lawfully in the territory" of the State Party. The term "lawfully" must be interpreted according to the "national law concerning the requirements for entry and stay [...], and [...] illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions."[506] However, when the legality of a non-national's presence on the territory is in dispute, Article 13 applies.[507]

Rights under Article 1 of Protocol No. 7 ECHR, apply only to non-nationals "lawfully resident" in the territory of the State Party. The notion of "lawful residence" is broader than that of physical presence on the State's territory. As the European Court of Human Rights held, "the word "resident" operates to exclude those aliens who have not been admitted to the territory or have only been admitted for non-residential purposes [...]. These exceptions are obviously inapplicable to someone who [...] had continuously resided in the country for many years. [...] The notion of "residence" is [...] not limited to physical presence but depends on the existence of sufficient and continuous links with a specific place".[508] In this particular case, the applicant was trying to re-enter his country of residence when his entry was refused because his visa had been arbitrarily withdrawn. This situation did not make him an unlawful resident.[509]

a) Decision in accordance with law

The first of the conditions for a permissible expulsion under Article 13 ICCPR, Article 1 of Protocol 7 ECHR, and Article 26.2 ArCHR is that

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506 CCPR, *General Comment No. 15, op. cit.*, fn. 30, para. 9. See also, *Kindler v. Canada,* CCPR, *op. cit.*, fn. 426, para. 6.6; *Nolan and K v. Russia,* ECtHR, *op. cit.*, fn. 472.

507 *Ibid*., para. 9.

508 *Nolan and K. v. Russia,* ECtHR, *op. cit.*, fn. 472, para. 110. See also, *Explanatory Report* ETS No. 117, *op. cit.*, fn. 495, para. 9; *Bolat v. Russia,* ECtHR, *op. cit.*, fn. 495, paras. 76–80.

509 *Ibid*.

the decision to expel must be reached in accordance with law. The European Court of Human Rights has held that this term should be interpreted, as elsewhere in the Convention, to include the need to provide for the measure in domestic law as well as for the law to be accessible, foreseeable, and afford protection against arbitrary action by public authorities.[510] According to the European Court and the Human Rights Committee, to be in accordance with law, the expulsion must comply with both the substantive and the procedural requirements of the law[511] which must be interpreted and applied in good faith.[512]

b) Right to submit reasons against expulsion

Under Article 13 ICCPR, Article 1.1(a) Protocol 7, and Article 26.2 ArCHR the person subject to expulsion has the right to make submissions against the expulsion. As this right must be interpreted in a way that guarantees that it is practical and effective, it is essential that the reasons for expulsion be communicated to the person to be expelled, to a degree of specificity sufficient to allow for effective submissions against expulsion. Where migrants are given no indications of the case against them, or are given insufficient information regarding the hearing of their case or insufficient time to prepare submissions, the European Court of Human Rights has found violations of Article 1.1(a) Protocol 7.[513] The Human Rights Committee has also stressed that "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."[514]

At the European level, the Committee of Ministers of the Council of Europe, whose recommendations have no binding force but are highly authoritative, 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."[515]

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510 *Lupsa v. Romania,* ECtHR, Application No. 10337/04, Judgment of 8 June 2006, para. 55; *Kaya v. Romania,* ECtHR, Application No. 33970/05, Judgment of 12 October 2006, para. 55; *C.G. and Others v. Bulgaria,* ECtHR, Application No. 1365/07, Judgment of 24 April 2008, para. 73. See also, *Twenty Guidelines on Forced Return,* adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Guideline 2.

511 *Maroufidou v. Sweden,* CCPR, Communication No. 58/1979, Views of 8 April 1981, para. 9.3; *Bolat v. Russia,* ECtHR, *op. cit.*, fn. 495, para. 81. See also, *Lupsa v. Romania,* ECtHR, *op. cit.*, fn. 510, paras. 56–61; *Kaya v. Romania, op. cit.*, fn. 510, paras. 56–61; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, para. 204.

512 *Ibid*., para. 10.1.

513 *Lupsa v. Romania,* ECtHR, *op. cit.*, fn. 510, paras. 59–60; *Kaya v. Romania,* ECtHR, *op. cit.*, fn. 510, paras. 59–60; *Nolan and K. v. Russia, op. cit.*, fn. 472, para. 115.

514 CCPR, *General Comment No. 15, op. cit.*, fn. 30, para. 10.

515 *Twenty Guidelines on Forced Return, op. cit.*, fn. 510, Guideline 4.1.

c) The right to representation

The right to representation before the authority competent to decide on the expulsion is specifically guaranteed under Article 13 ICCPR and Article 1.1(c) of Protocol 7 ECHR.

The Human Rights Committee has recommended that, in accordance with Article 13 ICCPR, States should grant "free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary".[516] It has also affirmed that States should "ensure that all asylum-seekers have access to counsel, legal aid and an interpreter".[517]

The European Court of Human Rights found a violation of the procedural guarantees of Article 1 of Protocol 7 ECHR where "the decision on the applicant's exclusion had not been communicated to him for more than three months and [...] he had not been allowed to submit reasons against his expulsion and to have his case reviewed with the participation of his counsel".[518]

The Committee of Ministers of the Council of Europe also declared in its *Twenty Guidelines on Forced Return* that the time-limits for exercising a remedy against expulsion must not be unreasonably short, and that "the remedy shall be accessible, which implies in particular that, 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".[519] The guidelines are a declaratory instrument of the European human rights system. However, the Committee of Ministers considered this particular provision as embodying already existing obligations of Member States of the Council of Europe.[520]

d) Right to appeal

While human rights treaty bodies and the Committee of Ministers of the Council of Europe have stopped short of recognising the right to a judicial appeal, they have insisted on guaranteeing the access to an appeal against expulsion decisions before an independent authority.

The Human Rights Committee, applying Article 13 ICCPR, has found that "[a]n alien must be given full facilities for pursuing his remedy against

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516 *Concluding Observations on Switzerland,* CCPR, UN Doc. CCPR/C/CHE/CO/3, 29 October 2009, para. 18; *Concluding Observations on Ireland,* CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 19.

517 *Concluding Observations on Japan,* CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25.

518 *Nolan and K. v. Russia, op. cit.*, fn. 472, para. 115.

519 *Twenty Guidelines on Forced Return, op. cit.*, fn. 510, Guideline 5.2.

520 *Ibid*., Preamble 2(a).

expulsion so that this right will in all the circumstances of his case be an effective one. [These] principles [...] relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of [the procedural rights in expulsion proceedings]."[521] Concluding observations of both the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have also affirmed that there must be equal access to an independent appeals procedure to review all immigration-related decisions and that pursuing such a procedure, as well as resorting to judicial review of adverse decisions, must have a suspensive effect upon the expulsion decision.[522]

Article 1 of Protocol 7 ECHR provides for the right to have the expulsion decision reviewed in light of the reasons against expulsion submitted by the person concerned.[523] The Council of Europe's Committee of Ministers has specified—in provisions considered to be declaratory of existing international law obligations of Member States—that "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."[524] The Committee of Ministers also stated that the time-limits to exercise the remedy must not be unreasonably short; the remedy must be accessible, with the possibility of granting legal aid and legal representation.[525]

e) Non-discriminatory application

It is clear that the procedure of expulsion must not discriminate in law, and must not be applied in a discriminatory way, for example, by arbitrarily targeting particular categories of non-nationals, or by applying divergent procedures to migrants of different nationalities without objective justification, or to different ethnic groups, or failing to ensure equal procedural protection to women. These practices would violate

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521 CCPR, *General Comment No. 15, op. cit.*, fn. 30, para. 10. See also, *Hammel v. Madagascar,* CCPR, Communication No. 155/1983, Views of 3 April 1987, paras. 19.2–19.3; *Concluding Observations on Sweden,* CCPR, Report of the Human Rights Committee to the General Assembly, 51st Session, Vol. I, UN Doc. A/51/40 (1996), paras. 88 and 96; *Concluding Observations on Syrian Arab Republic,* CCPR, Report of the Human Rights Committee to the General Assembly, 56th Session, UN Doc. A/56/40 (2001).

522 *Concluding Observations on Ireland,* CCPR, 2008, *op. cit.*, fn. 516, para. 19; *Concluding Observations on Dominican Republic,* CERD, 2008, *op. cit.*, fn. 500, para. 13.

523 *Explanatory Report,* ETS No. 117, *op. cit.*, fn. 495 para. 13.2. See also, *Europe's boat people: mixed migration flows by sea into southern Europe,* PACE Resolution No. 1637 (2008), para. 9.10.4.

524 *Twenty Guidelines on Forced Return, op. cit.*, fn. 510, Guideline 5.1.

525 *Ibid*., Guideline 5.2.

Article 2.1, read together with Article 13 ICCPR, Article 26 ICCPR (general clause on non-discrimination), which prohibits discrimination based on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[526] The same is true for the European human rights system under Article 14 ECHR, read together with Article 1 of Protocol 7 ECHR, and Article 1 of Protocol 12 ECHR;[527] the Inter-American system under Article 1 read together with Article 22.6 ACHR and Article 24 ACHR (right to equal protection of the law); the African system under Article 2 read together with Article 12.4 ACHPR and Article 3 ACHPR (right to equal protection of the law); and in the Arab system under Article 3 read together with Article 26.2 ArCHR, and Article 11 (right to equal protection of the law). Specific treaty protections against discrimination on the basis of race, gender and disability (see Introduction), are also relevant.

f) Public order and national security exceptions

As noted above, both Article 13 ICCPR and Article 1 Protocol 7 ECHR provide exceptions to the procedural guarantees in expulsion proceedings where compelling reasons of national security require otherwise. Article 13 ICCPR provides an exemption from the procedural protection of that article where required by "compelling reasons of national security". Article 1 of Protocol 7 ECHR does not, at least in theory, permit States to entirely deprive non-nationals of rights under that Article on grounds of national security or public order, but where an expulsion is "necessary in the interests of public order or is grounded on reasons of national security", it allows a non-national to be expelled **before** the exercise of these rights, without undermining his or her entitlement to exercise these rights after the expulsion.[528] In practice, however, such non-suspensive rights of review are unlikely to provide effective protection.

When these exceptions are claimed, the State must provide evidence capable of corroborating its claim that the interests of national security or public order are at stake.[529] The State must demonstrate that the decision is adequately prescribed by law (i.e. that it has an accessible and foreseeable basis in national law), that it is taken pursuant to a legitimate aim, and is necessary in a democratic society and proportionate to the aim pursued.[530]

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526 CCPR, *General Comment No. 15, op. cit.*, fn. 30, paras. 9–10.

527 To date Protocol 12 has been ratified only by 18 States (10 January 2014).

528 *Explanatory Report,* ETS No. 117, *op. cit.*, fn. 495, para. 15.

529 *Nolan and K. v. Russia, op. cit.*, fn. 472, para. 115; *Explanatory Report,* ETS No. 117, *op. cit.*, fn. 495, para. 15.

530 See, *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, para. 78.

Box 11. Automatic prohibitions on leaving one's country

The right to leave any country, including one's own, is enshrined in Article 12.2 ICCPR, Article 2.2 of Protocol 2 ECHR, Article 22.2 ACHR, Article 12.2 of the African Charter. It is not an absolute right as, it can be limited for the pursuance of a legitimate aim and only by measures which are prescribed by law, necessary and proportionate.

A particular reflection of this human right—which is rarely claimed before international human rights bodies—is to be found in the judgment of the European Court of Human Rights in the case *Stamose v. Bulgaria.* The case concerned a Bulgarian citizen whose passport was seized by the Bulgarian authorities and who was subject to a travel ban of two years for breach of the immigration laws of the USA. The scope of this measure was to "discourage and prevent breaches of the immigration laws of other States, and thus reduce the likelihood of those States refusing other Bulgarian nationals entry to their territory, or toughening or refusing to relax their visa regime in respect of Bulgarian nationals".[531] The law on which the measure was based was "enacted and subsequently tightened [...] as part of a package of measures designed to allay the fears of, amongst others, the then Member States of the European Union in respect of illegal emigration from Bulgaria, and that it played a part in the Union's decision in March 2001 to exempt Bulgarian nationals from a visa requirement for short-term stays [...]."[532]

The European Court held that the fact that the prohibition to leave his country derived from a EU agreement did not foreclose the examination of its compliance with the European Convention on Human Rights. On the matter of the dispute, the Court found it "quite draconian for the Bulgarian State—which could not be regarded as directly affected by the applicant's infringement—to have also prevented him from travelling to any other foreign country for a period of two years".[533] It finally ruled that, "[a]lthough the Court might be prepared to accept that a prohibition on leaving one's own country imposed in relation to breaches of the immigration laws of an-

[531] *Stamose v. Bulgaria,* ECtHR, Application No. 29713/05, Judgment of 27 November 2012, para. 32.

[532] *Ibid*., para. 36.

[533] *Ibid*., para. 34.

> other State may in certain compelling situations be regarded as justified, it does not consider that the automatic imposition of such a measure without any regard to the individual circumstances of the person concerned may be characterised as necessary in a democratic society".[534]

2. Expulsion procedures and the right to fair trial

Unlike the Human Rights Committee and the European Court of Human Rights, which, as noted, have rejected the application of the right to a fair hearing in expulsion cases,[535] one regional court, the Inter-American Court of Human Rights, and two regional human rights bodies, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, have recognised that fair trial guarantees apply in expulsion proceedings.[536]

In the Inter-American system, the Inter-American Court and the Inter-American Commission have determined that Article 8 (right to a fair trial) and Article 25 (right to judicial protection) ACHR and Article XVIII (right to a fair trial) of the American Declaration apply also to expulsion and deportation proceedings.[537] The Commission has clarified that, while the application of the right to a fair trial to these proceedings "may not require the presence of all the guarantees required for a fair trial in the criminal sphere, a minimum threshold of due process guarantees should be provided."[538] In particular, the following guarantees have been affirmed by these bodies:

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534 *Ibid*., para. 36.

535 See, fn. 503 and 504 under section II.1.

536 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, paras. 124–127; *Vélez Loor v. Panama,* IACtHR, Series C No. 218, Judgment of 23 November 2010, para. 146; *Riebe Star and Others v. Mexico,* IACHR, Case 11.160, Report No. 49/99, 13 April 1999, Merits, 13 April 1999, para. 71. See also, *Habal and son v. Argentina,* IACHR, Case 11.691, Report No. 64/08, Merits, 25 July 2008, para. 53; IACHR, *Report on Terrorism and Human Rights,* OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 401 and 409. For the African system see, *OMCT and Others v. Rwanda,* ACommHPR, *op. cit.*, fn. 65, pp. 49, 52; *Rencontre Africaine pour la Defence des Droits de l'Homme (RADDH) v. Zambia,* ACommHPR, Communication No. 71/92, 20th Ordinary Session, October 1996, p. 60, para. 29; *UIADH and Others v. Angola,* ACommHPR, *op. cit.*, fn. 43, paras. 19–20; *Amnesty International v. Zambia,* ACommHPR, *op. cit.*, fn. 469, paras. 38, 42 and 53; *IHRDA v. Republic of Angola,* ACommHPR, *op. cit.*, fn. 395, para. 59; *ZLHR and IHRD v. Republic of Zimbabwe,* ACommHPR, *op. cit.*, fn. 395, paras. 106–109; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 161–163, 179–180.

537 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.,* fn. 33, paras. 124–127; *Nadege Dorzema et al. v. Dominican Republic,* IACtHR, Judgment of 24 October 2012, para. 159; IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, paras. 398–403; *Habal and son v. Argentina,* IACHR, *op. cit.*, fn. 536, para. 54; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 71; *John Doe et al. v. Canada,* IACHR, *op. cit.*, fn. 117.

538 IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 403.

- the right to a public hearing;[539]
- the right to be given an adequate opportunity to exercise the right of defense;[540]
- the right to be assisted by a lawyer and have access to free legal aid;[541]
- the right to sufficient time to ascertain the charge against them;[542]
- the right to reasonable time in which to prepare and formalise a response, and to seek and adduce responding evidence;[543]
- the right to receive prior communication of the reasons for expulsion;[544]
- the right to appeal a decision before a superior judge or court;[545]
- the right to prior notification.[546]

The Inter-American Commission has also held that the failure to respect of the right to a fair trial; the right to due legal process; and the right to effective legal counsel constitute violations of Article 22.6 ACHR which states that "[a]n alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law."[547]

The African Commission on Human and Peoples' Rights has found applicable the right to a fair trial (Article 7 ACHPR),[548] and the right to receive information (Article 9.1 ACHPR)[549] to expulsion procedures. Under these provisions, the Commission has determined that non-nationals, regardless of their status, have the right to challenge an expulsion deci-

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539 *Ibid*., para. 403; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 71.

540 *Ibid*., para. 403.

541 *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 146; *Nadege Dorzema et al. v. Dominican Republic,* IACtHR, *op. cit.*, fn. 537, para. 164; IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 403; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 71.

542 IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 403; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 71.

543 *Ibid*., para. 403; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 71.

544 *Habal and son v. Argentina,* IACHR, *op. cit.*, fn. 536, para. 55.

545 *Ibid*., para. 55.

546 *Ibid*., para. 55.

547 Article 22.6 ACHR. See, *Habal and son v. Argentina,* IACHR, *op. cit.*, fn. 536, para. 58; *Riebe Star and Others v. Mexico,* IACHR, *op. cit.*, fn. 536, para. 107.

548 *OMCT and Others v. Rwanda,* ACommHPR, *op. cit.*, fn. 65, pp. 49, 52; *RADDH v. Zambia,* ACommHPR, *op. cit.*, fn. 536, p. 60, para. 29; *UIADH and Others v. Angola,* ACommHPR, *op. cit.*, fn. 43, paras. 19–20; *Amnesty International v. Zambia,* ACommHPR, *op. cit.*, fn. 469, paras. 46 and 61; *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, para. 59.

549 *Amnesty International v. Zambia,* ACommHPR, *op. cit.*, fn. 469, para. 41; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 194–195.

sion before a national judicial authority,[550] and the right to be provided with the reasons for deportation.[551]

The African Commission has held that, when the government expels a citizen or a non-national on grounds of national security, it must bring evidence against the person before the courts. The Commission stressed that the right to be informed of the reasons for expulsion is an inherent part of the right to a fair trial and may not be abrogated in times of emergency. It found that failure to provide reasons for expulsion violates the right to fair trial (Article 7), to an independent judiciary (Article 26) and of the right to access to information (Article 9) of the African Charter. The Commission warned that an expulsion without providing reasons for expulsion would constitute a "mockery of justice and the rule of law".[552]

The African Commission has established that expelling an individual without providing for the opportunity to plead before the competent national courts also constitutes a violation of Article 12.4 of the African Charter, stating that "[a] non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."[553]

Both the Inter-American and the African Commission have established that a lack or denial of access to a judicial remedy, a failure to implement judicial decisions against expulsion, or a lack of due process guarantees violate not only the right to a fair trial, but also the right to expulsion proceedings in accordance with the law (Articles 22 ACHR and 12.4 ACHPR),[554] the right to an independent judiciary in the African system (Article 26 ACHRP),[555] and, in the case of the Inter-American system, the right to an effective judicial remedy (Article 25 ACHR).[556] They

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550 *OMCT and Others v. Rwanda,* ACommHPR, *op. cit.*, fn. 65, pp. 49, 52; *Amnesty International v. Zambia,* ACommHPR, *op. cit.*, fn. 469, p. 76, paras. 46 and 61; *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, para. 59; *RADDH v. Zambia,* ACommHPR, *op. cit.*, fn. 536, para. 29; *UIADH and Others v. Angola,* ACommHPR, *op. cit.*, fn. 43, paras. 19–20.

551 *Amnesty International v. Zambia,* ACommHPR, *op. cit.*, fn. 469, para. 41; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 194–195.

552 *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 193, 194 and 177.

553 Article 12.4 ACHPR. See, *UIADH and Others v. Angola,* ACommHPR, *op. cit.*, fn. 43, paras. 14 and 20; *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, paras. 63–65; *ZLHR and Others v. Zimbabwe,* ACommHPR, *op. cit.*, fn. 395, para. 114; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, para. 205.

554 *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, paras. 63–65; *ZLHR and Others v. Zimbabwe,* ACommHPR, *op. cit.*, fn. 395, para. 114. For the Inter-American system, *Habal and son v. Argentina,* IACHR, *op. cit.*, fn. 536, para. 58; IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 402.

555 *ZLHR and Others v. Zimbabwe,* ACommHPR, *op. cit.*, fn. 395, paras. 118–120; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 179–180.

556 IACHR, "Situations of Haitians in the Dominican Republic", in *Annual Report 1991,* OAS Doc. OEA/Ser.L/V/II.81, Doc. 6 rev. 1, Chapter V, 14 February 1992 (IACHR, *Situations of Haitians*), Chapter V; *Habal and son v. Argentina,* IACHR, *op. cit.*, fn. 536, para. 53.

have held that fair trial guarantees and the right of access to courts to vindicate rights cannot be restricted in expulsion proceedings even in cases of national security, public order or public health.[557]

Box 12. Deportation and forcible transfer as a crime under international law

In situations of armed conflict, international humanitarian law prohibits the deportation or forcible transfer by an Occupying Power, whether a State or an armed group, of the civilian population of an occupied territory, unless the security of the population or imperative military reasons so demand. This rule applies to all conflicts whether of an international or a non-international character,[558] and is a norm of customary international law.[559] The Geneva Conventions characterise the infringement of this obligation as a grave breach of the Conventions.[560]

Deportation or forcible transfer of civilians for reasons not permitted by international law also constitutes a crime against humanity, when committed as a part of a widespread or systematic attack against any civilian population, and a war crime, when committed in the context of an international or non-international armed conflict.[561]

The definition of deportation or forcible transfer of population in treaty law is provided by the *Rome Statute of the International Criminal Court,* which refers to it as the "forced displacement of the persons concerned by expulsion or other coercive acts from

[557] *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, para. 84. See, *mutatis mutandis, Habeas corpus* in emergency situations, IACtHR, Advisory Opinion OC-8/87, 30 January 1987; *Good v. Republic of Botswana,* ACommHPR, *op. cit.*, fn. 470, paras. 161–163, 179–180.

[558] Article 49, *Convention (IV) relative to the Protection of Civilian Persons in Time of War,* Geneva, 12 August 1949 (IV Geneva Convention); Article 17, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* 8 June 1977 (APII to the Geneva Conventions).

[559] Rule 129, *Customary International Humanitarian Law,* Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC and Cambridge University Press, Vol I (Rules), 2009.

[560] Article 147, *IV Geneva Convention;* Article 85(4)(a), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 8 June 1977 (API to the Geneva Conventions).

[561] Articles 2(g) and 5(d), *Updated Statute of the International Criminal Tribunal for the former Yugoslavia,* September 2009 (ICTY Statute); Article 3(d), *Statute of the International Criminal Tribunal for Rwanda,* 31 January 2010 (ICTR Statute); Articles 7.1(d), 7.2(d), 8.2(a)(vii), 8.2(b)(viii) and 8.2(e)(viii), *Rome Statute.* See also, Article 6(c), Charter of the International Military Tribunal (Nuremberg Charter); Article 5(c), *Charter of the International Military Tribunal for the Far East;* Principle VI(b) (War Crimes) and (c) (Crimes against Humanity), "International Law Commission's Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", ILC, in *Yearbook of the International Law Commission,* 1950, vol. II, para. 97.

the area in which they are lawfully present, without grounds permitted under international law".[562] The definition is provided in the context of crimes against humanity. The requirement of being "lawfully present" does not encompass deportation or forcible transfer committed as a war crime, as it appears clearly from the ICC Elements of Crimes.[563] Deportation or forcible transfer have also been held by the ICTY to constitute a crime of persecution, if committed with a discriminatory intent.[564]

3. Procedural rights and collective expulsions

Collective expulsion is prohibited in an absolute way by all major human rights treaties and this prohibition is considered to have assumed the status of customary international law[565] therefore binding all States, regardless of their being party to a treaty expressing such prohibition. Treaty prohibitions on collective expulsions are contained in Article 4 of Protocol 4 to the ECHR,[566] Article 12.5 of the African Charter, Article 22.9 ACHR, Article 26.2 of the Arab Charter on Human Rights, and Article 22.1 ICRMW. Although no express ICCPR provision prohibits collective expulsions, the Human Rights Committee has been clear that "laws or decisions providing for collective or mass expulsions" would entail a violation of Article 13 ICCPR.[567] Furthermore, the Committee has affirmed in its *General Comment No. 29* that deportation and forcible transfer of population without grounds permitted under international law, as defined by the *Rome Statute of the International Criminal Court* (see, Box No. 11) is a measure which cannot be adopted even under state of emergency and that no derogation from a Covenant right, even if it is permitted *per se,* can justify implementation of such measures.[568] The Committee for the Elimination of All Forms of Racial Discrimination (CERD) found that collective expulsions violate Article 5(a) and 6 of the ICERD. [569]

562 Article 7.2(d), *Rome Statute.*

563 See, Articles 7.1(d), 8.2(a)(vii), 8.2(b)(viii), 8.2(e)(viii) of the *Elements of Crimes,* ICC, Doc. ICC-ASP/1/3 (part II-B), adopted on 9 September 2002. See also, *Prosecutor v. Milomir Stakic,* ICTY, Appeal Chamber Judgment, Case No. IT-97-24-A, 22 March 2006, paras. 276–300 and 317; and, *Prosecutor v. Milorad Krnojelac,* ICTY, Appeal Chamber Judgment, Case No. IT-97-25-A, 17 September 2003, paras. 218–229.

564 See, *Prosecutor v. Milorad Krnojelac,* ICTY, Appeal Chamber Judgment, Case No. IT-97-25-A, 17 September 2003, paras. 218-222.

565 The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law "recognised by civilised nations"; See, *ILC Third Report, op. cit.*, fn. 43, para. 115.

566 See also, *Twenty Guidelines on Forced Return, op. cit.*, fn. 510, Guideline 3.

567 CCPR, *General Comment No. 15, op. cit.*, fn. 30, para. 10.

568 *General Comment No. 29, States of Emergency,* CCPR, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13(d).

569 *Concluding Observations on Dominican Republic,* CERD, *op. cit.*, fn. 500, para. 13.

At the heart of the prohibition on collective expulsion is a requirement that individual, fair and objective consideration be given to each case. The European Court of Human Rights has stated that "collective expulsion [...] is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".[570] The expulsion procedure must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account.[571] Where individual expulsion decisions do not make sufficient reference to the particular circumstances of each of a group of migrants in similar circumstances, and where the procedures and timing of the expulsion of members of the group are similar, this may be grounds for a finding of collective expulsion in violation of Article 4 of Protocol 4 ECHR.[572] However, the Court warned that "[t]he fact, however, that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis".[573]

In the case of *Hirsi Jamaa and Others v. Italy,* the Grand Chamber of the European Court of Human Rights ruled that the prohibition of collective expulsion under Article 4 of Protocol 4 applies extraterritorially. The Court held that "the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4."[574]

The Inter-American Court of Human Rights upheld a similar definition of collective expulsion than that of the European Court: "the "collective" nature of an expulsion involves a decision that does not make an objec-

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570 *Čonka v. Belgium,* ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 59. See also, *Sultani v. France,* ECtHR, Application No. 45223/05, Judgment of 20 July 2007, para. 81.

571 *Ibid*., para. 63. *Sultani v. France,* ECtHR, *op. cit.*, fn. 570, para. 81; *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, para. 184–186.

572 *Ibid*., paras. 61–63.

573 *M.A. v. Cyprus,* ECtHR, Application No. 41872/10, Judgment of 23 July 2013, para. 246. See also, para. 254.

574 *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, para. 180. The case of Hirsi equates the practice of push-backs in the high seas to collective expulsions. Even beyond the human rights violations entailed in the practice, the Court stressed that "none of the provisions of international law cited by the Government justified the applicants being pushed back to Libya, in so far as the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the *non-refoulement* principle" (para. 134).

tive analysis of the individual circumstances of each alien and, consequently, incurs in arbitrariness".[575] The Inter-American Court also ruled that "a proceeding that may result in expulsion or deportation of an alien, must be individual, so as to evaluate the personal circumstances of each subject and comply with the prohibition of collective expulsions. Furthermore, this proceeding should not discriminate on grounds of nationality, color, race, sex, language, religion, political opinion, social origin or other status, and must observe the following minimum guarantees with regard to the alien:

i) To be expressly and formally informed of the charges against him or her and of the reasons for the expulsion or deportation. This notification must include information about his or her rights, such as:

   a. The possibility of stating his or her case and contesting the charges against him or her;

   b. The possibility of requesting and receiving consular assistance, legal assistance and, if appropriate, translation or interpretation;

ii) In case of an unfavorable decision, the alien must be entitled to have his or her case reviewed by the competent authority and appear before this authority for that purpose, and

iii) The eventual expulsion may only take effect following a reasoned decision in keeping with the law that is duly notified."[576]

The Inter-American Commission has considered that "[a]n expulsion becomes collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large".[577] The African Commission has ruled repeatedly that "[m]ass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations, "constitute special violation of human rights"[578] and a flagrant violation of the Charter.[579] The Commission affirmed that collective expulsion may entail many violations of human rights such as the right to property, to work, to education, to family, and to non-discrimination.[580]

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575 *Nadege Dorzema et al. v. Dominican Republic,* IACtHR, *op. cit.*, fn. 537, para. 171.

576 *Ibid*., para. 175.

577 IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 404.

578 *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, para. 69. See also, *RADDH v. Zambia,* ACommHPR, *op. cit.*, fn. 536, para. 19; *African Institute for Human Rights and Development (AIHRD) (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea,* ACommHPR, Communication No. 249/2002, 36th Ordinary Session, 23 November–7 December 2004, Annex IV, p. 131, para. 69; *OMCT and Others v. Rwanda,* ACommHPR, *op. cit.*, fn. 65.

579 *RADDH v. Zambia,* ACommHPR, *op. cit.*, fn. 536, para. 31.

580 *UIADH v. Angola,* ACommHPR, *op. cit.*, fn. 43, paras. 14–18.

Box 13. Repetitive expulsions may breach prohibition of inhuman and degrading treatment

The European Commission of Human Rights held in the case *A.H. v. the Netherlands* that "the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention [...]. Such an issue may arise, *a fortiori,* if an alien is over a long period of time deported repeatedly from one country to another without any country taking measures to regularise his situation".[581] Article 3 ECHR enshrines the prohibition of torture and inhuman or degrading treatment or punishment. The African Commission on Human and Peoples' Rights also held in the case *John K. Modise v. Botswana* that repetitive deportations and constant threats of deportations amounted to a violation of the right to freedom from cruel, inhuman or degrading treatment under Article 5 ACHPR.[582]

III. Procedural guarantees in expulsions and the right to a remedy

As widely recognised by major human rights treaties, where there is an arguable case that an individual's rights have been violated, he or she has the right to an effective remedy at the national level.[583] The right to a remedy means that, where there is an arguable complaint that a substantive human right will be violated by an expulsion (see, Chapter 2) additional procedural guarantees necessary to ensure an effective remedy against the violation or potential violation will apply and will require a stricter than usual scrutiny of the process of the expulsion.[584] The right to an effective remedy will apply even if it is later determined that no violation of the substantive human right occurred. The objective of a remedy is to "enforce the substance of the [international human rights treaty] rights and freedoms in whatever form they might happen to be secured in the domestic legal order".[585]

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581 *Harabi v. the Netherlands,* ECommHR, Application No. 10798/84, Admissibility Decision, 5 March 1986, para. 1.

582 *Modise v. Botswana,* ACommHPR, *op. cit.*, fn. 469, para. 91.

583 Article 8 UDHR; Article 2.3 ICCPR; Article 8.2 CPED; Article 13 ECHR; Article 25 ACHR; Article 25 *Protocol to the ACHPR on the Rights of Women in Africa.*

584 *Ahani v. Canada,* CCPR, *op. cit.*, fn. 503, paras. 10.6–10.8.

585 *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, para. 132. See also, *Omkarananada and the Divine Light Zentrum v. Switzerland,* ECommHR, *op. cit.*, fn. 474, para. 9.

1. An effective remedy

Where an individual is threatened with expulsion that gives rise to an arguable case of violation of human rights, there is a right to a remedy that is effective, impartial and independent and be capable to review and overturn the decision to expel.[586] The UN *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (the Principles) affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.[587] The Principles, which were approved by all members of the UN General Assembly, recall that this obligation arises from the general obligation to respect, ensure respect for and implement international human rights law and international humanitarian law, enshrined in treaty law and customary international law.[588] An effective remedy should be provided by a judicial body, but, if it is not, it must fulfil the requirements set out above, of effectiveness—i.e. the power to bring about cessation of the violation and appropriate reparation, including, where relevant, to overturn the expulsion order—of impartiality and independence.[589] The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.[590] In cases of *non-refoulement* to face a risk of torture or ill-treatment, the absolute nature of the rights engaged further strengthens the right to an effective remedy[591] and means that the decision to expel must be subject to close and rigorous scrutiny.[592]

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586 *Alzery v. Sweden,* CCPR, *op. cit.*, fn. 364, para. 11.8. In the same case, the Committee did not find a violation of Article 13 ICCPR, therefore demonstrating the more extended guarantees provided to by the principle of *non-refoulement*. See also, *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, para. 12.7; *Agiza v. Sweden,* CAT, *op. cit.*, fn. 332, para. 13.7; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, para. 460; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 293; *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, para. 56 (Right to a remedy where right to respect for family life under Article 8 ECHR was in issue); *Čonka v. Belgium,* ECtHR, *op. cit.*, fn. 570, paras. 77–85 (right to a remedy in case of alleged collective expulsion under Article 4 Protocol 4 ECHR). For the Inter-American system, *inter alia*, *Ximenes-Lopes v. Brazil,* IACtHR, Series C No. 149, Judgment of 4 July 2006, para. 175. A thorough analysis of the right to a remedy is to be found in, ICJ, *Practitioners' Guide No. 2, op. cit.*, fn. 480.

587 Articles 2 and 3 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation.*

588 Article 1 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation.*

589 See, ICJ, *Practitioners' Guide No.2, op. cit.*, fn. 480, pp. 49–54.

590 *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 100; *Isakov v. Russia,* ECtHR, *op. cit.*, fn. 324, para. 136; *Yuldashev v. Russia,* ECtHR, *op. cit.*, fn. 324, paras. 110–111; *Garayev v. Azerbaijan,* ECtHR, *op. cit.*, fn. 484, paras. 82 and 84.

591 *Agiza v. Sweden,* CAT, *op. cit.*, fn. 332, para. 13.8.

592 *Jabari v. Turkey,* ECtHR, *op. cit.*, fn. 116, para. 39.

The European Court of Human Rights has held that, in order to comply with the right to a remedy, a person threatened with an expulsion which arguably violates another Convention right must have:

- access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- where necessary, translated material and interpretation;
- effective access to legal advice, if necessary by provision of legal aid;[593]
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.[594]

Where the State authorities fail to communicate effectively with the person threatened with expulsion concerning the legal proceedings in his or her case, the State cannot justify a removal on the grounds of the individual's failure to comply with the formalities of the proceedings.[595]

The European Court of Human Rights has addressed, in the case of *I.M. v. France,* the compatibility of accelerated asylum procedures with the right to a remedy under Article 13 ECHR in connection with the principle of *non-refoulement*. While the Court has recognized that these special procedures can facilitate the examination of clearly abusive or manifestly unfounded applications,[596] it stressed that they cannot be used at the expense of the effectiveness of the essential procedural guarantees for the protection of the applicant from an arbitrary *refoulement*.[597] In the case of *I.M.,* the resort to an accelerated asylum procedure to examine the first application of an asylum seeker resulted in excessively short time limits for the asylum seeker to present his arguments, lack of access to legal and linguistic assistance, and a series of material and procedural difficulties, exacerbated by the asylum seeker's detention, which rendered the legal guarantees afforded to him merely theoretical, in breach of Article 13 ECHR.[598]

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593 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 301.

594 *Ibid*., para. 302; *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, paras. 56–65. See also, *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, paras. 202–204.

595 *Ibid*., para. 312.

596 *I.M. v. France,* ECtHR, Application No. 9152/09, Judgment of 2 February 2012, para. 142. In *K.K. v. France,* ECtHR, Application No. 18913/11, Judgment of 10 October 2013, paras. 62–71, the Court has upheld the use of an accelerated asylum procedure in the specific case. See also, *Mohammed v. Austria,* ECtHR, *op. cit.*, fn. 388, para. 79.

597 *Ibid*., para. 147.

598 *Ibid*., para. 150–154.

2. The right to an appeal with suspensive effect

The right to an effective remedy also requires review of a decision to expel, by an independent and impartial appeals authority, which has competence to assess the substantive human rights issues raised by the case, to review the decision to expel on both substantive and procedural grounds, and to quash the decision if appropriate. The European Court has held that judicial review constitutes, in principle, an effective remedy, provided that it fulfills these criteria.[599] The appeal procedure must be accessible in practice, must provide a means for the individual to obtain legal advice, and must allow a real possibility of lodging an appeal within prescribed time limits.[600] In *non-refoulement* cases, an unduly lengthy appeal process may render the remedy ineffective, in view of the seriousness and urgency of the matters at stake.[601]

To provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.[602] A system where stays of

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[599] *Vilvarajah and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 99; *Isakov v. Russia,* ECtHR, *op. cit.*, fn. 324, para. 137; *Yuldashev v. Russia,* ECtHR, *op. cit.*, fn. 324, para. 110–111; *Garayev v. Azerbaijan,* ECtHR, *op. cit.*, fn. 484, paras. 82 and 84; *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, para. 133. See also, *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, para. 56.

[600] *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 318.

[601] *Ibid*., para. 320.

[602] *Jabari v. Turkey,* ECtHR, *op. cit.*, fn. 116, para. 50; *Čonka v. Belgium,* ECtHR, *op. cit.*, fn. 570, para. 79; *Gebremedhin v. France,* ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58, 66; *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 101; *Concluding Observations on France,* CAT, UN Doc. CAT/C/FRA/CO/3, 3 April 2006, para. 7; *Concluding Observations on Belgium,* CCPR, UN Doc CCPR/CO/81/BEL, 8 December 2004, para. 21; *Concluding Observations on Morocco,* CCPR, UN Doc. CCPR/CO/82/MAR, 1 December 2004, para. 13; *Concluding Observations on Uzbekistan,* CCPR, UN Doc. CCPR/CO/83/UZB, 26 April 2005, para. 12; *Concluding Observations on Thailand,* CCPR, *op. cit.*, fn. 244, para. 17; *Concluding Observations on Ukraine,* CCPR, UN Doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 9; *Concluding Observations on Libyan Arab Jamahiriya,* CCPR, UN Doc. CCPR/C/LBY/CO/4, 15 November 2007, para. 18; *Concluding Observations on Belgium,* CAT, UN Doc. CAT/C/BEL/CO/2, 19 January 2009, para. 9; *Concluding Observations on Yemen,* CAT, UN Doc. CAT/C/YEM/CO/2, 19 November 2009, para. 22; *Concluding Observations on Belgium,* CAT, Report of the Committee against Torture to the General Assembly, 58th Session, UN Doc. A/58/44 (2003), p. 49, paras. 129 and 131: the Committee expressed concern at the "non-suspensive nature of appeals filed with the Council of State by persons in respect of whom an expulsion order has been issued". The Council of States in Belgium is the Supreme Court in administrative matters. See also, *Concluding Observations on Cameroon,* CAT, UN Doc. CAT/C/CR/31/6, 5 February 2004, para. 9(g); *Concluding Observations on Monaco,* CAT, UN Doc. CAT/C/CR/32/1, 28 May 2004, paras. 4(c) and 5(c); *Concluding Observations on Mexico,* CAT, UN Doc. CAT/C/MEX/CO/4, 6 February 2007, para. 17; *Concluding Observations on South Africa,* CAT, UN Doc. CAT/C/ZAF/CO/1, 7 December 2006, para. 15; *Concluding Observations on Australia,* CAT, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; *Concluding Observations on Azerbaijan,* CAT, UN Doc. CAT/C/AZE/CO/3, 8 December 2009, para. 22; *Concluding Observations on Canada,* CAT, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(c). See also, *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, para. 62.

execution of the expulsion order are at the discretion of a court or other body are not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.[603]

The European Court of Human Rights has held that, to be effective, a remedy must have automatic suspensive effect whenever there is a potential breach of the principle of *non-refoulement*, at least with regard to the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, or the prohibition of collective expulsions, in light of the absolute nature of these human rights obligations.[604] Conversely, "where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal of residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality".[605]

3. National security

Where national security considerations are the basis for the expulsion, the right to an effective remedy nevertheless requires an independent hearing and the possibility to access documents and reasons for expulsion and to contest them.[606] Where cases involve the use of classified information, it must be in some way accessible to the applicant if that information was determinative in the expulsion decision.[607] Executive claims of national security do not qualify or limit the obligation to ensure that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons

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603 *Čonka v. Belgium,* ECtHR, *op. cit.*, fn. 570, paras. 81–85.

604 *De Souza Ribeiro v. France,* ECtHR, GC, Application No. 22689/07, Judgment of 13 December 2012, para. 82 ; *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, para. 206; *Mohammed v. Austria,* ECtHR, *op. cit.,* fn. 388, para. 80.

605 *Ibid*., para. 83.

606 *Alzery v. Sweden,* CCPR, *op. cit.*, fn. 364, para. 11.8; *Al-Gertani v. Bosnia and Herzegovina,* CCPR, Communication No. 1955/2010, Views of 1 November 2013, paras. 10.8–10.10. See, *M. and Others v. Bulgaria,* ECtHR, Application No. 41416/08, Judgment of 26 July 2011, para. 129: "By choosing to rely on national security in a deportation order the authorities cannot do away with effective remedies". See also, *Global Principles on National Security and the Right to Information* (Tshwane Principles), 12 June 2013, available at http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf.

607 *Liu v. Russia,* ECtHR, Application No. 42086/05, Judgment of 6 December 2007, paras. 62–63.

are not publicly available. The European Court has emphasised that "[t]he 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."[608] The Court stressed that the individual must be able to challenge the executive's assertion that national security is at stake before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.[609] In addition, the decision or judgment of the authority in charge of the remedy must be public, at least in part.[610]

IV. Expulsion of refugees

Under international refugee law, as noted in Chapter 2, Article 32 of the *Geneva Refugee Convention* permits expulsion of refugees exclusively "on grounds of national security or public order". The decision of expulsion must be reached "in accordance with due process of law". Because of the similarity between Article 32 of the Refugee Convention and the provisions on expulsion procedural rights of the ICCPR and ECHR, rights and guarantees developed by the Human Rights Committee and the European Court of Human Rights must be applied together with those included under Article 32 of the *Geneva Refugee Convention* (see, above, Section 1).

Under the Refugee Convention, where a refugee is expelled in accordance with Article 32, he or she must have the right to submit evidence to counter the grounds for expulsion, to appeal and to be represented before competent authority or a person or persons specially designated by the competent authority.[611] These procedural rights may, under certain conditions, be limited on national security grounds. International

608 *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, para. 137. See also, *C.G. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 510, para. 57; *M. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 606, para. 100; *Amie and Others v. Bulgaria,* ECtHR, Application No. 58419/08, Judgment of 12 February 2013, para. 92.

609 *Nolan and K. v. Russia,* ECtHR, *op. cit.*, fn. 472, para. 71. See also, *Liu v. Russia,* ECtHR, *op. cit.*, fn. 607; *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, paras. 123–124 and 137 (on Article 8 ECHR); and *Lupsa v. Romania,* ECtHR, *op. cit.*, fn. 510, paras. 33–34; *M. and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 606, para. 101.

610 *Amie and Others v. Bulgaria,* ECtHR, *op. cit.*, fn. 608, para. 99: "the publicity of judicial decisions aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness. The Court has already had occasion to observe that other countries have, in the same context, chosen to keep secret only those parts of their courts' decisions whose disclosure would compromise national security or the safety of others, thus illustrating that there exist techniques that can accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions".

611 Article 32.2, *Geneva Refugee Convention*.

human rights law requires that any such limitations must pursue a legitimate aim, be necessary in a democratic society and proportionate to the aim pursued.[612]

Finally, and regardless of national security or public order considerations, the State must allow the refugee a reasonable period within which to seek legal admission into another country.[613] In the interim the State is authorised to apply "such internal measures as they may deem necessary", which might include limitations to freedom of movement or detention (see, Chapter 4).

The UNHCR Executive Committee has made clear that, under Article 32 of the *Geneva Refugee Convention*, refugees may be expelled only in very exceptional cases and after due consideration of all the circumstances, including the possibility for the refugee to be admitted to a country other than his or her country of origin.[614] In particular, "as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum".[615] This recommendation also encompasses the obligations of the country under the principle of *non-refoulement* (see, Chapter 2).

Article 31 of the *Geneva Refugee Convention* also bears consequences in the case of expulsion proceedings. The provision states that "the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1 [definition of refugee], enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".[616] In the particular situation of asylum-seekers or refugees who move irregularly to a third country which has not granted them protection, the Executive Committee considers that they may be returned to the country of refuge if they are protected there against *refoulement* and they are permitted to remain there and to be treated in accordance

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612 Although this last criterium is not explicit in the *Geneva Refugee Convention*, the interpretation of Article 32 in light of international human rights principle leads to such conclusion.

613 Article 32.3, *Geneva Refugee Convention*.

614 *Conclusion No. 7,* UNHCR, *op. cit.*, fn. 180, para. (c).

615 *Conclusion No. 85,* UNHCR, *op. cit.*, fn. 183, para. (aa).

616 Article 31.1, *Geneva Refugee Convention*.

with recognised basic human standards until a durable solution is found for them.[617] However, "there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State where he requests asylum."[618]

1. Voluntary repatriation of refugees

The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* is the only Convention expressly regulating voluntary repatriation of refugees. Its Article V(1) stresses that "the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."

As for the regime applicable under the *Geneva Refugee Convention*, the UNHCR Executive Committee has clarified that, in cases of voluntary repatriation, refugees should be "provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate; recognized further that visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there—without such visits automatically involving loss of refugee status—could also be of assistance in this regard".[619] The Committee stressed "[t]he repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected".[620]

The free choice of the refugee to repatriate is therefore paramount for the legitimacy of this procedure. In practice, the ILC Special Rapporteur on expulsion of aliens has documented practices of "disguised expulsion", where what had been called "voluntary repatriations" were indeed expulsions. Disguised expulsions may occur after groundless confiscation or invalidation of an alien's legal residence permit, can be based on

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617 *Conclusion No. 58 (XL) Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection,* ExCom, UNHCR, 40th Session, 1989, para. (f).

618 *Ibid*., para. (g).

619 *Conclusion No. 18 (XXXI) Voluntary Repatriation,* ExCom, UNHCR, 31st Session, 1980, para. (e). See also, for more details on procedures, *Conclusion No. 101 (LV) on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees,* ExCom, UNHCR, 55th Session, 2004.

620 *Conclusion No. 40 (XXXVI) Voluntary Repatriation,* ExCom, UNHCR, 36th Session, 1985, para. (b).

"incentive" measures for a return that is "allegedly voluntary" but that in fact leaves the alien with no choice (see the definition of expulsion in Section I), or can result from the hostile conduct of the State towards a non-national.[621] These practices do not constitute voluntary repatriations and are, in fact, expulsions, which must observe the procedural and substantive rules of international refugee and human rights law. The Special Rapporteur emphasised that, "disguised expulsion is by its nature contrary to international law. First, it violates the rights of persons expelled and hence the substantive rules pertaining to expulsion, which link a State's right of expulsion with the obligation to respect the human rights of the expelled person. Second, it violates the relevant procedural rules which gave expelled persons an opportunity to defend their rights."[622]

[621] *ILC Sixth Report, op. cit.*, fn. 497, paras. 31–34.

[622] *Ibid*., para. 41.

CHAPTER 4: MIGRANTS IN DETENTION

Under international human rights law, detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out pursuant to a legal basis.[623] International standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort,[624] to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case. European Convention standards are in some respects less exacting, however, and have been held to permit short-term detention for purposes of immigration control without individualised consideration of alternative measures.[625]

This Chapter explains how international human rights standards apply to detention for the purposes of immigration control, increasingly used by government as a means of both processing entrants to the country and of facilitating deportations. It assesses when individuals will be considered by international law to be deprived of their liberty; justification for detention in accordance with principles of necessity, proportionality, and protection against arbitrary conduct; procedural safeguards, in particular judicial review of detention and reparation for unjustified detention. It also considers standards on the treatment of detainees and conditions of detention, and the implications of overcrowded or unsuitable conditions for detainees, increasingly a feature of over-burdened immigration detention systems in many countries.

I. The nature of "detention"[626]

Whether individuals are in fact deprived of their liberty in a way that engages protection of Article 9 ICCPR, Article 5 ECHR, Article 6 ACHPR,

[623] Article 9 ICCPR, Article 5 ECHR, Article 6 ACHPR, Article 7 ACHR, Articles I and XXV ADRDM, Article 14 ArCHR. Further information can be found in CMW, *General Comment No. 2, op. cit.*, fn. 2, paras. 23–48. As the General Comment mostly reiterates or essentially affirms the other international jurisprudence described in this Guide, we will not refer to it extensively.

[624] UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008,* UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, principle XI.1. See also, *Conclusion No. 7, UNHCR, op. cit.*, fn. 180, para. e: "an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged". See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers,* ExCom, UNHCR, 37th Session, 1986, para. B; *Concluding Observations on Bahamas,* CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17; *Yvon Neptune v. Haiti,* IACtHR, Series C No. 180, Judgment of 6 May 2008, para. 90; *Álvarez and Iñiguez v. Ecuador,* IACtHR, Series C No. 170, Judgment of 21 November 2007, para. 53; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 116, 166–171.

[625] *Saadi v. United Kingdom,* ECtHR, GC, Application No. 13229/03, Judgment of 29 January 2008, paras. 70–74.

[626] The term "detention" will be used throughout the Guide as a shorthand for "deprivation of liberty".

Article 7 ACHR or Article 14 ArCHR, or are merely subject to restrictions on their freedom of movement, will not always be clear. In international human rights law, a deprivation of liberty is not defined with reference to the classification imposed by national law, but rather takes into account the reality of the restrictions imposed on the individual concerned.[627] Since classification in national law is not determinative, persons accommodated at a facility classified as a "reception", "holding" or "accommodation" centre and ostensibly not imposing detention, may, depending on the nature of the restrictions on their freedom of movement, and their cumulative impact, be considered under international human rights law to be deprived of their liberty.[628] Holding centres in international zones at airports or other points of entry have also been found to impose restrictions amounting to deprivation of liberty.[629] In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors will include the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure.[630] There is no clear line between restrictions on freedom of movement and deprivation of liberty: the difference is one of degree or intensity, not one of nature or substance.[631]

A series of restrictions, which in themselves would not cross the threshold of deprivation of liberty, may cumulatively amount to such deprivation. The European Court of Human Rights found this to be the case, for example, in *Guzzardi v. Italy,*[632] where the applicant was confined on a small island and subject to a curfew, reporting requirements, restrictions on movement and communications.[633]

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627 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45, para. 42; *Nolan and K. v. Russia,* ECtHR, *op. cit.*, fn. 472, paras. 93–96; *Abdolkhani and Karimnia v. Turkey,* ECtHR, Application No. 30471/08, Judgment of 22 September 2009, paras. 125–127; *Ashingdane v. United Kingdom,* ECtHR, Application No. 8225/78, Judgment of 28 March 1985, para. 42.

628 *Abdolkhai and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, para. 127, finding that detention at an accommodation centre, although not classified as detention in national law, did in fact amount to a deprivation of liberty.

629 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45; *The CPT Standards,* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1—Rev. 2010, Strasbourg, December 2010 ("CPT Standards"), pp. 53–54.

630 *Engel and Others v. Netherlands,* ECtHR, Plenary, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1986, para. 59; *Guzzardi v. Italy,* ECtHR, Plenary, Application No.7367/76, Judgment of 6 November 1980, para. 92.

631 *Guzzardi v. Italy,* ECtHR, *op. cit.*, fn. 630, para. 93.

632 *Ibid*., para. 93.

633 See, by contrast, *Engel and Others v. Netherlands,* ECtHR, *op. cit.*, fn. 630, para. 61, where there was found to be no deprivation of liberty involved in military disciplinary measures of "light arrest" and "aggravated arrest" involving restrictions on movement whilst off duty, but where the applicants were not locked up and continued to perform their normal work duties, remaining "more or less, within the ordinary framework of their army life." The *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,* UNHCR, 2012 ("UNHCR Guidelines on Detention"), also acknowledge that the cumulative impact of restrictions on freedom of movement may amount to detention.

Restrictions on liberty, imposed for a short time at points of entry to the country, to address practical necessities such as checking identity or processing of asylum applications, and which if applied for a short period only would not usually amount to detention, will do so where they are excessively prolonged.[634] For example, it was held by the European Court of Human Rights, in *Amuur v. France,* that enforced confinement to an international zone of an airport, involving restrictions on movement and close police surveillance, for 20 days, did amount to deprivation of liberty. It was also relevant to this finding that the applicants were not provided with legal or social assistance by public authorities, and that they had no access to judicial review of the restrictions imposed on them.[635] The European Committee for the Prevention of Torture has stated that "[p]ersons being transferred onto [State] vessels or otherwise in the custody of [State] officials, pending delivery, contrary to their wishes, to the authorities of another State, must be considered as deprived of their liberty by the [State] authorities for the duration of their transfer/custody".[636]

The mere fact that a detained migrant is free to leave a place of detention by agreeing to depart from the country does not mean that the detention is not a deprivation of liberty. This was affirmed by the European Court of Human Rights in *Amuur v. France,*[637] the Court noting that the possibility to leave the country would in many cases be theoretical if no other country could be relied on to receive the individual or to provide protection if the individual is under threat. The *UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* ("UNCHR Guidelines on Detention") take the same approach.[638]

Less severe restrictions, that do not amount to deprivation of liberty, should be considered in relation to rights to freedom of movement, protected under Article 12 ICCPR, Article 2 of Protocol 4 ECHR, Article 22 ACHR, Article 12 ACHPR and Article 26 ArCHR. In *Celipli v. Sweden,*[639] for example, the Human Rights Committee held that the confinement to a single municipality of a non-national subject to a deportation order, with a requirement to report three times weekly, did not amount to deprivation of liberty, but did raise issues under Article 12 ICCPR. Restrictions on residence may also raise issues in regard to the right

634 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45, para. 43.

635 *Ibid*., para. 43.

636 *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009,* CPT, *op. cit.*, fn. 265, para. 39.

637 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45, para. 48.

638 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Terminology, para. 7.

639 *Celepli v. Sweden,* CCPR, Communication No. 456/1991, Views of 26 July 1994.

to respect for family life, where they serve to separate members of a family.[640]

II. Justification of detention

1. Different approaches to justification of immigration detention

The right to liberty and security of the person under international human rights law requires that deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.[641] Deprivation of liberty may be "arbitrary" either because it is not based on a legitimate basis for detention or because it does not follow procedural requirements. In this Section, it is the first dimension of "arbitrariness" of deprivation of liberty which is addressed.

Neither the ICCPR nor the ACHR, the ACHPR or the ArCHR make further express provision for the circumstances in which deprivation of liberty is permitted. They generally prohibit detention that is "arbitrary". The ECHR, by contrast, provides for the lawfulness of detention on a series of specified grounds. In relation to immigration detention, it permits detention in two specific situations: to prevent unauthorised entry to the country, and pending deportation or extradition (Article 5.1(f)). The scheme of Article 5 ECHR differs from that of the ICCPR, ACHR, ArCHR and ACHPR in that detention that cannot be justified on one of the specified grounds will always be considered arbitrary. Conversely, however, if detention can be shown to be necessary for a listed purpose, such as prevention of unauthorised entry, it will not be considered to be arbitrary, without the need for further justification related to the circumstances of the individual case. The protection offered by the ECHR is therefore potentially narrower than that of instruments such as the ICCPR, as will be considered further below.

Detention of asylum seekers and refugees is also regulated by Article 31 of the *Geneva Refugee Convention* and associated standards and guidance, (considered further below) which establishes a presumption against detention, and the principle that detention must be justified as necessary in a particular case.

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640 *Agraw v. Switzerland,* ECtHR, Application No. 3295/06, Judgment of 29 July 2010.

641 Adequate prescription by law and freedom from arbitrary deprivation of liberty are requirements of the right to security of the person as well as the right to liberty. See, *Zamir v. France,* ECommHR, Plenary, Application No.9174/80, Admissibility Decision, 13 July 1982, holding that "it is implicit in the said right [to security of the person] that an individual ought to be able to foresee with a reasonable degree of certainty the circumstances in which he is liable to be arrested and detained. It is further implicit in the right to security of person that there shall be adequate judicial control of arrest and detention."

2. Detention must have a clear legal basis in national law and procedures

An essential safeguard against arbitrary detention is that all detentions must be adequately prescribed by law. This reflects the general human rights law principle of legal certainty, by which individuals should be able to foresee, to the greatest extent possible, the consequences which the law may have for them. The need for legal certainty is regarded as particularly vital in cases where individual liberty is at stake.[642] The principle of prescription by law has two essential aspects:

- that detention be in accordance with national law and procedures;
- that national law and procedures should be of sufficient quality to protect the individual from arbitrariness.[643]

For detention to have a sufficient basis in national law, the national law must clearly provide for deprivation of liberty. In *Abdolkhani and Karimnia v. Turkey,*[644] the European Court of Human Rights held that a law that required non-nationals without valid travel documents to reside at designated places did not provide sufficient legal basis for their detention pending deportation. Laws imposing deprivation of liberty must be accessible and precise.[645] Its consequences must be foreseeable to the individuals it affects. The law must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending detention.[646] Furthermore, there must be a clear record regarding the arrest or bringing into custody of the individual.[647] Legislation which allows wide executive discretion in authorising or reviewing detention is likely to be considered an insufficiently precise basis for deprivation of liberty.[648] The Inter-American Commission on Human Rights has stressed that "[t]he grounds and procedures by which non-nationals may be deprived of their liberty should define with

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642 *Medvedyev v. France,* ECtHR, *op. cit.*, fn. 51, para. 80.

643 *Čonka v. Belgium, ECtHR, op. cit.*, fn. 570, para. 39; *Amuur v. France, op. cit.*, fn. 45, para. 51. See also, *Servellón-García et al. v. Honduras,* IACtHR, Series C No. 152, Judgment of 21 September 2006, paras. 88–89; *Yvon Neptune v. Haiti,* IACtHR, *op. cit.*, fn. 624, para. 98. See also, UN Working Group on Arbitrary Detention (WGAD), *Annual Report 1998,* UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, *Annual Report 1999,* UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 "Situations regarding immigrants and asylum-seekers", Principle 6; WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82.

644 *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, para. 133.

645 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45, para. 51

646 *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 117.

647 *Tehrani and Others v. Turkey,* ECtHR, Applications Nos. 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010; *Nadege Dorzema et al. v. Dominican Republic,* IACtHR, *op. cit.*, fn. 537, para. 131.

648 *Rafael Ferrer-Mazorra et al. v. USA,* IACHR, *op. cit.*, fn. 395, paras. 222 and 226.

sufficient detail the basis for such action, and the State should always bear the burden of justifying a detention. Moreover, authorities have a very narrow and limited margin of discretion, and guarantees for the revision of the detention should be available at a minimum in reasonable intervals."[649]

The requirement that the law governing detention must be accessible, precise and foreseeable has particular implications in the case of migrants, faced with an unfamiliar legal system, often in an unfamiliar language. The authorities are required to take steps to ensure that sufficient information is available to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain. The European Court of Human Rights has held that "the absence of elaborate reasoning for [a] deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention".[650] For the information to be accessible, it must also be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand his or her circumstances.[651]

3. Detention must not be arbitrary, unnecessary or disproportionate

The European Court of Human Rights has held that, in order to avoid arbitrariness, detention must, in addition to complying with national law:

- be carried out in good faith and not involve deception on the part of the authorities;
- be closely connected to the purpose of preventing unauthorised entry of the person to the country or deportation;
- the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear of their lives;

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649 IACHR, *Report on Terrorism and Human Rights, op. cit.*, fn. 536, para. 379.

650 *Lokpo and Toure v. Hungary,* ECtHR, Application No. 10816/10, Judgment of 20 September 2011, para. 24.

651 *Nasrulloyev v. Russia,* ECtHR, Application No. 656/06, Judgment of 11 October 2007, para. 77; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 118; *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, para. 74; *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, paras. 131–135; *Amuur v. France,* ECtHR, *op. cit.*, fn. 45; *Soldatenko v. Ukraine,* ECtHR, *op. cit.*, fn. 361. See also, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 116, 180; WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principles 1 and 8; WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82.

- the length of the detention must not exceed that reasonably required for the purpose pursued.[652]

The European Court of Human Rights, applying Article 5.1(f) ECHR, has found that, provided that these tests are met and that the detention can be shown to be for the purposes of preventing unauthorised entry or with a view to deportation, it is not necessary to show further that the detention of the individual is reasonable, necessary or proportionate, for example to prevent the person concerned from committing an offence or fleeing.[653] In *Saadi v. United Kingdom,* the Court therefore held that short-term detention, in appropriate conditions, for the purposes of efficient processing of cases under accelerated asylum procedures, was permissible in circumstances where the respondent State faced an escalating flow of asylum seekers.[654] The approach of the Court to Article 5.1(f) is in contrast to justification of detention on certain other grounds under Article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort.[655]

By contrast, under Article 9 of the ICCPR, as well as in international refugee law in regard to asylum seekers, the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary.[656] To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C. v. Australia,*[657] the Human

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652 *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, para. 74.

653 *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 112; *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, para. 72. This is in contrast to justification of detention under Article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort: *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, para. 70.

654 *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, paras. 75–80

655 *Ibid*., para. 70.

656 *A. v. Australia,* CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3: "The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends." *Saed Shams and Others v. Australia,* Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands,* CCPR, Communication No. 794/1998, Views of 15 April 2002: arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness; *F.K.A.G. v. Australia,* CCPR, Communication No. 2094/2011, Views of 26 July 2013, para. 9.3. In that case was not unreasonable to detain considering the risk of escape, as had previously fled from open facility. See, *Yvon Neptune v. Haiti,* IACtHR, *op. cit.*, fn. 624, para. 98, containing a restatement of the Inter-American Court jurisprudence on necessity and proportionality.

657 *C. v. Australia,* CCPR, *op. cit.*, fn. 350. See also, *Al-Gertani v. Bosnia and Herzegovina,* CCPR, *op. cit.*, fn. 606, para. 10.4.

Rights Committee found a violation of Article 9.1 on the basis that the State did not consider less intrusive means, such as "the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was . . . arbitrary and constituted a violation of Article 9.1".

In *F.K.A.G. v Australia,* the Human Rights Committee reaffirmed its general approach on arbitrariness of detention. It held that "detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion".[658]

Both the ICCPR and the ECHR require that the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.[659] Excessive length of detention, or uncertainty as to its duration, may also raise issues of cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.[660] Prolonged detention of minors calls for particularly

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658 *F.K.A.G. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 9.3.

659 See, WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantee 10; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 7; WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82.

660 *Concluding Observations on Sweden,* CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12: detention should be for the shortest possible time; *Concluding Observations on Costa Rica,* CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 expressed concern at failure to limit the length of administrative detention of non-nationals. CAT recommended: "the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite."

strict scrutiny and may violate obligations under the CRC (Articles 3 and 37) as well as Article 24 ICCPR.[661]

Where a national court orders the release of a detainee, delay in implementing the Court's order may lead to arbitrary detention. The European Court has held that although "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 . . . the national authorities must attempt to keep it to a minimum . . . formalities connected with release cannot justify a delay of more than a few hours."[662] In *Eminbeyli v. Russia,*[663] three days to communicate a decision and to release the applicant was found to lead to a violation of Article 5.1(f).

The Inter-American Court of Human Rights also makes an assessment as to the legitimate aim of the detention, and its adequacy, necessity and proportionality to the legitimate aim.[664] The Court has held in *Vélez Loor v. Panama* that automatic detention following irregular presence is arbitrary as any decision on detention must assess the individual circumstances of the case.[665] Preventive detention may be a legitimate means to assure the implementation of a deportation,[666] however "the aim of imposing a punitive measure on the migrant who re-enters irregularly the country after a previous deportation order does not constitute a legitimate aim under the [American] Convention".[667] Finally, the Court held that "it is essential that States have at their disposal a catalogue of alternative measures [to detention] that may be effective to reach the pursued aims. Accordingly, migration policies whose central axis is the mandatory detention of irregular migrants will be arbitrary, if the competent authorities do not verify case-by-case, and individually, the possibility of using less restrictive measures that are effective to reach those aims".[668]

The Inter-American Commission on Human Rights has highlighted four instances in which detention of migrants or asylum-seekers may be arbitrary:

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661 *Concluding Observations on Czech Republic,* CCPR, UN Doc. CCPR/C/CZE/CO/2, 9 August 2007, para. 15: the committee expressed concern at legislation permitting the detention of those under the age of 18 for up to 90 days, in light of obligations under Articles 10 and 24 ICCPR, and recommended that this period should be reduced.

662 *Eminbeyli v. Russia,* ECtHR, Application No. 42443/02, Judgment of 26 February 2009, para. 49.

663 *Ibid*., para. 49.

664 *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 166.

665 *Ibid*., para. 118.

666 *Ibid*., para. 169.

667 *Ibid*., para. 169 (our translation).

668 *Ibid*., para. 171 (our translation).

- when they fail to define with sufficient particularity the grounds upon which the concerned persons have been deprived of their liberty;
- when the procedures place the onus upon the detainee to justify his or her release;
- when they are subjected to a degree of discretion on the part of officials that exceeds reasonable limits;
- and when they fail to provide for detention review at reasonable intervals.[669]

4. Particular considerations in the detention of asylum seekers and refugees

Under international refugee law, detention of asylum seekers is permitted, but is constrained by Article 31 of the *Convention on the Status of Refugees* which prohibits States from imposing penalties on those entering the State without authorisation, where they come directly from a State fleeing persecution "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." More specifically, Article 31.2 prohibits restrictions on the movement of such persons other than those which are necessary, and requires that they be imposed only until the individual's status is regularised or they obtain admission into another country". Based on these provisions, *UNHCR Guidelines on Detention,*[670] and the Conclusions adopted by the Executive Committee on the International Protection of Refugees,[671] establish a presumption against detention, and the need to justify individual detentions as necessary for specified purposes.[672] Detention must therefore never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be seen as an exceptional measure, and must last for the shortest possible period.[673] The Executive Committee Conclusions (endorsed by the Guidelines, Guideline 3) stipulate that detention may only be resorted to where necessary on grounds prescribed by law:

"• to verify identity;

- to determine the elements on which the claim to refugee status or asylum is based;

669 *Rafael Ferrer-Mazorra et al. v. USA,* IACtHR, *op. cit.*, fn. 395, para. 221.

670 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 2.

671 *Conclusion No. 44,* UNHCR, *op. cit.*, fn. 624.

672 *Ibid*.

673 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guidelines 3 and 6.

- to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security or public order".[674]

Guideline 4.1 of the *UNHCR Guidelines on Detention* further specifies the grounds allowing for detention of asylum-seekers:

- to protect public order:
  - to prevent absconding and/or in cases of likelihood of non-co-operation;
  - in connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
  - for initial identity and/or security verification;
  - in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention;
- to protect public health;
- to protect national security.[675]

The Guidelines stipulate that detention of asylum-seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum-seekers from pursuing their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law.[676] Guideline 4.3 provides that States must demonstrate that they have considered alternative measures to detention as this "ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken."[677]

5. Particular factors in detention on entry or pending removal

a) Detention to prevent unauthorised entry

The European Court of Human Rights has determined that Article 5.1(f) ECHR permits relatively wide powers to detain for the purposes of pre-

[674] *Conclusion No. 44,* UNHCR, *op. cit.*, fn. 624. Reaffirmed in *Conclusion No. 85,* UNHCR, *op. cit.*, fn. 183. See also *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 4.1.

[675] *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 4.1.

[676] *Ibid*., Guideline 4.1.4.

[677] *Ibid*., Guideline 4.3.

venting unauthorised entry. In *Saadi v. United Kingdom* it held that Article 5.1(f) could not be interpreted as permitting detention only of persons attempting to evade entry restrictions, but also applied to other entrants, since until a State has authorised entry, any entry is unauthorised.[678] Nevertheless, the State must show that detention of those seeking entry to the country is reasonably justified. Factors such as the numbers of asylum seekers seeking entry to the country, and administrative difficulties, may contribute to the reasonableness of detention. In *Saadi v. United Kingdom,* these factors, and the fact that the UK authorities were using detention in good faith as a way of speedily processing asylum seekers through accelerated procedures, helped to justify seven days' detention in suitable conditions.[679] The conditions of detention are also important when considering the maximum length possible of a detention to prevent unauthorized entry. The Court has found a detention to be arbitrary, where the periods of detention amounted to three months or six months in inappropriate conditions while a determination was pending in respect of the migrant's entitlement to stay on the territory.[680]

Nevertheless, laws and procedures must ensure that detention on entry does not adversely affect rights under international refugee law to gain effective access to procedures for claiming refugee status.[681]

The UN Human Rights Committee conducts a more individualised assessment of the necessity and proportionality of detention of those seeking entry to the country. Although it accepts in principle that detention on the basis of illegal entry to the country may be permissible and not necessarily arbitrary,[682] it requires that such detention be shown to be necessary in the circumstances of the particular case.[683] In *A. v. Australia*[684] the Committee stressed that there must be reasonable justification for a particular detention, and that the detention must not last beyond the period for which this justification applies. The Committee has also found that detention on entry may be justified for the purposes of verification of identity, although such detention may become arbitrary if it is unduly prolonged.[685]

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678 *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, paras. 64–66.

679 *Ibid*., paras. 76–80.

680 *Suso Musa v. Malta,* ECtHR, Application No. 42337/12, Judgment of 23 July 2013, paras. 100–103 ; *Kanagaratnam and Others v. Belgium,* ECtHR, Application No. 15297/09, Judgment of 13 December 2011, paras. 94–95.

681 *Amuur v. France,* ECtHR, *op. cit.*, fn. 45, para. 43.

682 *A. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 9.3.

683 *Madafferi and Madafferi v. Australia,* CCPR, *op. cit.*, fn. 460, para. 9.2: "although the detention of unauthorised arrivals is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant."

684 *A. v. Australia,* CCPR, *op. cit.*, fn. 656, paras. 9.3–9.4.

685 *Bakhtiyari v. Australia,* CCPR, Communication No.1069/2002, Views of 6 November 2003, paras. 9.2–9.3; *F.K.A.G. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 9.3.

b) Detention pending deportation

Under the ECHR, unlike the ICCPR, the specific terms of Article 5.1(f) narrow the scrutiny which will be applied to detentions pending deportation. In such cases, it is sufficient for the State to show that action is being taken with a view to deportation. It is not necessary to show that the substance of the decision to deport is justified under national law; nor is it necessary to show that other factors, such as the propensity to escape, or the risk of commission of a criminal offence, warrant detention.[686] This is in contrast to the jurisprudence of the Human Rights Committee applying the ICCPR, by which, if the decision is not to be arbitrary, individual circumstances that justify detention must be established in each case.[687]

In order for detention to be justified, the State must establish that deportation is being pursued with due diligence.[688] Longer periods of detention may be justified by the complexity of a case or where the actions of the applicant have led to delays.[689]

However, where proceedings have been suspended for a significant period,[690] or where deportation is no longer being actively pursued or is excessively delayed, then detention will no longer be justified.[691] Equally, if the authorities are unable to pursue a deportation because sending the person to the country of origin would be in breach of the principle of *non-refoulement* (see, Chapter 2), detention pending deportation can no longer be justified.[692] The same applies when other legal or practical obstacles impede the deportation, such as the fact that the concerned person is stateless and there is no other State willing to accept him or her.[693]

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686 *Čonka v. Belgium,* ECtHR *op. cit.*, fn. 570, para. 38: "Article 5.1(f) does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing . . . all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation". *Soldatenko v. Ukraine,* ECtHR, *op. cit.*, fn. 361, para. 109.

687 *Samba Jalloh v. the Netherlands,* CCPR, *op. cit.*, fn. 656, para. 8; *Danyal Shafiq v. Australia,* CCPR, Communication No. 1324/2004, Views of 13 November 2006, paras. 7.2–7.3.

688 *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 113: "any deprivation of liberty under Article 5.1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible." See, *Lokpo and Toure v. Hungary,* ECtHR, *op. cit.*, fn. 650, para. 22, where a five month detention with a view to expulsion that never materialized contributed to the declaration of unlawfulness of the detention.

689 *Kolompar v. Belgium,* ECtHR, Application No. 11613/85, Judgment of 24 September 1992, paras. 40–43.

690 *Ryabikin v. Russia,* ECtHR, *op. cit.*, fn. 356, para. 131, in the context of extradition proceedings, which were suspended for more than a year.

691 *Quinn v. France,* ECtHR, Application No. 18580/91, Judgment of 22 March 1995; *A. and Others v. United Kingdom,* ECtHR, GC, Application No. 3455/05, Judgment of 19 February 2009, para. 164. See also, WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82.

692 *Mikolenko v. Estonia,* ECtHR, Application No. 10664.05, Judgment of 8 October 2009, para. 65. See also, WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82.

693 *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 167.

One consequence of this is that, where the Court has ordered interim measures (see, Annex 2) to prevent a deportation pending full consideration of the case by the Court, and deportation proceedings are therefore suspended, detention may, in certain circumstances, no longer be justified.[694] The European Court has held that, as a general principle, "the fact that expulsion proceedings are provisionally suspended as a result of the application of an interim measure does not in itself render the detention of the person concerned unlawful, provided that the authorities still envisage expulsion at a later stage, so that 'action is being taken' although the proceedings are suspended, and on condition that that the detention must not be unreasonably prolonged."[695] However, this does not suspend consideration of the suitability of the detention measures in view of deportation. In the case of *Keshmiri v. Turkey (No. 2),* the Court found the detention unreasonably prolongued and, therefore, in breach of Article 5.1 ECHR, because it "continued for many months after the interim measure was applied and during that time no steps were taken to find alternative solutions",[696] including the possibility of sending the returnee to a different country than his country of origin, where the principle of *non-refoulement* did not allow for his transfer. However, the Court has also stressed that "an interim measure [...] preventing a person's extradition or deportation does not require or form a basis for the person's detention pending a decision on his or her extradition or deportation."[697]

A further requirement is that detention must be genuinely for the purposes of expulsion. The European Court of Human Rights has held that where the real purpose of the detention is transfer for prosecution and trial in another State, then the detention will amount to a "disguised extradition" and will be arbitrary and contrary to Article 5.1(f) as well as to the right to security of the person protected by Article 5.1.[698] The same reasoning applies when the detention is ordered solely for reasons of national security even when deportation is not possible.[699]

6. Particular considerations in the detention of certain groups

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment. This

694 *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, para. 134.

695 *Keshmiri v. Turkey (No. 2),* ECtHR, Application No. 22426/10, Judgment of 17 January 2012, para. 34.

696 *Ibid*., para. 34.

697 *Molotchko v. Ukraine,* ECtHR, Application No. 12275/10, Judgment of 26 April 2012, para. 174.

698 *Bozano v. France,* ECtHR, Application No. 9990/82, Judgment of 18 December 1986, para. 60.

699 *M.S. v. Belgium,* ECtHR, Application No. 50012/08, Judgment of 31 January 2012, paras. 155–156.

principle can be particularly significant in relation to detention of asylum seekers, who may have suffered torture or ill-treatment or other traumatic experiences, sometimes with physical or mental health implications. In regard to all detained persons, particular concerns arise in relation to survivors of torture or trafficking; children and elderly persons; or persons suffering from serious illness or disability. For example, in *Farbtuhs v. Latvia,*[700] the European Court held that detention of a 79 year old disabled man violated Article 3 ECHR.

The *UNHCR Guidelines on Detention* (Guideline 9) recommend that especially active consideration should be given to alternatives to detention, for persons for whom detention is likely to have a particularly serious effect on psychological well-being. Such persons may include unaccompanied elderly persons, survivors of torture or other trauma, and persons with a mental or physical disability. The UNHCR Guidelines recommend that such persons only be detained following medical certification that detention will not adversely affect their health or well-being.[701] Where such persons are detained, then in order to ensure compliance with freedom from cruel, inhuman and degrading treatment, particular care will need to be taken in relation to conditions of detention, provision of healthcare, etc (considered further below in Section 2).

In *C. v. Australia,*[702] the Human Rights Committee found a violation of Article 9.1 on the basis that "the State Party has not demonstrated that, in the light of the author's particular circumstances [a psychiatric illness], there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party's immigration policies".

The European Court of Human Rights has, in practice, begun to temper its previously inflexible approach to alternatives to detention (see, above, section II.5.b.), with regard to migrants in situations of vulnerability. For instance, the Court has ruled that the best interest of the child (Article 3 CRC) and the provisions of the *Convention on the Rights of the Child* on detention (Article 37 CRC) require that State authorities consider any alternatives to detention before resorting to this measure in order to satisfy its lawfulness under Article 5.1(f) ECHR.[703] This approach also applies when children are accompanied by their family. In *Popov v. France,* the European Court ruled that, "in spite of the fact that they were accompanied by their parents, and even though the deten-

[700] *Farbthus v. Latvia,* ECtHR, Application No. 4672/02, Judgment of 2 December 2004.

[701] *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 9: "Because of the serious consequences of detention, initial and periodic assessments of detainees' physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention".

[702] *C. v. Australia,* CCPR, *op. cit.*, fn. 350.

[703] *Rahimi v. Greece,* ECtHR, Application No. 8687/08, Judgment of 5 April 2011, paras. 108–109.

tion centre had a special wing for the accommodation of families, the children's particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available. The Court thus [found] that the [...] system did not sufficiently protect their right to liberty".[704] In the case *Yoh-Ekale Mwanje v. Belgium,* the Court found that the detention of a woman affected by AIDS that did not present particular risks of flight was arbitrary because the authorities had not contemplated the resort to less intrusive alternatives to detention, such as a temporary residence permit.[705]

a) Justification of detention of children

Detention of children raises particular considerations under the CRC, as well as under international refugee law and international human rights law generally.

The CRC provides in Article 37(b) that detention of a child should be only as a last resort and for the shortest appropriate period of time. Article 37 should be read in light of other provisions of the CRC which affect decision-making regarding migrant children. Of significance in all cases where detention of child migrants is considered is Article 3.1 CRC which requires that the best interests of the child should be a primary consideration in all actions concerning children. Under Article 22.1 CRC, States must take all appropriate measures to ensure that a child refugee or asylum seeker shall receive appropriate protection and humanitarian assistance, a provision which could have consequences for decisions on whether to detain a child. For child migrants who accompany their parents or other adults, and who may risk imprisonment as a result, Article 2.2 CRC is relevant. It provides: "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Similar provision is made in Article 24 ICCPR, and Article 19 ACHR. Also of potential significance is Article 39 CRC, which requires States to take measures to ensure the physical and psychological recovery and social reintegration of child victims of armed conflict, torture or inhuman or degrading treatment, neglect, exploitation or abuse.

The Committee on the Rights of the Child, in General Comment No. 6 (2005)[706] has provided guidance on the application of Article 37(b) CRC to migrant children.

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[704] *Popov v. France,* ECtHR, Applications Nos. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 91.

[705] *Yoh-Ekale Mwanje v. Belgium,* ECtHR, *op. cit.*, fn. 412, para. 124.

[706] CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 61.

The Committee has stated that "unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall . . . only be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation."[707]

Where children are held in immigration detention contrary to their best interests, the Human Rights Committee has considered that such detention may be arbitrary in violation of Article 9.1 ICCPR. It may also violate Article 24 ICCPR, which guarantees the rights of the child to measures of protection required by his or her status as a minor, without discrimination. In *Bakhtiyari v. Australia,* the Committee held that mandatory immigration detention of an Afghan refugee with five children for two years and eight months constituted arbitrary detention[708] as well as a violation of Article 24.1 ICCPR since the measures had not been guided by the best interests of the children.[709] However, detention of a minor does not necessarily violate Article 24 of the Covenant, and may be justified in exceptional circumstances. In *Samba Jalloh v. the Netherlands* the Committee held that detention of a minor was justified "where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for his expulsion, and where an identity investigation was still ongoing".[710]

The European Court of Human Rights has ruled that States must take into account their obligations under Articles 3 and 37 CRC in the implementation of their duties under the European Convention on Human Rights. Following this line, the Court has determined that, when decisions on detention involve children, the best interest of the child (Article 3 CRC) and the provisions of the *Convention on the Rights of the Child* on detention (Article 37 CRC) require that State authorities consider any alternatives to detention before resorting to this measure in

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[707] *Ibid*., para. 61. See also, *Concluding Observations on Australia,* CRC, UN Doc. CRC/C/15/Add.268, 20 October 2005: "the Committee remains concerned that children who are unlawfully in Australian territory are still automatically placed in administrative detention—of whatever form—until their situation is assessed. [...] the Committee is seriously concerned that [...] administrative detention is not always used as a measure of last resort and for the shortest appropriate period of time."

[708] *Bakhtiyari v. Australia,* CCPR, *op. cit.*, fn. 685, para. 9.3.

[709] *Ibid*., para. 9.6.

[710] *Samba Jalloh v. the Netherlands,* CCPR, *op. cit.*, fn. 656, para. 8.2.

order to satisfy its lawfulness under Article 5.1(f) ECHR.[711] Furthermore, in regard to the right to respect for family life, the Court held that "the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life."[712] The Court therefore found a violation of the right to family life of children and parents held in immigration detention for fifteen days without any indication that they would abscond, where no alternatives to detention were considered.

In regard to the detention of asylum seekers or refugees, the *UNHCR Guidelines on Detention,*[713] as well as the *UNHCR Guidelines on Refugee Children,* state that child asylum seekers should not be detained. They reaffirm the principle in Article 37 CRC that detention of children should be a measure of last resort, and for the shortest possible period of time; and specify that where children accompany their parents, they should be detained only where detention is the only means of maintaining family unity.[714] Similarly, the *Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings* state that "children, 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".[715]

Where children are in fact detained, then the UNHCR guidelines as well as other international standards require that it should be in places and conditions appropriate to their age (see, further below, Sections III.1.a and III.3.a).

b) Detention of stateless persons

Particular issues arise in regard to the detention of persons who are stateless (see, Chapter 1). In the case of stateless persons, it will be particularly difficult to return them to their "country of origin" or to find alternative places of resettlement. This can mean that stateless persons are held for unusually long periods in detention, ostensibly awaiting deportation. The general principle described above concerning the need to establish that deportation is being actively pursued, in order for detention to be justified, is therefore of particular relevance to stateless persons. Their detention will not be justified if there is no active or realistic progress towards transfer to another State. The *UNHCR Guidelines*

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711 *Rahimi v. Greece,* ECtHR, *op. cit.*, fn. 703, paras. 108–109; *Popov v. France,* ECtHR, *op. cit.*, fn. 704, para. 91.

712 *Popov v. France,* ECtHR, *op. cit.*, fn. 704, para. 116.

713 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 9.2.

714 *UNHCR Guidelines on Unaccompanied Children, op. cit.*, fn. 214, paras. 7.6–7.8.

715 *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, principle XI.2.

on Detention apply equally to "stateless persons who are seeking asylum, although they do not specifically cover the situation of non-asylum-seeking stateless persons, persons found not to be in need of international protection or other migrants, although many of the standards detailed herein may apply to them *mutatis mutandis*. This is particularly true with regard to non-refugee stateless persons in the migratory context who face a heightened risk of arbitrary detention".[716]

7. Detention of migrants for purposes other than immigration control

Although the focus of this Chapter is on detention for the purposes of immigration control, it should be noted that migrants, like others, may also be detained on other legitimate or illegitimate grounds. While the majority of human rights treaties do not expressly specify the grounds on which detention is permitted, under the ECHR, in addition to detention for the purposes of immigration control, permissible detention is limited to:

- detention following conviction by a criminal court;
- detention for failure to comply with an order of a court or to secure the fulfilment of an obligation prescribed by law;
- detention following arrest on suspicion of committing an offence or in order to prevent an offence being committed;
- detention of minors for educational purposes;
- detention where strictly necessary for the prevention of the spread of infectious diseases;
- detention of persons of unsound mind, alcoholics, drug addicts or vagrants, where necessary for their own protection or the protection of the public.

All such detentions are subject to safeguards against arbitrariness similar to those that apply to immigration detention. It should also be noted that such powers of detention are subject to the principle of non-discrimination, including on grounds of nationality, and must therefore not be exclusively or disproportionately imposed on non-nationals except where the difference in treatment can be objectively and reasonably justified in the circumstances.[717]

a) Administrative detention on grounds of national security

Administrative detention for reasons of national security, although distinct from detention for the purposes of immigration control, may nevertheless disproportionately affect non-nationals. Although, under the

[716] *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Scope, para. 4.

[717] *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691.

ICCPR, administrative detention without trial is permitted in exceptional circumstances, to the extent that it can be shown not to be arbitrary, and to be in accordance with principles of necessity, proportionality and non-discrimination and based on grounds and procedures established by law,[718] in practice such detention is unlikely to be permissible where there is not a derogation from Article 9 ICCPR in a declared state of emergency.[719] The UN Working Group on Arbitrary Detention has held the practice of preventive detention to be generally incompatible with international human rights law. In 2009, the Working Group declared administrative detention to be inadmissible in relation to persons suspected of terrorism-related conduct.[720] Previously, in 1993, the Working Group examined the use of administrative detention and concluded that it is arbitrary on procedural grounds if fair trial standards are violated. The Working Group also found that administrative detention was "inherently arbitrary" where it was, *de jure* or *de facto*, of an indefinite nature.[721]

The European Convention system imposes strict limitations on the use of administrative detention. Under the ECHR, administrative detention without trial is not a specified ground for which detention is permitted under Article 5 ECHR and therefore can only be legitimately imposed where the State derogates from its Article 5 obligations in a time of public emergency threatening the life of the nation (under Article 15 ECHR) and where the use of administrative detention can be shown to be "strictly required by the exigencies of the situation" and necessary, proportionate and non-discriminatory in the context of the particular emergency situation that prevails.[722] Measures which impose security-related administra-

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718 *General Comment No. 8, Right to Liberty and Security of the Person,* CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 30 June 1982, para. 4. See also, *Concluding Observations on Jordan,* CCPR, UN Doc. CCPR/C/79/Add.35, 10 August 1994, paras. 226–244; *Concluding Observations on Morocco,* CCPR, UN Doc. CCPR/C/79/Add.44, 23 November 1994, para. 21; and, *Concluding Observations on Zambia,* CCPR, UN Doc. CCPR/C/79/Add.62, 3 April 1996, para. 14. See, generally, International Commission of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism,* March 2006.

719 The Committee has also emphasised that the totality of ICCPR Article 9 safeguards apply even when there is a "clear and serious threat to society which cannot be contained in any other manner" except through preventive detention. See, *Cámpora Schweizer v. Uruguay,* CCPR, Communication No. 66/1980, Views of 12 October 1982, para. 18.1.

720 WGAD, *Annual Report 2008, op. cit.*, fn. 624, para.54. The Working Group states that: "(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems; (b) resort to administrative detention against suspects of such criminal activities is inadmissible; (c) the detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges [...]".

721 WGAD, *Annual Report 1992,* UN Doc. E/CN.4/1993/24, 12 January 1993, Deliberation No. 4, Conclusions at III.B. See also, WGAD, *Report on the visit to the People's Republic of China,* UN Doc. E/CN.4/1998/44/Add.2, 22 December 1997, paras. 80–99 and 109.

722 *Lawless v. Ireland (No. 3),* ECtHR, Application No. 332/57, Judgment of 1 July 1961, paras. 13 and 14; *Ireland v. United Kingdom,* ECtHR, Plenary, Application No. 5310/71, 18 January 1978, paras. 194–196 and 212–213; *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 172.

tive detention exclusively on those subject to immigration control, in circumstances where others may also pose similar security risks, have been found to discriminate unjustifiably between nationals and non-nationals and therefore to amount to disproportionate measures of derogation in violation of Article 5 ECHR.[723] Issues of judicial review of security-related detentions, whether characterised as immigration law measures or as administrative detention, are considered further at Section IV.3.b.

b) Detention by private actors

As a general principle, international law requires States to take steps to ensure that the conduct of non-state actors does not impair the enjoyment of human rights. The right to liberty under international human rights law also prohibits arbitrary detention by private, non-state actors. In regard to such detention, it imposes positive obligations on the State to take measures to prevent and punish such detentions. This will often be relevant in the immigration context in cases of trafficking and exploitative labour practices. Such private sphere restrictions on liberty will often involve imprisonment in the workplace or home alongside confiscation of passports and other travel documents, as well as other substantial restrictions on liberty amounting to detention. Such situations are also likely to raise issues of the right to freedom from slavery, servitude or forced labour (see, further, Chapter 6). As noted above (Section I) even where they do not involve situations of private-sphere detention, they may nonetheless raise issues in relation to freedom of movement.

In accordance with the right to liberty, the State has a duty to provide an adequate legal framework which criminalises unauthorised detention by private actors; to take all appropriate measures to enforce the criminal law effectively, to establish prompt, thorough and independent investigations into credible allegations of detention by private actors; and to provide other appropriate reparations to victims. Where the authorities are aware of concerns that a particular individual is being held in violation of the right to liberty, they must take all reasonable measures to prevent and end the violation.[724]

A different situation arises when non-state actors, including private actors, exercise elements of governmental authority in place of State or-

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723 *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 190. In light of this finding the Grand Chamber found it unnecessary to consider whether the measure also violated Article 14 ECHR in conjunction with Article 5.

724 CCPR, *General Comment No. 31, op. cit.*, fn. 46, paras. 8, 15, and 18; Article 2 CPED; *Storck v. Germany,* ECtHR, Application No. 61603/00, Judgment of 16 June 2005; *Kurt v. Turkey,* ECtHR, Case No. 15/1997/799/1002, Judgment of 25 May 1998, para. 124; Venice Commission, *Opinion 363/2005, op. cit.*, fn. 352, para. 53: "Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantial claim that a person has been taken into custody and has not been seen since."

gans, as it is the case for privately-run detention centres for migrants or asylum-seekers. In this situation, the State is directly internationally responsible for international wrongful acts, including breaches of international human rights law, caused by acts or omissions of private or non-state actors.[725] International human rights law obligations and standards on treatment of detainees and conditions of detention apply irrespective of whether detention facilities are operated by State authorities, or by private companies on behalf of the State. This derives from the principle that a State cannot absolve itself from responsibility for its human rights obligations by delegating its responsibilities to a private entity.[726]

III. Treatment of detainees

Even where detention of migrants can be justified on the basis of the standards discussed above, international human rights law imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention. The most relevant standard for the treatment of detainees is the prohibition on cruel, inhuman and degrading treatment (Article 16 CAT, Article 7 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR). The *Convention against Torture* establishes that States have obligations to take effective measures to prevent acts of torture[727] and of cruel, inhuman or degrading treatment or punishment[728] including to keep under systematic review arrangements for the custody and treatment of persons subjected to any form of detention with a view to preventing torture and ill-treatment.[729]

Article 10.1 ICCPR makes specific provision for the right of detained persons to be treated with humanity and respect for their dignity, a more specific application of the general right under Article 7 ICCPR to freedom from torture or other cruel, inhuman or degrading treatment or punishment. Article 5.2 ACHR, Article 5 ACHPR and Article 20 ArCHR also make similar specific provision for the treatment of persons de-

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725 Article 5, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* adopted by the International Law Commission at its 53rd session in 2001, in *Yearbook of the International Law Commission,* 2001, vol. II, Part Two (ILC Draft Articles on State Responsibility). See also, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts,* adopted by the International Law Commission at its 53rd session in 2001, *Yearbook of the International Law Commission,* 2001, vol. II, Part Two, on Article 5, pp. 42–43 (ILC State Responsibility Commentary).

726 *Costello-Roberts v. United Kingdom,* ECtHR, *op. cit.*, fn. 401, para. 27; *Ximenes-Lopes v. Brazil,* IACtHR, *op. cit.*, fn. 586.

727 Article 2.1 CAT.

728 Article 16.1 CAT.

729 Article 11 read together with Article 16.1 CAT.

prived of their liberty. It has been suggested that Article 10 ICCPR may extend to treatment less harsh than that covered by Article 7 ICCPR, since the Human Rights Committee has found violations of Article 10 in many cases where it has found no violation of Article 7.[730] In addition, provisions of other international instruments may be relevant in terms of protecting the human rights of certain categories of detained migrants (CEDAW, CRPD, and Article 37 CRC).

Detailed standards on conditions of detention are set out in the *UN Standard Minimum Rules on the Treatment of Prisoners;*[731] the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;*[732] the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty;*[733] and the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* as well as, at a European level, the CPT standards. These standards provide comprehensive recommendations on conditions and facilities to be provided in all forms of detention, including immigration detention. As regards asylum seekers, the *UNHCR Guidelines on Detention* provide that "[c]onditions of detention must be humane and dignified." They emphasise in particular that detained asylum seekers should have the opportunity to have contact with the outside world and to receive visits; the opportunity for exercise and indoor and outdoor recreation; the opportunity to continue their education; the opportunity to exercise their religion; and access to basic necessities i.e. beds, shower facilities, basic toiletries etc.[734]

The *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and, in the *European system, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) have established independent committees of experts—respectively the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT)—with mandates to visit detention facilities of State parties without limitations and to issue recommendations.[735] The OPCAT also requires State Parties to establish

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730 Manfred Nowak, *UN Covenant on Civil and Political Rights Commentary,* 2nd Revised Edition, N.P. Engel Publisher, 2005 (Nowak, ICCPR Commentary), pp. 245–250.

731 *UN Standard Minimum Rules on the Treatment of Prisoners,* adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

732 Adopted by General Assembly resolution 43/173 of 9 December 1988.

733 Adopted by General Assembly resolution 45/113 of 14 December 1990.

734 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 8.

735 The mandate and powers of visit of the SPT are to be found in Articles 4, 11.1, 12, and 14 of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT); and of the CPT in Articles 2 and 7 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT).

one or more independent national mechanisms for the prevention of torture and cruel, inhuman or degrading treatment or punishment with powers of access to detention centres.[736]

1. Appropriateness of place of detention

International guidance stipulates that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.[737] Under the particular scheme of Article 5 ECHR, holding a detainee in a facility which is inappropriate in light of the grounds on which he or she is held (for example for the prevention of unlawful entry or pending deportation under Article 5.1(f)) may also violate the right to liberty.[738] So for example, it has been held that holding a child asylum seeker with adults in a facility not adapted to her needs, violated the right to liberty.[739] A similar rationale would be likely to apply to the long-term use of prisons or police cells for immigration detention.

In general, under international human rights law, the detention of migrants in unsuitable locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.[740] In relation to particular classes of migrants, it may also violate other international standards, including, in the case of minors, requirements to act in the best interests of the child under the CRC. International and regional standards as well as conclusions of UN treaty bodies and the UNHCR consistently recommend that asylum seekers or other migrants should not be detained in police or prison custody. The length of time for which someone is held in a detention facility is often relevant to whether the detention amounts to ill-treatment. For example, while detention of a migrant at an airport may be acceptable for a short period of a few hours on arrival, more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment.[741] This has been recognised

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[736] See, Articles 3, 17–22, OPCAT.

[737] *CPT Standards, op. cit.*, fn. 629, p. 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Principle XI.7: "detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy." See also, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 209.

[738] *Aerts v. Belgium,* ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46.

[739] *Mayeka and Mitunga v. Belgium,* ECtHR, Application no 13178/03, Judgment of 12 October 2006.

[740] Under Article 7 and 10.1 ICCPR; Article 3 ECHR; Article 5 ACHR; Article 5 ACHPR.

[741] *CPT Standards, op. cit.*, fn. 629, p. 54.

by the European Committee for the Prevention of Torture, which has emphasised that, 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 time they spend there should be kept to the absolute minimum.[742] In *Charahili v. Turkey,* the European Court of Human Rights found that prolonged detention of the applicant in the basement of a police station, in poor conditions, violated Article 3 ECHR.[743] In *R.U. v. Greece,* the Court found that the detention of an asylum seeker, who because of his status as an asylum seeker was considered by the Court to be a member of a vulnerable group, for more than two months in inappropriate conditions of detention, constituted degrading treatment prohibited by Article 3 ECHR.[744] The UN Human Rights Committee has also expressed concern at detention of those awaiting deportation in police custody for lengthy periods.[745]

International standards also consistently reject detention of asylum seekers or other migrants in prisons, requiring that other facilities should be put in place or, at a minimum, that in any case asylum seekers and migrants should be kept separate from convicted persons or persons detained pending trial.[746]

a) Place of detention of children and families

International standards require that, in those exceptional cases where children are detained, they should be held in facilities and conditions appropriate to their age. This general principle is established by Article 37.c CRC, which states that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with

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742 *Ibid*., p. 54.

743 *Charahili v. Turkey,* ECtHR, Application No. 46605/07, Judgment of 13 April 2010.

744 *R.U. v. Greece,* ECtHR, Application No. 2237/08, Judgment of 7 June 2011, para. 63.

745 *Concluding Observations on Austria,* CCPR, *op. cit.*, fn. 188, para. 17. The Committee expressed concern that asylum seekers awaiting deportation were frequently detained for up to several months in police detention facilities and recommended that the State Party "review its detention policy with regard to asylum seekers [...] and take immediate and effective measures to ensure that all asylum seekers who are detained pending deportation are held in centres specifically designed for that purpose [...]."

746 *Concluding Observations on Ireland,* CCPR, *op. cit.*, fn. 516, para. 21; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 207–208. See also, *Concluding Observations on Sweden,* CCPR, UN Doc. CCPR/C/SWE/CO/6, 2 April 2009, para. 17; *Concluding Observations on New Zealand,* CAT, UN Doc. CAT/C/NZL/CO/5, 14 May 2009, para. 6: "The Committee notes with concern that asylum-seekers and undocumented migrants continue to be detained in low security and correctional facilities."; *Conclusion No. 44,* UNHCR, *op. cit.*, fn. 624, para. 10.

his or her family through correspondence and visits, save in exceptional circumstances . . .". Detailed rules for the exceptional situation of detention of children are provided by the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty.*[747]

Other international tribunals have found that detention of children in inappropriate facilities may in certain circumstances lead to violations of the freedom from cruel, inhuman and degrading treatment. In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,*[748] for example, the European Court found that detention of a five year old unaccompanied asylum seeker in an adult detention centre without proper arrangements for her care violated Article 3 ECHR, since the conditions of detention were not adapted to her position of extreme vulnerability; the Court also found a violation of her mother's Article 3 rights because of anxiety and uncertainty in relation to her daughter's detention. The Court has also found a violation of Article 3 ECHR for children detained in a similar situation but accompanied by their mother, considering that the central test is that of the best interest of the child[749] and that the "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant".[750] Conversely, the Court failed to find that the situation of the mother reached the threshold of inhuman or degrading treatment, because she was detained with her children and their presence may have alleviated her feelings of anguish and frustration.[751] The Inter-American Court established that Article 19 ACHR requires higher standards of care and responsibility on the State when detention of a child is involved.[752]

2. Conditions of detention

Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or other cruel, inhuman or degrading treatment ("ill-treatment") and the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR, Article 5.2 ACHR, Article 5 ACHPR and Article 20 ArCHR). In the context of increasing use

747 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* adopted on December 14, 1990 by General Assembly resolution 45/113.

748 *Mayeka and Mitunga v. Belgium,* ECtHR, *op. cit.*, fn. 739. See also, *Rahimi v. Greece,* ECtHR, *op. cit.*, fn. 703, para. 86.

749 *Kanagaratnam and Others v. Belgium,* ECtHR, *op. cit.*, fn. 680, paras. 61–69.

750 *Popov v. France,* ECtHR, *op. cit.*, fn. 704, para. 64. In this case the detention for fifteen days of two children (a three year old and a baby) with their parents in an adult detention environment with a strong police presence, without any children's activities and taking account of the parents' distress, led to a violation of Article 3 ECHR.

751 *Kanagaratnam and Others v. Belgium,* ECtHR, *op. cit.*, fn. 680, paras. 70–72.

752 *"Juvenile Reeducation Institute" v. Paraguay,* IACtHR, Series C No. 112, Judgment of 2 September 2004, paras. 143, 160–162.

of immigration detention and the holding of ever-larger numbers of migrants, often in overcrowded facilities,[753] poor or overcrowded conditions of detention for migrants have regularly been found by international courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment. Although detention by its nature imposes a certain level of hardship, the general principle to be applied is that conditions of detention should be compatible with human dignity and not subject detainees to a level of suffering beyond that inherent in detention.[754] Furthermore, economic pressures or difficulties caused by an increased influx of migrants cannot justify a failure to comply with the prohibition on torture or other ill-treatment, given its absolute nature.[755]

a) Cumulative effect of poor conditions

The cumulative effect of a number of poor conditions may lead to violation of the prohibition on ill-treatment.[756] Furthermore, the longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment. The test is an objective one, and can be met irrespective of whether there had been any intent on the part of the authorities to humiliate or degrade.[757] The prohibition on cruel, inhuman or degrading treatment places an obligation on State authorities to ensure that those whom they deprive of liberty are held in humane conditions; the onus cannot be placed on detainees themselves to take the initiative to seek access to adequate conditions.[758] Whether conditions are cruel, inhuman or degrading must also be seen in the context of the individual—it may depend on the sex, age or health of the individual detainee. For those held in immigration detention, it is also relevant that they are not charged with or convicted of any crime, which should be reflected in the conditions of detention and facilities at the detention centre.[759]

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753 *CPT Standards, op. cit.*, fn. 629, Safeguards for Irregular Migrants Deprived of their Liberty, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85–89.

754 *S.D. v. Greece,* ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para. 45; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, para. 221. See also, *"Juvenile Reeducation Institute" v. Paraguay,* IACtHR, *op. cit.*, fn. 752, paras. 151–155.

755 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 223–224.

756 *Dougoz v. Greece,* ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Z.N.S. v. Turkey,* ECtHR, Application No. 21896/08, Judgment of 19 January 2010; *Charahili v. Turkey,* ECtHR, *op. cit.*, fn. 743; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 230–233.

757 *Riad and Idiab v. Belgium,* ECtHR, Applications Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para. 107.

758 *Ibid*., para.103.

759 See *CPT Standards, op. cit.*, fn. 629, Safeguards for Irregular Migrants Deprived of their Liberty, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85–89; *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 231–233.

For example, detention of asylum seekers for two months in a prefabricated building with poor conditions of hygiene, restricted access to the open air and no access to phones, was found in one case to violate Article 3 ECHR, in particular given that the applicants suffered from health and psychological problems following torture in their country of origin.[760] The Inter-American Court equally ruled that "poor physical and sanitary conditions existing in detention centers, as well as the lack of adequate lightning and ventilation, are *per se* violations to Article 5 of the American Convention, depending on their intensity, length of detention and personal features of the inmate, since they can cause hardship that exceeds the unavoidable level of suffering inherent in detention, and because they involve humiliation and a feeling of inferiority."[761]

Inadequate provision for migrants held at entry points can also lead to violations. In *Riad and Idiab v. Belgium,* for example, the European Court found a violation of Article 3 ECHR where the applicants had been held for more than 10 days in an airport transit zone without any legal or social assistance, no means of subsistence, shelter, sleeping or washing facilities and no means of communication with the outside world. Although there was a reception centre at the airport, the applicants were not informed about it for some time. The Court found that this failure to ensure the essential needs of persons deprived of their liberty amounted to a violation of Article 3.[762]

The African Commission on Human and Peoples' Rights has held that cruel, inhuman or degrading treatment or punishment under Article 5 ACHPR extends "to the widest possible protection against abuses, whether physical or mental, [...] referring to any act ranging from denial of contact with one's family and refusing to inform the family of where the individual is being held, to conditions of overcrowded prisons and beatings and other forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine or medical care".[763]

b) Overcrowding

Severe overcrowding has regularly been determined by international tribunals to amount to a violation of freedom from cruel, inhuman or degrading treatment. The European Court of Human Rights has found

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760 *S.D. v. Greece,* ECtHR, *op. cit.*, fn. 754, paras. 52–53.

761 *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela,* IACtHR, Series C No. 150, Judgment of 5 July 2006, para. 97; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 215–216 (on access to water in detention).

762 *Riad and Idiab v. Belgium,* ECtHR, *op. cit.*, fn. 757, paras. 103–106.

763 *IHRDA and Others v. Republic of Angola,* ACommHPR, *op. cit.*, fn. 395, para. 52; *Media Rights Agenda v. Nigeria,* ACommHPR, Communication No. 224/1998, 28th Ordinary Session, 23 October–6 November 2000, para. 71; *Amnesty International and Others v. Sudan,* ACommHPR, Communications Nos. 48/1990, 50/1991, 52/1991 and 89/1993, para. 54.

that less than three square metres of personal space per detainee is a strong indication that conditions are degrading so as to violate Article 3 ECHR.[764] The Court has ruled, in the case of *Aden Ahmed v. Malta,* that, in "deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements:

(a) each detainee must have an individual sleeping place in the cell;

(b) each detainee must dispose of at least three square metres of floor space; and

(c) the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.

(d) Other aspects [...]".[765]

Where overcrowding is less severe, it may nevertheless lead to violations of freedom from cruel, inhuman or degrading treatment when considered in conjunction with other conditions of detention, including poor ventilation or access to natural light or air, poor heating, inadequate food, poor sanitation or lack of a minimum of privacy.[766] The Inter-American Court has also held that severe overcrowding amounts *per se* to "cruel, inhuman and degrading treatment, contrary to the dignity inherent to human beings and, therefore, a violation to Article 5.2 of the American Convention."[767]

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has held that "one of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of detention is overcrowding [and that] [t]his is particularly applicable in cases of pre-trial detention and detention of children, asylum-seekers and refugees."[768]

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764 *Kantyrev v. Russia,* ECtHR, Application No. 37213/02, Judgment of 21 June 2007, paras. 50–51; *Labzov v. Russia,* ECtHR, Application No. 62208/00, Judgment of 16 June 2005, para. 44; *Orchowski v. Poland,* ECtHR, Application No. 17885/04, Judgment of 22 October 2009, para. 122.

765 *Aden Ahmed v. Malta,* ECtHR, Application No. 55352/12, Judgment of 23 July 2013, para. 87.

766 *Orchowski v. Poland,* ECtHR, *op. cit.*, fn. 764, para. 122–123; *Peers v. Greece,* ECtHR, *op. cit.*, fn. 406, paras. 70–72; *Belevitskiy v. Russia,* ECtHR, Application No. 72967/01, Judgment of 1 March 2007, paras. 73–79; *Aden Ahmed v. Malta,* ECtHR, *op. cit.*, fn. 765, para. 88.

767 *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela,* IACtHR, *op. cit.*, fn. 761, para. 91.

768 Theo Van Boven, UN Special Rapporteur on Torture, *Annual Report to the Commission on Human Rights,* UN Doc. E/CN.4/2004/56, 23 December 2003, para. 49.

c) Access to healthcare

Inadequate healthcare or access to essential medicines for detainees may also violate the freedom from inhuman or degrading treatment, either on its own or in conjunction with other factors. Although there is no general obligation to release detainees on health grounds, there is an obligation to protect their physical and mental wellbeing while in detention, by providing medical care and medicines appropriate to the health condition of a detainee.[769] For example, failure to provide medical supervision and drugs necessary to detainees with HIV, or with severe epilepsy, leading to exacerbation of their conditions, can undermine the dignity of the detainee, and cause anguish and hardship beyond that normally inherent in detention, in violation of Article 3 ECHR.[770] Such a violation may occur even in the absence of demonstrated deterioration of the health condition of a detainee.[771] The Inter-American Court has found that lack of adequate medical assistance in detention could constitute a violation of Article 5 ACHR "depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention and its cumulative effects."[772]

CPT standards set out the principle that medical care available in detention should be of an equivalent standard to that available to the general public.[773] Guideline 10 (v) of the *UNHCR revised guidelines on detention of asylum seekers* provides that detained asylum seekers should have the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate. Other international standards, including the *Standard Minimum rules for the Treatment of Prisoners* (Rules 22 to 25) *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 22 to 26), the *United Nations Rules for the Protection of Juveniles Deprived of their*

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769 *Hurtado v. Switzerland,* ECtHR, Application No. 17549/90, Judgment of 28 January 1994; *Mouisel v. France,* ECtHR, Application No. 67263/01, Judgment of 14 November 2002, para. 40; *Keenan v. United Kingdom,* ECtHR, Application No. 27229/95, Judgment of 3 April 2001, para. 111; *Aleksanyan v. Russia,* ECtHR, Application No. 46468/06, Judgment of 22 December 2008, para. 137.

770 *Kaprykowski v. Poland,* ECtHR, Application No. 23052/05, Judgment of 3 February 2009; *Kotsaftis v. Greece,* ECtHR, Application No. 39780/06, Judgment of 12 June 2008. See also, *Mouisel v. France,* ECtHR, *op. cit.*, fn. 769, paras. 40–42.

771 *Kotsaftis v. Greece,* ECtHR, *op. cit.*, fn. 770.

772 *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela,* IACtHR, *op. cit.*, fn. 761, para. 103. See also, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 220, 225, 227.

773 *CPT Standards, op. cit.*, fn. 629, Extract from the 3rd General Report [CPT/Inf (93) 12], p. 27, para. 31. Although the European Court of Human Rights has sometimes accepted a lower standard of healthcare for prisoners than that available in the community, this has been in regard to convicted prisoners only, and the Court has expressly drawn a distinction between convicted prisoners and other detainees in this regard: *Aleksanyan v. Russia,* ECtHR, *op. cit.*, fn. 769, para. 139.

Liberty (Section H), and the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* set out detailed guidelines regarding appropriate medical care in detention.

Security measures applied during medical treatment must also be designed so far as possible to respect the dignity of the detainee. Issues in this regard may be raised by the use of handcuffs or the imposition of other restraints during treatment.[774]

It should also be borne in mind that, as will be discussed in more detail in Chapter 5, under international law and standards enshrining the right to health, all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency health care, a right which also applies in the context of detention.[775]

3. Conditions of detention of particular groups

a) Mentally ill detainees

Detainees who are mentally ill or who are disturbed as a result of traumatic experiences require particular consideration where they are held in immigration detention. Their detention raises questions as to (a) whether the person should be detained at all or whether more suitable alternatives can be found (see, Section 6); and, if detention is warranted, (b) the appropriate form of detention, conditions of detention, and provision of medical care.

Where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions, continued detention may amount to cruel, inhuman or degrading treatment. In *C. v. Australia,* the Human Rights Committee found a violation of Article 7 ICCPR as a result of the prolonged detention of a person with serious psychiatric illness which the authorities knew had come about as the result of his detention and which by the time of his eventual release, was so serious as to be irreversible.[776]

Even where the detention of a mentally ill person is justifiable, consideration should be given to the appropriate place of detention: whether the person should be held in a specialist psychiatric facility; or whether

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774 *Henaf v. France,* ECtHR, Application No. 65436/01, Judgment of 27 November 2003, paras. 49–60.

775 CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 34: "In particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."

776 *C. v. Australia,* CCPR, *op. cit.*, fn. 350, para. 8.4.

the person should be accommodated in a specialist psychiatric ward in a detention centre.[777]

Irrespective of the place of detention, inadequate mental healthcare, alone or in combination with other inappropriate conditions of detention, can constitute or lead to cruel, inhuman or degrading treatment.[778] In assessing whether detention or conditions of detention of a mentally ill person amount to cruel, inhuman or degrading treatment, account must be taken of such persons' vulnerability, and their inability, in some cases, to complain coherently or effectively about how they are affected.[779]

b) People with disabilities

Both ICCPR Article 10 and ECHR Article 3 have been found to require that, where disabled people are detained, measures are taken to ensure that conditions of detention are appropriate to their level of disability.[780] Under Article 14 CRPD, States parties must "ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation." Article 2 of that Convention defines reasonable accommodation as "all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

c) Survivors of Torture

Given that detained asylum seekers include those who have been victims of torture, international standards recommend that the authorities should screen detainees at the outset of their detention to identify victims of torture or other trauma, whose situation may warrant accommodation outside of detention (see, above, Section 6), or where they

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777 *Recommendation R(1998)7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison,* adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers' Deputies: 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.

778 *Musial v. Poland,* ECtHR, Application No. 28300/06, Judgment of 20 January 2009, para. 96; *Madafferi and Madafferi v. Australia,* CCPR, *op. cit.*, fn. 460, where the applicant was returned to immigration detention against the advice of doctors and psychiatrists, found that the decision was not based on a proper assessment of the circumstances of the case and was in violation of Article 10.1 ICCPR.

779 *Ibid*., para. 87.

780 *Price v. United Kingdom,* ECtHR, Application No. 33394/96, Judgment of 10 July 2001, paras. 25–30; *Farbthus v. Latvia,* ECtHR, *op. cit.*, fn. 700, para. 56; *Hamilton v. Jamaica,* CCPR, Communication No. 616/1995, Views of 23 July 1999.

are detained, may require a different type of detention facility, or particular services or healthcare.[781] Such screening will assist in ensuring that the authorities meet international human rights law obligations to provide appropriate conditions of detention or accommodation, and physical and mental healthcare for such persons.

d) Children

In any exceptional cases where children are detained (see, Section 6.a, above, in relation to appropriateness of detention), whether they are unaccompanied or with their families, the conditions of detention must be appropriate and the best interests of the child must guide all decisions concerning the detention.[782] The Committee on the Rights of the *Child's General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin*[783] states that "in the exceptional case of detention, conditions of detention must be governed by the best interests of the child . . . Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. . . . Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. . . . In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."[784]

i) Education in immigration detention

Children detained for immigration purposes continue to enjoy a right to education, which must be provided to them on an equal basis with children who are at liberty, and without discrimination on grounds of

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781 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 10(i); *Recommendation R(1998)7,* CMCE, *op. cit.*, fn. 777, para. 12: "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". See also, *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline XI.3 "in those cases where other vulnerable persons are detained, they should be provided with adequate assistance and support."

782 Article 3(a) CRC.

783 CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 63.

784 See also, *Concluding Observations on Cyprus,* CESCR, UN Doc. E/C.12/CYP/CO/5, 12 June 2009, para. 22, expressing concern at inadequate conditions for children in immigration detention; *Concluding Observations on Australia,* CRC, *op. cit.*, fn. 707, paras. 62(b) and 64(c).

race, nationality or religion.[785] The *UNHCR Guidelines on Detention* and the Committee on the Rights of the Child's *General Comment No. 6* recognise that children have a right to education while in detention, that education should take place outside of detention premises and that provision should be made for the children's recreation and play.[786]

The *UN Rules for the Protection of Juveniles Deprived of their Liberty* further add that such education should be provided "in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty [and that] [s]pecial attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. [Furthermore] Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education."[787] Finally the UN Rules specify that "[j]uveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes."[788]

e) Women detainees

Women held in immigration detention often face particular difficulties. These may include instances of gender-based violence or harassment, including sexual violence and abuse, perpetrated by both State actors and detainees (see, Section 4, below); absence of childcare; inadequate and inappropriate provision of healthcare, goods and services needed by women; as well as other forms of gender discrimination.

International law and standards require States to take certain specific measures to address these problems. They emphasise the need to provide separate accommodation for women in detention, to ensure women are attended and supervised by women officials and to ensure body searches on women are only conducted by women.[789] For exam-

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785 Article 2 Protocol 1 ECHR; Article 28 CRC; Article 5(e)(v) ICERD; Article 13 ICESCR; *General Comment No. 13, The right to education,* CESCR, UN Doc. E/C.12/1999/10, 8 December 1999, para. 34: "confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status."

786 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 9.2; and CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 63.

787 *UN Rules for the Protection of Juveniles Deprived of their Liberty,* Rule 38.

788 *Ibid*., Rule 39.

789 Rules 8 and 53, *Standard Rules for the Treatment of Prisoners;* Principles XIX, XX, XXI, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas;* Rule 19, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).*

ple, the Human Rights Committee has highlighted that in respect of compliance with Articles 3, 7 and 10 of the ICCPR, an important consideration will be "whether men and women are separated in prisons and whether women are guarded only by female guards."[790] It has also specified that, "persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex."[791] The European Court of Human Rights has held that a situation of prolonged detention of a woman migrant, who had undergone a miscarriage in a facility that lacked female staff and otherwise inappropriate conditions of detention, were insufficient conditions taken individually, to reach the threshold of an Article 3 ECHR violation. In combination, however, they "diminished [her] human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance" and, thus, constituted a degrading treatment prohibited by Article 3 ECHR.[792]

International law and standards on ill-treatment, the right to health, and non-discrimination, require that migrants in detention be ensured appropriate and adequate access to healthcare, goods and services (see, Section 2.c, above). These standards require that women detainees have access to the healthcare and hygiene facilities they may need as women, including sexual and reproductive healthcare, goods and services. In addition they require that treatment be provided to detained women in an acceptable and appropriate manner. For example, the European Committee on the Prevention of Torture considers that shackling and restraining pregnant women during delivery or examination amounts to inhuman and degrading treatment,[793] and the European Court of Human Rights has held that it was inhuman and degrading to require a woman detainee to undergo a gynaecological examination whilst handcuffed and in the presence of male staff.[794]

These international legal requirements apply to all female detainees, including women migrants. In addition, certain bodies have explicitly addressed the situation of women migrants in detention. For example, CEDAW has provided that: "States parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeed-

790 CCPR, *General Comment No. 28, op. cit.*, fn. 22, para. 15 (Article 3).

791 *General Comment No. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation,* CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 8 April 1988, para. 8.

792 *Aden Ahmed v. Malta,* ECtHR, *op. cit.*, fn. 765, para. 91–100.

793 *CPT Standards, op. cit.*, fn. 629, Extract from the 10th General Report [CPT/Inf (2000) 13], p. 81, para. 27.

794 *Filiz Uyan v. Turkey,* ECtHR, Application No. 7496/03, Judgment of 8 January 2009.

ing mothers as well as women in ill health have access to appropriate services."[795]

The *UNHCR Guidelines on Detention* also emphasise that where women asylum-seekers are detained, they should be held separately from men, except where they are close family relatives. The guidelines recommend the use of female staff in detention facilities for women, and note the need for additional healthcare facilities.[796]

4. Protection from ill-treatment, including violence in detention

Physical or sexual assaults, or excessive or inappropriate use of physical restraint techniques—may violate rights including the right to life and freedom from torture or cruel, inhuman or degrading treatment and rights to physical integrity. Where a person is unlawfully killed or subjected to cruel, inhuman or degrading treatment while in detention, there is a presumption that State agents are responsible, and the onus is on the State to provide a satisfactory and convincing explanation to the contrary.[797]

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation.[798] This arises as part of the general positive obligations on States to exercise due diligence and take reasonable measures to prevent, protect against and investigate acts of private persons in violation of these rights.[799] Obligations to protect are heightened for persons held in detention, in respect of whom the State has a special duty of care.[800]

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795 CEDAW, *General recommendation No. 26, op. cit.*, fn. 8, para. 26(j).

796 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 9.2.

797 *Anguelova v. Bulgaria,* ECtHR, Application No. 38361/97, Judgment of 13 June 2002, paras. 110–111; *Salman v. Turkey,* ECtHR, GC, Application No. 21986/93, Judgment of 27 June 2000, para. 100; *Demiray v. Turkey,* ECtHR, Application No. 27308/95, Judgment of 21 November 2000.

798 See, *Osman v. United Kingdom,* ECtHR, GC, Application No. 23452/94, Judgment of 28 October 1998; *Anguelova v. Bulgaria,* ECtHR, *op. cit.*, fn. 797; *Pueblo Bello Massacre v. Colombia,* IACtHR, Series C No. 140, Judgment of 31 January 2006, para. 123. On obligations to protect against inter-prisoner violence in detention: *Edwards v. United Kingdom,* ECtHR, Application No. 46477/99, Judgment of 14 March 2002.

799 CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 8; *Osman v. United Kingdom,* ECtHR, *op. cit.*, fn. 798; CAT, *General Comment No. 2, op. cit.*, fn. 31, para. 18; CEDAW, *General Recommendation No. 19, op. cit.*, fn. 237, para. 9; *Velasquez Rodriguez v. Honduras,* IACtHR, Series C No. 1, Judgment of 29 July 1988, para. 172; *Pueblo Bello Massacre v. Colombia,* IACtHR, *op. cit.*, fn. 798, para. 120.

800 *Salman v. Turkey,* ECtHR, *op. cit.*, fn. 797.

In situations where there is clear potential for gender or ethnic violence in detention, for example, appropriate preventive and security measures must be put in place. In *Rodic v. Bosnia-Herzegovina,* the ECtHR held that two Serb prisoners held in open, crowded conditions in an ethnic Bosnian dominated prison, and subjected to violence by fellow prisoners, without any adequate security measures being taken by the authorities, suffered mental anxiety as a result of the threat and anticipation of violence that amounted to a violation of Article 3 ECHR.[801] The Inter-American Court has also held that "the State has an obligation to guarantee the right to life and the right to humane treatment of the inmates interned in its penal institutions [and within it] a duty to create the conditions necessary to avoid, to the maximum extent possible, fighting among inmates".[802]

In addition to protection from the acts of officials or fellow detainees, the State also has an obligation to take reasonable measures within its power to protect detained persons from acts of self-harm or suicide.[803]

Women in detention may face particular risks of sexual or gender-based violence, either from officials or from private actors. States are required to take measures to prevent and protect detainees from all sexual violence in detention, including by making it a criminal offence, and enforcing the criminal law. Certain forms of sexual violence in detention, such as rape, amount to torture.[804] The Inter-American Court of Human Rights has held, that arbitrary vaginal searches of female detainees by State officials amount to rape and therefore to torture;[805] and that a situation where women detainees were held naked and guarded by armed men also amounted to sexual violence and violated the right to humane treatment in Article 5.2 ACHR.[806]

a) Violence or ill-treatment during deportation

Forced expulsions, during which migrants remain in detention, may also involve the use of physical force or ill-treatment. As long as an individual being deported remains within the authority or control of agents of the State—for example while being escorted on an aircraft that has

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801 *Rodic and Others v. Bosnia and Herzegovina,* ECtHR, Application No. 22893/05, Judgment of 27 May 2008, para. 73.

802 *"Juvenile Reeducation Institute" v. Paraguay,* IACtHR, *op. cit.*, fn. 752, paras. 184.

803 *Keenan v. United Kingdom,* ECtHR, *op. cit.*, fn. 769, paras. 92–101; *Barbato v. Uruguay,* CCPR, Communication No. 84/1981, Views of 21 October 1982, para. 9.2.

804 *Aydin v. Turkey,* ECtHR, *op. cit.*, fn. 403, paras. 83–86; *C.T. and K.M. v. Sweden,* CAT, *op. cit.*, fn. 322, para. 7.5.

805 *Miguel Castro-Castro Prison v. Peru,* IACtHR, Series C No. 160, Judgment of 25 November 2006, paras. 306–313.

806 *Ibid*.

left the territory of the State—he or she remains within the jurisdiction of the State for the purposes of international human rights law (see, Chapter 1, Section I.2). Unjustifiable use of force or violence by State officials or private agents involved in a deportation, including excessive or inappropriate use of physical restraints, may violate the right to life, freedom from torture and other cruel, inhuman or degrading treatment, or rights to respect for physical integrity.[807] Since persons undergoing forced expulsion are deprived of their liberty, the heightened responsibility of the State to respect and protect the rights of those in detention, applies. Standards of the European Committee for the Prevention of Torture on the Deportation of foreign nationals by air[808] note the high risk of inhuman and degrading treatment involved in such deportations and provide guidelines to ensure that use of force during deportation is no more than reasonably necessary and that the risk involved in particular restraint techniques is adequately assessed and taken into account.[809]

IV. Procedural protection

1. Reasons for detention

A person detained for any reason, including for purposes of immigration control, has the right to be informed promptly of the reasons for detention. This right is protected by Article 5.2 ECHR, Article 9.2 ICCPR, Article 7 and 8 ACHR, and Article 14.3 ArCHR. Although Article 5.2 ECHR refers expressly only to the provision of reasons for "arrest", the European Court of Human Rights has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty.[810] The Inter-American Court has held that information on the reasons for detention must be provided

[807] See, *Raninen v. Finland,* ECtHR, *op. cit.*, fn. 398, para. 56; *Öcalan v. Turkey,* ECtHR, Application No. 46221/99, Judgment of 12 March 2003, paras. 182–184, both finding that handcuffing during transportation of prisoners did not normally violate Article 3 where it did not entail the use of force or public exposure beyond what was reasonably necessary, including to prevent absconding.

[808] *CPT Standards, op. cit.*, fn. 629, Deportation of foreign nationals by air, Extract from the 13th General Report [CPT/Inf (2003) 35], p. 66.

[809] On the use of restraints, see also, *Standard Minimum Rules on the Treatment of Prisoners,* principles 33 and 34; *UN Rules for the Protection of Juveniles Deprived of their Liberty,* paras. 63–64.

[810] *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, paras. 136–137. *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, paras. 413–414. The Court reasoned that since Article 5.4 and Article 5.2 are closely linked, with knowledge of the reasons for deprivation of liberty being essential to challenge that detention under Article 5.4, and since Article 5.4 makes no distinction between deprivation of liberty for the purposes of arrest or for other purposes, the right to reasons for detention applies in all cases of detention.

"when the detention takes place, [which] constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained."[811] The Human Rights Committee has stressed that "one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint",[812] bearing consequences for the respect of the detainee's right to *habeas corpus*.

The right to be informed of reasons for detention is also affirmed by international standards and guidelines relating to the detention of migrants and asylum seekers. The *Body of Principles for the Protection of all persons deprived of their liberty* provides in Principle 11.2 that: "a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor." Principle 13 provides that at the commencement of detention, or promptly thereafter, a detained person should be provided with information on and an explanation of his or her rights and how to avail himself of such rights.[813]

The *UNHCR Guidelines on Detention* and the *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum* provide that, if detained, asylum-seekers are entitled to receive prompt and full communication of the legal and factual reasons of detention, including detention orders, and of their rights and available remedies, in a language and in terms that they understand.[814]

Information provided on the reasons for detention must be in simple, non-technical language that can be easily understood, and must include the essential legal and factual grounds for the detention—including the detention order—and information concerning the remedies available to the detainee. The information provided must be sufficiently comprehensive and precise to allow the detainee to challenge his or her detention

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811 *Yvon Neptune v. Haiti,* IACtHR, *op. cit.*, fn. 624, para. 105; *Humberto Sánchez v. Honduras,* IACtHR, Series C No. 99, Judgment of 7 June 2003, para. 82.; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 116, 180; *Nadege Dorzema et al. v. Dominican Republic,* IACtHR, *op. cit.*, fn. 537, para. 132.

812 *Al-Gertani v. Bosnia and Herzegovina,* CCPR, *op. cit.*, fn. 606, para. 10.5; *F.K.A.G. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 9.5.

813 See also, WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principles 1 and 8.

814 See, *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 7; *Twenty Guidelines on Forced Return,* CMCE, *op. cit.*, fn. 510, Guideline 6; and, *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Principle XI.5.

judicially.[815] The principle that the information must be provided in a form that is accessible, may require, in the case of migrants, that it be translated.[816]

Reasons for detention must be provided promptly. Although whether information is conveyed sufficiently promptly will depend on the individual circumstances of each case, they should in general be provided within hours of detention.[817] The right to be provided with reasons for detention has been found to have been violated, for example, where reasons were provided only after 76 hours.[818] It is not essential however that the information be provided at the very moment in which someone is taken into detention.[819]

A "bare indication of the legal basis" for the detention is not sufficient; in addition, there must also be some indication of the factual basis for the detention.[820] The responsibility of the State to inform the detainee of the grounds for detention is not discharged where the detainee has managed to infer from the circumstances or various sources, the basis for the detention. In such circumstances, there remains an obligation on the State to provide the information.[821]

For asylum seekers who are subject to accelerated asylum procedures, and who are detained pending expulsion in accordance with those procedures, the right to reasons for detention applies without qualification. At a regional European level, this right is affirmed in the *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures,* Guideline XI.5 of 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."

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815 *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, fn. 627, paras. 136–137; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, paras. 413–414. See, *Yvon Neptune v. Haiti,* IACtHR, *op. cit.*, fn. 624, paras. 106–107; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 116.

816 *Body of Principles for the Protection of all persons deprived of their liberty,* Principle 14: a person who does not adequately speak the language used by the authorities, is entitled to receive this information in a language he understands. See also, *Rahimi v. Greece,* ECtHR, *op. cit.*, fn. 703, para. 120, where the information sheet on remedies was in Arabic when the applicant spoke only Farsi. The Court found that this led to a violation of the right to *habeas corpus* under Article 5.4 ECHR.

817 *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, paras. 413–416; *Fox, Campbell and Hartely v. United Kingdom,* ECtHR, Applications Nos. 12244/86; 12245/86; 12383/86, Judgment of 30 August 1990, para. 42; *Kerr v. United Kingdom,* ECtHR, Application No. 40451/98, Admissibility Decision, 7 December 1999.

818 *Saadi v. United Kingdom,* ECtHR, *op. cit.*, fn. 625, paras. 81–85.

819 *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, paras. 413–416.

820 *Fox, Campbell and Hartley v. United Kingdom,* ECtHR, *op. cit.*, fn. 817, para. 41; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 116.

821 *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, para. 425.

2. Safeguards following detention

a) Right of access to a lawyer

Migrants brought into detention have the right to prompt access to a lawyer, and must be promptly informed of this right.[822] International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided.[823] Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.[824]

Although Article 5 ECHR does not expressly provide for the right of detainees to have access to a lawyer, the European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate Article 5.4 ECHR where they prevent the detainee from effectively challenging the lawfulness of detention.[825] Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under Article 5.4.[826] In the case of *Suso Musa v. Malta,* the European Court held that, "although the authorities are not obliged to provide free legal aid in the context of detention proceedings [...], the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5, § 4, may raise an issue as to the accessibility of such a remedy."[827]

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822 *Concluding Observations on Australia,* CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol. I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern "at the State Party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right." See also, Article 17.2(d), CPED; WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 2; *European Guidelines on Accelerated Asylum Procedures,* CMCE, *op. cit.*, fn. 119, Guideline XI.5 and 6.

823 *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 132–133, 146. The IACtHR has held that the provision of legal assistance is an obligation inherent to Article 7.6 (right to *habeas corpus*) and Article 8 (due process), and that in cases involving detention free legal assistance is an "imperative interest of justice" (para. 146, our translation).

824 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 7(ii): "Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights"; Body of Principles for the Protection of all persons deprived of their liberty, Principle 18.

825 *Öcalan v. Turkey,* ECtHR, *op. cit.*, fn. 807, para. 72, endorsed by the judgment of the Grand Chamber, *op. cit.*, fn. 47, para. 70.

826 *Istratii v. Moldova,* ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87–101.

827 *Suso Musa v. Malta,* ECtHR, *op. cit.*, fn. 680, para. 61.

b) Right of access to medical attention

On first entering into detention, there is also a right of prompt access to a doctor of one's choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.[828] Standards relating to adequacy of healthcare are discussed above in regard to conditions of detention.

c) Right to inform family members or others of detention

The possibility to notify a family member, friend, or other person with a legitimate interest in the information, of the fact and place of detention, and of any subsequent transfer, is an essential safeguard against arbitrary detention, consistently protected by international standards.[829] Article 18.1 of the *Convention on the Protection of all Persons from Enforced Disappearance* provides that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, have the right of access to at least information on the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to detention; the authority responsible for supervising the detention; the whereabouts of the person, including, in the event of a transfer, the destination and the authority responsible for the transfer; the date, time and place of release; information relating to the state of health of the person; and in the event of their death during detention, the circumstances and cause of death and the destination of the remains.

This right is of general application and applies, therefore, also to detention of migrants and asylum-seekers. The *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* also affirm the importance of this right in the immigration detention context.[830]

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828 *Algür v. Turkey,* ECtHR, Application No. 32574/96, Judgment of 22 October 2002, para. 44; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 220, 225, 227 (the right to medical assistance is derived by the right to physical, mental and moral integrity, to human dignity and not to be subject to torture or cruel, inhuman or degrading punishment or treatment of Articles 5.1 and 5.2 ACHR); Article 14.4 ArCHR; *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991,* CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; *Body of Principles for the Protection of all persons deprived of their liberty,* Principle 24: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." See also, *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Guideline XI.5.

829 Article 17.2(d) CPED; Article 10.2, UN *Declaration on the Protection of All Persons from Enforced Disappearance;* Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty;* CPT, *2nd General Report, op. cit.*, fn. 828, para. 36; WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantee 6; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 2.

830 *European Guidelines on Accelerated Asylum Procedures,* CMCE, *op. cit.*, fn. 119, Principle XI.5.

d) Right of access to UNHCR

Persons seeking asylum have the right, following detention, "to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available."[831] They should be informed of this right promptly following detention, as it is established by the *UN Body of Principles for the Protection of all Persons Deprived of their liberty*.[832] The *Council of Europe Guidelines on Accelerated Asylum Procedures* also affirm that this right must be applied in accelerated asylum procedures.[833]

e) Right to consular access

Article 36 of the *Vienna Convention on Consular Relations* of 1963 (VCCA) provides for the right of non-nationals to consular access while held in any form of detention. It protects:

- the right to communicate freely and have access to consular officers;[834]
- the right of a detainee to have the fact of his or her detention or arrest communicated to the consular officers, if he or she so requests;
- the right to have their communication forwarded to them without delay;
- the right to be informed of his or her rights of communication with consular officers without delay;[835]
- the right to refuse action or assistance by consular officers.[836]

The International Court of Justice has held that, despite the fact that the Convention deals with obligations between States, the right to consular access is a right of the individual.[837] The Court has ruled that "the duty

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831 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 7(vii). See, WGAD, *Annual Report 1998, op. cit.*, fn. 643, Guarantee 14; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 10, which include also the International Committee of the Red Cross and specialized NGOs.

832 *Body of Principles for the Protection of all Persons Deprived of their Liberty,* Principle 16.2.

833 *European Guidelines on accelerated asylum procedures,* CMCE, *op. cit.*, fn. 119, Principle XIV.

834 See this rights also in WGAD, *Annual Report 1998, op. cit.*, fn. 643, para. 69, Guarantee 6; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 2.

835 Article 36.1(b), *Vienna Convention on Consular Relations (VCCR)* (contains all the last three rights).

836 Article 36.1(c) VCCR.

837 *LeGrand (Germany v. United States of America),* ICJ, Judgment, 27 June 2001, ICJ Reports 2001, p. 466, p. 494, para. 77.

upon the detaining authority to give [...] information to the individual [on the right to contact and communicate with the consular authority] arises once it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[838] It has recently reiterated that "[i]t is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect [...]. Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights "without delay".[839] However, the ICJ has held that the requirement to provide information without delay "cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36".[840]

In international human rights law the right to consular access is reflected in Articles 16.7 and 23 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.* This right applies regardless of the regular or irregular status of the migrant. The *International Convention for the Protection of All Persons from Enforced Disappearance* provides for the right to consular access in Article 17.2(d). In non-treaty sources, it is affirmed in Article 38 of the *Standard Minimum Rules of the Treatment of Prisoners,*[841] Article 16.2 of the *Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment,*[842] and Article 10 of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.*[843]

In the Inter-American system, the Inter-American Court of Human Rights has directly interpreted the provisions of Article 36 of the *Vienna Convention on Consular Assistance.* The Court recognised, as did the

838 *Avena and Other Mexican Nationals (Mexico v. United States of America),* ICJ, Judgment, 31 March 2004, ICJ Reports 2004, p. 12, p. 43, para. 63, and p. 49, para. 88.

839 *Diallo (Republic of Guinea v. Democratic Republic of Congo),* ICJ, Judgment, 30 November 2010, para. 95.

840 *Avena and Other Mexican Nationals,* ICJ, *op. cit.*, fn. 838, p. 43, para. 63, and p. 49, para. 87.

841 *Standard Minimum Rules of the Treatment of Prisoners.*

842 *Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment.*

843 *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,* adopted by General Assembly resolution 40/144 of 13 December 1985, A/RES/40/144.

ICJ, the individual nature of the right to consular access under the VCCA.[844] It found that, under this right, it is "imperative that the State advises the detainee of his rights if he is an alien, just as it advises him of the other rights accorded to every person deprived of his freedom".[845] Unlike for the ICJ, "notification must be made at the time the [non-national] is deprived of his freedom, or at least before he makes his first statement before the authorities".[846] Furthermore, the Court has held that the right to consular access "must be recognised and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defence and receive a fair trial".[847] A violation of this right has been interpreted to entail a violation of Article 7.4 *(habeas corpus)* and Article 8 ACHR (right to a fair trial)[848] and Articles XVIII and XXVI ADRDM.[849]

At a European level, there is no legally binding right to consular access, but the right is enshrined in Article 44 of the *European Prison Rules*[850] and in the standards of the *European Committee for the Prevention of Torture*.[851]

3. Judicial review of detention

The right to challenge the lawfulness of detention judicially, protected by Article 9.4 ICCPR, Article 5.4 ECHR, Article 7.6 ACHR and Article 14.6 ArCHR,[852] is a fundamental protection against arbitrary detention, as

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844 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* IACtHR, Advisory Opinion OC-16/99, 1 October 1999, para. 84.

845 *Ibid*., para. 96.

846 *Ibid*., para. 106.

847 *Ibid*., para. 122.

848 *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 151–160.

849 *Moreno Ramos v. United States,* IACHR, Case 12.430, Report No. 1/05, Merits, 28 January 2005, para. 59; *Martinez Villareal v. United States,* IACHR, Case 11.753, Report No. 52/02, Merits, 10 October 2002, paras. 63–77.

850 *Recommendation R(87)3 of the Committee of Ministers to member states on the European Prison Rules,* adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies.

851 *CPT Standards, op. cit.*, fn. 629, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, para. 83.

852 See also Article 37(d) CRC: "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action"; and Article 17.2(f) CPED. See, WGAD, *Annual Report 1998, op. cit.*, fn. 643, Guarantees 3 and 4; WGAD, *Annual Report 1999, op. cit.*, fn. 643, Principle 3; WGAD, *Annual Report 2003,* UN Doc. E/CN.4/2004/3, 15 December 2003, para. 86; WGAD, *Annual Report 2008, op. cit.*, fn. 624, paras. 67 and 82. The African Commission on Human and Peoples' Rights has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR): *IHRDA and Others v. Republic of Angola,* ACommHPR, *op. cit.*, fn. 395, paras. 58–60; *RADDH v. Zambia,* ACommHPR, *op. cit.*, fn. 536, para. 30.

well as against torture or ill-treatment in detention.[853] This right is of vital importance to detained migrants, in particular where no clear individualised grounds for detention have been disclosed to the detainee or to his or her lawyer. Since the right to judicial review of detention must be real and effective rather than merely formal, its consequence is that systems of mandatory detention of migrants or classes of migrants are necessarily incompatible with international human rights standards.[854]

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, whether lawful or unlawful, and requires that they should have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative should have the opportunity to be heard before the court.[855] The right requires that there be prompt access to court when a person is first detained, but also that thereafter there are regular judicial reviews of the lawfulness of the detention.[856] Particular public interest concerns, such as national security, are not grounds to restrict the right to judicial review of detention, in the absence of derogation.[857] The Inter-American Court of Human Rights has stated that "writs of *habeas corpus* and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27.2 and that serve, moreover, to preserve legality in a democratic society."[858]

The right to review of the lawfulness of the detention is designed to protect against arbitrariness: it is therefore a right to review not only of the detention's compliance with national law, but also of its compliance with principles of human rights law, including freedom from arbitrary detention.[859] As the European Court of Human Rights recognised in *Kurt v. Turkey,* "[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,

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853 *Yvon Neptune v. Haiti,* IACtHR, *op. cit.*, fn. 624, para. 115; *Neira Alegría et al. v. Perú,* IACtHR, Series C No. 20, Judgment of 19 January 1995, para. 82; *La Cantuta v. Peru,* IACtHR, Series C No. 162, Judgment of 29 November 2006, para. 111; *Serrano Cruz Sisters v. El Salvador,* IACtHR, Series C No. 120, Judgment of 1 March 2005, para. 79. See also, *Habeas corpus* in emergency situations, IACtHR, *op. cit.*, fn. 557, para. 35.

854 Article 9.4 ICCPR. Nowak states that: "Mandatory detention systems seem to be incompatible with the right to *habeas corpus*", referring to Australian cases: Nowak, *CCPR Commentary, op. cit.*, fn. 730, p. 236.

855 *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, para. 92; De Wilde, *Ooms and Versyp v. Belgium,* ECtHR, Plenary, Applications Nos. 2832/66; 2835/66; 2899/66, Judgment of 18 June 1971, para. 73; *Winterwerp v. the Netherlands,* ECtHR, Application No. 6301/73, Judgment of 24 October 1979; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 124.

856 See, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 107–109.

857 *Al-Nashif v. Bulgaria,* ECtHR, *op. cit.*, fn. 481, para. 94.

858 *Habeas corpus in emergency situations,* IACtHR, *op. cit.*, fn. 557, para. 42.

859 *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 202.

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."[860] Judicial review of detention must provide a practical, effective and accessible means of challenging detention. The principle of accessibility implies that the State must ensure that the detainee has a realistic possibility of using the remedy, in practice as well as in theory.[861] This may require provision of information, legal assistance or translation.

It should be noted that these international human rights standards refer only to remedies that must be made available during detention. They do not address the need for remedies to review the lawfulness of a detention which has already ended.[862] In the latter case, it is the right to an effective remedy which will be relevant.

The right to judicial review of detention protected by international human rights law is also reflected in international refugee law. UNHCR guidelines require both automatic review of detention and regular automatic periodic reviews thereafter, and a right to challenge detention.[863]

a) Requirements of effective judicial review of detention

For a judicial review to meet international human rights law, it must fulfil a number of requirements.

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860 *Kurt v. Turkey,* ECtHR, *op. cit.*, fn. 724, para. 123.

861 *Nasrulloyev v. Russia,* ECtHR, *op. cit.*, fn. 651, para. 86. The need for accessibility is emphasised in the Council of *Europe Guidelines on Human Rights Protection in the context of accelerated asylum procedures, op. cit.*, fn. 119, which state in Principle XI.6 that "detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance." See also, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 129.

862 *Slivenko v. Latvia,* ECtHR, *op. cit.*, fn. 454, paras. 158–159.

863 *UNHCR Guidelines on Detention, op. cit.*, fn. 633, Guideline 7: "(iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24–48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release. (iv) following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached. (v) irrespective of the reviews in (iii) and (iv), either personally or through a representative, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected. The burden of proof to establish the lawfulness of the detention rests on the authorities in question. As highlighted in Guideline 4, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less instrusive means of achieving the same objectives have been considered in the individual case."

- **The review must be clearly prescribed by law.** Both the law permitting detention, and the procedure for its review must be sufficiently certain, in theory and in practice, to allow a court to exercise effective judicial review of the permissibility of the detention under national law, and to ensure that the review process is accessible.[864] The review of detention must be accessible to all persons detained, including children. In *Popov v. France,* the European Court of Human Rights found a violation of Article 5.4 ECHR in respect of children detained in an immigration centre with their parents because "the law [did] not provide for the possibility of placing minors in administrative detention. As a result, children 'accompanying' their parents [found] themselves in a legal vacuum, preventing them from using any remedies available to their parents."[865] In addition to establishing when detention is permissible, the law must prescribe a specific legal process for review of the legality of detention, separate from the legal process leading to a decision to deport. In the absence of such a separate procedure, there will be no means of redress for an initially legitimate detention that becomes illegitimate, for example where a deportation is initially being pursued but is later suspended.[866]
- **The review must be by an independent and impartial judicial body.** This reflects the general standard of the right to a fair hearing, which is given more specific expression in guarantees relating to judicial review of detention.[867]
- **The review must be of sufficient scope and have sufficient powers to be effective.** The scope of the judicial review required will differ according to the circumstances of the case and to the kind of deprivation of liberty involved.[868] The European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention.[869] The review must be by a body which is more than merely advisory, and which has power to issue legally binding judgments capable of leading, where appropriate, to release.[870] The Human Rights Committee has repeatedly emphasised that judicial review requires real and not merely formal review of the

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[864] *Z.N.S. v. Turkey,* ECtHR, *op. cit.*, fn. 756, para. 60; *S.D. v. Greece,* ECtHR, *op. cit.*, fn. 754, para. 73.

[865] *Popov v. France,* ECtHR, *op. cit.*, fn. 704, para. 96.

[866] *Z.N.S. v. Turkey,* ECtHR, *op. cit.*, fn. 756, para. 60.

[867] See, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, para. 108.

[868] *Bouamar v. Belgium,* ECtHR, Application No. 9106/80, Judgment of 29 February 1988.

[869] *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 202; *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, paras. 127–130.

[870] *Chahal v. United Kingdom,* ECtHR, *op. cit.*, fn. 43, para. 128.

grounds and circumstances of detention, judicial discretion to order release. In *A. v. Australia,*[871] it found that allowing the court to order release of detainees only if they did not fall within a particular category of people was insufficient to provide an effective judicial review of detention. It emphasised that "[c]ourt review of the lawfulness of detention [...] must include the possibility of ordering release [and must be], in its effects, real and not merely formal."[872] The Inter-American Court has held that the remedy of *habeas corpus* "is not exercised with the mere formal existence of the remedies it governs. Those remedies must be effective, since their purpose [...] is to obtain without delay a decision "*on the lawfulness of* [the] *arrest or detention,*" and, should they be unlawful, to obtain, also without delay, an "*order* [for] [...] *release".*[873]

- **The review must meet standards of due process.** Although it is not always necessary that the review be attended by the same guarantees as those required for criminal or civil litigation,[874] it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.[875] Thus, proceedings must be adversarial and must always ensure "equality of arms" between the parties. Legal assistance must be provided to the extent necessary for an effective application for release.[876]

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871 *A. v. Australia,* CCPR, *op. cit.*, fn. 656.

872 *C. v. Australia,* CCPR, *op. cit.*, fn. 350, para. 8.3, finding a violation of Article 9.4 where "the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. There was no discretion for a court [...] to review the author's detention in substantive terms for this continued justification." See also, *Danyal Shafiq v. Australia,* CCPR, *op. cit.*, fn. 687: "court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere formal compliance of the detention with domestic law governing the detention"; *Bakhtiyari v. Australia,* CCPR, *op. cit.*, fn. 685: "As to the claim under article 9, para. 4, [...] the court review available to Mrs Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, para. 1, constitutes a violation of article 9, para. 4." See also, *F.K.A.G. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 9.6. To the same effect see, *Rafale Ferrer-Mazorra et al v. United States,* IACHR, *op. cit.*, fn. 395, para. 235.

873 *Suárez-Rosero v. Ecuador,* IACtHR, Series C No. 35, Judgment of 12 November 1997, para. 63; *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 142–143.

874 *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 203.

875 *Bouamar v. Belgium,* ECtHR, *op. cit.*, fn. 868, para. 60. See, *Vélez Loor v. Panama,* IACtHR, *op. cit.*, fn. 536, paras. 107–109.

876 *Ibid*., paras. 60–63; *Winterwerp v. Netherlands,* ECtHR, *op. cit.*, fn. 855, para. 60: "essential that the person concerned has access to a court and the opportunity to be heard in person or through a legal representative"; *Lebedev v. Russia,* ECtHR, Application No. 4493/04, Judgment of 25 October 2007, paras. 84–89; *Suso Musa v. Malta,* ECtHR, *op. cit.*, fn. 680, para. 61.

Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures.[877]

- **The review must be prompt.** What is a reasonable time for judicial review of detention to take place will depend on the circumstances. The Human Rights Committee found in *Mansour Ahani v. Canada* that a delay of nine and a half months to determine lawfulness of detention subject to a security certificate violated Article 9.4 ICCPR.[878] However, in the same case a delay of 120 days before a later detention pending deportation could be challenged was permissible. In *ZNS v. Turkey,*[879] the European Court of Human Rights held that, where it took two months and ten days for the courts to review detention, in a case that was not complex, the right to speedy review of detention was violated. In *Skakurov v. Russia,* the Court held that delays of thirteen and thirty-four days to examine appeals against detention orders in non-complex cases were in breach of Article 5.4 ECHR.[880] In *Embenyeli v. Russia,*[881] where it took five months to process a review of detention, there had also been a violation of Article 5.4.

b) Effective judicial review in national security cases

Special procedures for judicial review of detention in cases involving national security or counter-terrorism concerns, raise particular issues in regard to Article 9.4 ICCPR and equivalent protections, where they rely on the use of "closed" evidence not available to the detainee or his or her representatives. Detention on the basis of national security certificates in Canada, as well as counter-terrorism administrative detentions in the UK, illustrate these difficulties. In *A. v. UK,* the European Court of Human Rights found that the system of review of administrative detention of persons subject to immigration control and suspected of terrorism, which relied on special advocates to scrutinise closed evidence and represent the interests of the detainee in regard to the allegations it raised, without the detainee being aware of them, did not provide sufficient fair procedures to satisfy Article 5.4. The Court held that the detainee had to be provided with sufficient information to enable him to give instructions to the special advocate. Where the open material consisted only of general assertions, and the decision on detention was

877 *De Wilde, Ooms and Versyp v. Belgium,* ECtHR, *op. cit.*, fn. 855, para. 79; *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 691, para. 217: "in view of the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants' fundamental rights, Article 5 para. 4 must import substantially the same fair trial guarantees as Article 6 para. 1 in its criminal aspect".

878 *Ahani v. Canada,* CCPR, *op. cit.*, fn. 503.

879 *Z.N.S. v. Turkey,* ECtHR, *op. cit.*, fn. 756, paras. 61–62.

880 *Shakurov v. Russia,* ECtHR, Application No. 55822/10, Judgment of 5 June 2012, para. 187.

881 *Eminbeyli v. Russia,* ECtHR, *op. cit.*, fn. 662, para. 10.5.

based mainly on the closed material, Article 5.4 would be violated. In *Mansour Ahani v. Canada,*[882] the Human Rights Committee held that a hearing on a security certificate which formed the basis for the detention of a non-national pending deportation was sufficient to comply with due process under Article 14 ICCPR. The Committee based its decision on the fact that the non-national had been provided by the Court with a redacted summary of the allegations against him, and that the Court had sought to ensure that despite the national security constraints in the case, the detainee could respond to the case against him, make his own case and cross-examine witnesses.

4. Reparation for unlawful detention

The UN *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (the Principles) affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.[883]

In accordance with this general principle, persons who are found by domestic or international courts or other appropriate authorities to have been wrongly detained have a right to reparation, in particular compensation, for their wrongful detention (Article 5.5 ECHR; Article 9.5 ICCPR, Article 14.7 ArCHR). Under the ICCPR this right arises whenever there is "unlawful" detention, i.e. detention which is either in violation of domestic law, or in violation of the Covenant. Under the ECHR, it arises only where there is detention in contravention of the Convention itself (although in practice this will include cases where the detention did not have an adequate basis in domestic law).[884] The award of compensation must be legally binding and enforceable:[885] *ex gratia* payments will not be sufficient.

882 *Ahani v. Canada,* CCPR, *op. cit.*, fn. 503, para. 10.5.

883 Articles 2 and 3 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation.*

884 Nowak, *CCPR Commentary, op. cit.*, fn. 730, pp. 180–182.

885 *Brogan and Others v. United Kingdom,* ECtHR, Plenary, Applications Nos. 1209/84, 11234/84, 11266/84, 11386/85, Judgment of 29 November 1988, para. 67.

CHAPTER 5: ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN MIGRATION

Economic, social and cultural (ESC) rights are an essential part of the corpus of international human rights law. They are recognised in the UDHR and guaranteed by the ICESCR as well as other UN human rights treaties (CERD, CEDAW, CRC, CRPD) and at a regional level by several treaties including, but not limited to, the *European Social Charter,* the American *Convention on Human Rights,* the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,* the *African Charter on Human and Peoples' Rights* (ACHPR) and the *Arab Charter of Human Rights* (ArCHR). They encompass a range of guarantees relating to the right to work, workplace and trade union rights (addressed in Chapter 6); rights to health, education, social security, and an adequate standard of living including housing, food, water and sanitation; and rights to engage in cultural activities. Some of these rights, or aspects of them, are also protected under civil and political rights instruments such as the ICCPR and the ECHR.

As with civil and political rights, economic, social and cultural rights are universally applicable, to citizens and to non-citizens, including all categories of migrants. They are subject to principles of non-discrimination on a number of grounds including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular guarantees relating to the ESC rights of children are set out in the CRC, as well as relating to the ESC rights of women in CEDAW. ESC rights provide a framework for considering questions of migrants' entitlements to social services in the host State, and the State's obligation to provide for the basic living needs of migrants who, because of their migration status or for other reasons, are unable to work.

I. General Principles

1. Duties to Respect, Protect and Fulfil

As with all human rights under international human rights law, ESC rights carry legally binding obligations on States to respect, protect and fulfil. The CESCR has adopted and developed this three-tier classification of State obligations to guarantee the Covenant rights.[886]

[886] See, generally, ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29, pp. 42–53. See also a complete description in *SERAC and CESR v. Nigeria,* ACommHPR, *op. cit.*, fn. 29, paras. 44–48; and, CEDAW, *General Recommendation No. 24, op. cit.*, fn. 29, paras. 13–17. See also, Article 6, *Maastricht Guidelines, op. cit.* fn. 29. See also, CMW, *General Comment No. 2, op. cit.*, fn. 2, paras. 60–79.

The duty to respect requires the State not to intervene unduly in the enjoyment of a particular right. These duties apply to situations such as: State-organised or sanctioned forced evictions, direct threats to health by State actors, interruption of existing levels of medical treatment provided by the State, arbitrary termination of employment in the public sphere.[887]

The duty to protect requires the State to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular right. Such duties arise, for example, in cases of privately conducted forced evictions, labour conditions in the private labour market, failure to comply with health or education requirements in the private sphere, discrimination in contracts directed at providing basic services, such as health, water, housing or education, and abusive termination or modification of contracts.

The duty to fulfil imposes obligations on a State to, as appropriate, facilitate, provide or promote access to ESC rights. The obligation to fulfil imposes a duty on the State to guarantee a minimum essential level of each right to all individuals who cannot, for reasons beyond their control, realise the right without assistance.

2. Obligations of immediate effect and progressive realisation

Under the ICESCR, obligations to respect and, in most instances, to protect the Covenant rights are of immediate effect. Similarly, non-discrimination and the guarantee of the enjoyment of at least "minimum essential levels" of the rights[888] are immediate obligations.

In addition, States have immediate obligations under Article 2.1 ICESCR "to take steps", **to the maximum of the resources available to the State,** to realise the Covenant rights. This obligation is not in itself qualified or limited by other considerations. Steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.[889]

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887 See, endorsement of justiciability of duty to respect in *SERAC and CESR v. Nigeria,* ACommHPR, *op. cit.,* fn. 29, paras. 45, 54, 61–62, 66.

888 See, CESCR, *General Comment No. 3, op. cit.*, fn. 147, paras. 9–10. See also, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* adopted 2 to 6 June 1986, reproduced in UN doc. E/CN.4/1987/17 (Limburg Principles); and, *Report of the UN High Commissioner for Human Rights,* focussing on the concept of "progressive realization" of economic, social and cultural rights, 2007 substantive session of the UN ECOSOC, UN Doc, E/2007/82, 25 June 2007.

889 CESCR, *General Comment No. 3, op. cit.,* fn. 147, para. 2.

This notwithstanding, certain aspects of the Covenant rights, as regards the obligation to fulfil, are subject to the principle of "progressive realisation" (Article 2.1 ICESCR), an acknowledgement that their full realisation might not be achieved immediately and that there may be resource constraints that should be taken into account when assessing State compliance with some of these obligations.

3. Prohibition of retrogressive measures

Article 2.1 ICESCR also prohibits States from taking retrogressive measures in regard to the rights contained therein.[890] The prohibition of retrogression "means that any measure adopted by the State that suppresses, restricts or limits the content of the entitlements already guaranteed by law, constitutes a *prima facie* violation. It entails a comparison between the previously existing and the newly passed legislation, regulations and practices, in order to assess their retrogressive character."[891] A State adopting retrogressive measures breaches its ESC rights obligations unless it can show that the measures:

- were taken in pursuit of a pressing goal;
- were strictly necessary; and
- there were no alternative or less restrictive measures available.[892]

4. Non-discrimination and application to non-nationals

Irrespective of whether a particular obligation is of immediate effect or is to be realised progressively, it must not be implemented so as to exclude or unjustifiably discriminate against non-nationals. Article 2 ICESCR protects against discrimination in relation to the Covenant rights. The CESCR has made clear that the prohibition of discrimination also includes discrimination against non-citizens on the grounds of nationality. Although this is not an express ground, it is included under "other grounds" in Article 2.2 ICESCR. The Committee has stated that: "[t]he ground of nationality should not bar access to Covenant rights [...]. The Covenant rights apply to everyone including non-nationals,

890 See, *ibid.*, para. 9.

891 ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29, p. 6.

892 See, CESCR, *General Comment No. 3, op. cit.*, fn. 147, para. 9. See, *Free Legal Assistance Group and Others v. Zaire,* ACommHPR, Communications Nos. 25/89, 47/90, 56/91, 100/93, 19th Ordinary Session, March 1996, para. 48 and holding; *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Perú,* IACtHR, Series C No. 198, Judgment of 1 July 2009, para. 103; *Miranda Cortez et al. v. El Salvador,* IACHR, Case No. 12.249, Report No. 27/09, Merits, 20 March 2009, para. 105 (finding prohibition of retrogressive measures under Article 26 ACHR); and, *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru,* IACHR, Case No. 12.670, Report No. 38/09, Merits, 27 March 2009, para. 140.

such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[893] An exception, permitting limitations on the application of the Covenant rights to non-nationals is given for developing countries in Article 2.3 ICESCR.[894]

The CRC also includes protection against discrimination in regard to the ESC rights of children protected by the Convention, including on the basis of the child's or the child's parents' national origin. The Committee on the Rights of the Child has stated that "the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children—including asylum-seeking, refugee and migrant children—irrespective of their nationality, immigration status or statelessness."[895]

The Inter-American Court of Human Rights has ruled that the principles of equality and non-discrimination, including on the basis of nationality, are peremptory norms of international law, *(jus cogens)* and therefore impose binding obligations on all States, to respect and fulfil them.[896] As clarified by the Court, "the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person's migratory status in a State. In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause."[897]

The African Commission has held that measures depriving non-nationals of rights which are not expressly guaranteed only to citizens (such as the right to vote) will constitute arbitrary discrimination under Article 2 of the African Charter, as "[r]ights under the African Charter are to be enjoyed by all, without discrimination, by citizens and non-nationals residents alike."[898]

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893 CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 30. See also, Article 42, *Limburg Principles, op. cit.*, fn. 888. Certain kinds of discrimination between citizens and non-citizens are also covered by Article 26 ICCPR, but the Human Rights Committee did not precise many cases of application. See, CCPR, *General Comment No. 28, op. cit.*, fn. 22, para. 31.

894 However, it is inferred that this provision was limited to end domination of certain economic groups of non-nationals during colonial times. The fact that the exception is set only for developing countries means that no other country can advance any exception on this ground. See, Articles 43–44, *Limburg Principles, op. cit.*, fn. 888. Its application has been excluded for children by the CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 16.

895 CRC, *General Comment No. 6, op. cit.*, fn. 138, paras. 12 and 18.

896 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, para. 101 (our emphasis) and holding at para. 4.

897 *Yean and Bosico Case,* IACtHR, *op. cit.*, fn. 281, para. 155.

898 *IHRDA v. Angola,* ACommHPR, *op. cit.*, fn. 395, para. 80.

The European Court of Human Rights has held that when a State decides to provide benefits to a migrant, it must do so in a way that is compliant with Article 14 ECHR,[899] which prohibits unjustified discrimination in the enjoyment of other ECHR rights "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The Court ruled that immigration status could be considered as an "other status" on which unjustified discrimination was prohibited under Article 14 and "the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual" did not preclude this classification, since "a wide range of legal and other effects flow from a person's immigration status".[900] However, "[g]iven the element of choice involved in immigration status, [...] while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, [when] the subject matter [...] is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide."[901] Because of this wider margin of appreciation given to the authorities, the European Court found it justifiable to discriminate in the prioritization for the assignment of housing benefits by disfavouring migrants who are undocumented or that are present in the national territory on the condition that they had no recourse to public funds, as this specific discrimination "pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants."[902]

The European Committee on Social Rights has considered the exclusion of certain categories of foreign nationals (those unlawfully present on the territory) from the Charter rights. Drawing on the nature of the Charter as a living instrument inspired by the values of dignity, autonomy, equality and solidarity, the Committee found that the exclusion of undocumented migrants did not apply to rights such as the right to healthcare, "of fundamental importance to the individual since [they are] connected to the right to life itself and [go] to the very dignity of the human being".[903] The Committee has stressed that "this choice in applying the Charter follows from the legal need to comply with the peremptory norms of general international law *(jus cogens)* such as the rules requiring each state to respect and safeguard each individual's right to life and physical

899 *Bah v. the United Kingdom,* ECtHR, Application No. 56328/07, Judgment of 27 September 2011, para. 40.

900 *Ibid*., para. 46.

901 *Ibid*., para. 47.

902 *Ibid*., para. 50.

903 *International Federation of Human Rights Leagues (FIDH) v. France,* ECSR, Complaint No. 14/2003, Merits, 8 September 2004, paras. 30–32.

integrity."[904] The Committee failed to apply this approach to the right to social protection/benefits under Article 23 of the ESC(r),[905] to the right to adequate housing (Article 31.1 ESC(r)), even for unaccompanied minors[906] or the right to protection against poverty and social exclusion (Article 30 ESC(r)),[907] but it found that the right to immediate shelter "is closely connected to the right to life and is crucial for the respect of every person's human dignity"[908] and is therefore applicable to undocumented migrants.[909] The Committee has also considered of fundamental importance the obligation to "provide protection and special aid from the State for children and young persons temporarily or definitively deprived of their family's support".[910] The right to health (Article 11 ESC(r)), the right to social and medical assistance (Aritcle 13 ESC(r)) have been equally considered applicable to undocumented foreign minors.[911] The Committee has also held that "the part of Article 16 relating to the right of families to decent housing and particularly the right not to be deprived of shelter applies to foreign families unlawfully present in the country".[912]

5. Remedies for violations of ESC Rights

Although the extent to which ESC rights are justiciable[913] has been controversial, arguments that ESC rights cannot be adjudicated on by courts, or that they are policy objectives rather than rights, have been authoritatively dismissed, and ESC rights are regularly adjudicated on by national courts. International judicial or quasi-judicial bodies also adjudicate on a comprehensive catalogue of ESC rights, as described further in Annex II.

The way in which ESC rights can be claimed in courts and the remedies available will vary according to the legal system and the domestic

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904 *Defence for Children International (DCI) v. Belgium,* ECSR, Complaint No. 69/2011, Merits, 23 October 2012, para. 33.

905 *International Federation of Human Rights Leagues (FIDH) v. Ireland,* ECSR, Complaint No. 42/2007, Merits, 3 June 2008, para. 18.

906 *Defence for Children International (DCI) v. the Netherlands,* ECSR, Complaint No. 47/2008, Merits, 20 October 2009, paras. 44–45.

907 *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, paras. 143–147.

908 *Ibid*., para. 47.

909 *Ibid*., paras. 46–48.

910 Article 17(1)(c) ESC(r). See, *DCI v. the Netherlands,* ECSR, *op. cit.*, fn. 906, para. 66; *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, para. 39.

911 *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, paras. 102, 119–122.

912 *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, para. 136.

913 "Justiciability" "refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur, [and it] implies access to mechanisms that guarantee recognised rights": ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29, p. 6. The case *Purohit and Moore v. The Gambia,* ACommHPR, Communication No. 241/2001 (2003), 33rd Ordinary Session, 15–29 May 2003, paras. 78–85, constitutes a good example, and not the only, of justiciability of ESC rights.

law and to national implementation of international obligations. The effectiveness will also depend on the legal system of each country and to what extent ESC rights have been incorporated into domestic law. Nevertheless, even where national legal systems do not provide directly for remedies for ESC rights, their invocation may be a useful tool for the interpretation of national laws concerning the provision of benefits or social services for migrants, and may also help to support an eventual communication against a violation submitted to an international human rights mechanism.

The CESCR has stressed that, "[w]hile the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions".[914] The Committee accepts the possibility of resorting to administrative remedies for some rights. These must in any case be "accessible, affordable, timely and effective".[915] However, the Committee stressed that there are some obligations "in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant."[916] It stressed that judicial review and the judiciary's application of domestic law must be undertaken in consonance with the ICESCR, otherwise "[n]eglect by the courts of this responsibility is incompatible with the principle of the rule of law".[917] The right of access to courts for non-citizens without any discriminatory implementation, denial or omission of ESC rights has been also highlighted by the CERD.[918]

As noted in Section I.4, the obligation of non-discrimination is of immediate effect.[919] In addition, the CESCR has found of immediate effect the principle of gender equality (Article 3 ICESCR), the right to fair wages and equal remuneration for work of equal value without distinction of any kind (Article 7.1 ICESCR), freedom of association and trade unions rights (Article 8 ICESCR), essential rights relating to child labour (Article 10.3 ICESCR), the right to be free from hunger and to access basic shelter (article 11 ICESCR), the right to free and compulsory primary education (Article 13.2(a) ICESCR), the right of parents to have their children educated in respect of their religious and moral convictions (Article 13.3 ICESCR), the liberty of individuals and bodies to establish educational institutions (Article 13.4 ICESCR), and the freedom

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914 *General Comment No. 9,* The domestic application of the Covenant, CESCR, UN Doc. E/C.12/1998/24, 3 December 1998, para. 10.

915 *Ibid*., para. 9.

916 *Ibid*., para. 9

917 *Ibid*., paras. 14 and 15.

918 See, CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 29.

919 CESCR, *General Comment No. 3, op. cit.*, fn. 147, paras. 1 and 5. See, Articles 22 and 35, *Limburg Principles, op. cit.*, fn. 888.

of scientific research and creative activity (Article 15.3) ICESCR). The CESCR clearly rejected any inference that these elements of rights and obligations might be non-self-executing.[920] The list is illustrative and non-exhaustive.[921] Furthermore, it must be recalled that, even in the case of obligations subject to progressive realisation, national courts can review compliance with ESC rights based on principles of reasonableness, proportionality and necessity.

Box 14. ESC Rights in regional courts

ESC rights are adjudicated by a number of international courts and tribunals. The Inter-American Court of Human Rights and the African Commission supervise and rule on the implementation of the ESC rights included in their main instruments.[922] The European Court has a more limited role due to the scarce presence of the ESC rights in the European Convention, but it includes protection for some rights also protected as ESC rights including the right to education (Article 2 of Protocol 1) and other ECHR rights allow it to adjudicate on some aspects of ESC rights, including the right to respect for private and family life and to respect for the home (Article 8 ECHR) and the right to property (Article 1 Protocol 1). The European Court can also find violations of ESC rights under the general prohibition of discrimination set out in Article 1 of Protocol 12 ECHR (for those States Parties that have ratified the Protocol), which prohibits discrimination in regard to "any right set forth by law".[923] The European Committee of Social Rights can receive collective complaints, and, despite the restrictive scope of the *European Social Charter,* its jurisprudence is opening up to adjudicating on at least a minimum common core of ESC rights for all migrants, regardless of their status. Finally,

920 *Ibid*., para. 5.

921 See, CESCR, *General Comment No. 9, op. cit.*, fn. 914, para. 10.

922 See, *SERAC and the CESR v. Nigeria,* ACommHPR, *op. cit.*, fn. 29, para. 68. In *Socio-Economic Rights Accountability Project (SERAP) v. Nigeria,* ACommHPR, Communication No. 300/2005, 5th Extraordinary Session, 21–29 July 2008, para. 65, the Court said that the "African Charter [...] constitutes a normative base for socio-economic rights claims which allow any claim brought under the Charter to be litigated before national courts."

923 In particular, the *Explanatory Report to Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* ETS No. 177, clarifies that the prohibition of discrimination refers to "the enjoyment of any right specifically granted to an individual under national law; [...] the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; [unjustified discrimination] by a public authority in the exercise of discretionary power (for example, granting certain subsidies); [or] by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."

a recently agreed Optional Protocol to the ICESCR, which allows for individual complaints to the Committee on Economic, Social and Cultural Rights, will, when entered into force, provide a universal international mechanism for adjudication on ESC Rights (see, Annex 2).

a) Means of judicial enforcement

A number of national courts, as well as international bodies and experts have developed jurisprudence which may clarify the content and define standards facilitating the legal enforcement of ESC rights. Principles developed in this jurisprudence include the following:

- The question as to whether a State has discriminated against certain individuals and groups, has failed to respect and protect ESC rights or has taken retrogressive measures in relation to the rights (see, above, Section 3) are subject to adjudication by national courts as immediate and/or negative obligations.[924]
- Even for aspects of rights that are subject to progressive realisation, courts can judicially review compliance with them based on principles of reasonableness, proportionality and necessity.[925]
- A number of national legal systems will judicially enforce ESC rights within the scope of the "minimum core content".[926] "Minimum core" refers to the absolute minimum essential level of each right without which the right would be meaningless.[927] The CESCR has established that "a State Party in which any significant number of

[924] See, for example, Belgian Court of Arbitration, Case No. 5/2004, January 14, 2004 and Portugal Constitutional Tribunal, Decision No. 39/84, April 11, 1984.

[925] See, Article 4 ICESCR, and CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant,* UN Doc. E/C.12/2007/1, 10 May 2007, para. 8. See also, ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29, at pp. 33–36.

[926] See, German Federal Constitutional Court *(BVerfG)* and German Federal Administrative Court *(BVerwG)*: BVerfGE 1,97 (104f); BVerwGE 1,159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (133, 134); BVerfGE 45, 187 (229); BVerfGE 82, 60 (85) and BVerfGE 99, 246 (259). Swiss Federal Court, *V. v. Einwohnergemeinde X und Regierungsrat des Kanton Bern,* BGE/ATF 121I 367, 27 October 1995. Brasilian Federal Supreme Court *(Supremo Tribunal Federal),* RE 436996/SP (opinion written by Judge Calso de Mello), 26 October 2005. Argentine Supreme Court, *Reynoso, Nida Noemi c/INSSJP s/amparo,* 16 May 2006 (majority vote agreeing with Attorney General's brief). See, for more explication on this point, ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29.

[927] See, CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 47 (on right to health). See also, Article 9, *Maastricht Guidelines, op. cit.*, fn. 29. This notion of minimum core seems reflected in the obligation "to respect the basic human rights of all migrant workers", enshrined in Article 1 of the *Migrant Workers (Supplementary Provisions) Convention (C143),* ILO, adopted on 24 June 1975. Despite the low ratification of this Convention, such an approach would make applicable this provision also to State non-Parties.

individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant."[928] In order to avoid a violation the State "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".[929] An example of "minimum core content" has been provided by the Executive Committee of the UNHCR, which found under the *Geneva Refugee Convention*, a right of asylum-seekers, even in situations of large-scale influx, to "receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities".[930]

- In a number of national legal systems, courts often rely on a broad interpretation of civil and political rights, such as the right to life, to develop protection against the most serious violations of ESC rights.[931] The Inter-American Court has determined that the right to life includes a "right not to be prevented from access to conditions that may guarantee a decent life, which entails the adoption of measures to prevent the breach of such right".[932] This entails a duty to respect and protect on the State.[933] The Court has recognised obligations to take positive, concrete measures to fulfil the right to a decent life, as part of the right to life,[934] as also guaranteed by Article 11 ICESCR.[935] The European Court of

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928 CESCR, *General Comment No. 3, op. cit.*, fn. 147, para. 10.

929 *Ibid*., para. 10.

930 *Conclusion No. 22,* UNHCR, *op. cit.*, fn. 151, para. II(B)(2)(c). See also, for refugee women, *Conclusion No. 64 (XLI) on Refugee Women and International Protection,* ExCom, UNHCR, 41st session, 1990, para. (a)(ix). The minimum core for refugee children and adolescent is higher, due to the link with the general principle of the "best interest of the child". The UNHCR ExCom has found within the minimum core for children the right to education, adequate food, and the highest attainable standard of health. See, *Conclusion No. 84* (UNHCR, *op. cit.*, fn. 214, para. (a)(iii).

931 See, ICJ, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, op. cit.*, fn. 29, Chapter 4, at pp. 65–72.

932 *Sawhoyamaxa Indigenous Community v. Paraguay,* IACtHR, Series C No. 146, Judgment of 29 March 2006, para. 153. See also, *"Street Children" (Villagran-Morales et al.) v. Guatemala,* IACtHR, Series C No. 63, Judgment of 19 November 1999 (Street Children Case), paras. 144 and 191; *Yakye Axa Indigenous Community v. Paraguay,* IACtHR, Series C No. 125, Judgment of 17 June 2005, paras. 161–163.

933 *Street Children Case,* IACtHR, *op. cit.*, fn. 932, para. 144.

934 *Yakye Axa Indigenous Community v. Paraguay,* IACtHR, *op. cit.*, fn. 932, para. 162.

935 See, Article 11 ICESCR and Article 27(2) CRC. See also, CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 44; *Concluding Observations on Japan,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 56th Session, UN Doc. A/56/18 (2001), p. 35, para. 177; *Concluding Observations on Gambia,* CRC, Report of the Committee on the Rights of the Child on its 28th Session, UN Doc, CRC/C/111 (2001), 28 September 2001, para. 450.

Human Rights has held that forced evictions,[936] forced displacements and destruction of homes,[937] and the exposure of housing to unhealthy environmental conditions[938] may amount to a violation of the right to privacy, family life and home, to a violation of the right to property,[939] and even to inhuman and degrading treatment.[940]

Box 15. Destitution, the right to life and freedom from cruel, inhuman or degrading treatment

The Inter-American Court has recognised that the right to life includes a "right not to be prevented from access to conditions that may guarantee a decent life, which entails the adoption of measures to prevent the breach of such right".[941] This entails a duty on the State to respect and protect. Indeed, the State has an obligation to "guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents

936 See, for example, *Connors v. the United Kingdom,* ECtHR, Application No. 66746/01, Judgment of 27 May 2004, paras. 35–45.

937 See, for example, *Akdivar and Others v. Turkey,* ECtHR, GC, Application No. 21893/93, Judgment of 16 September 1996, para. 88; *Cyprus v. Turkey,* ECtHR, *op. cit.*, fn. 410, paras. 174–175; *Yöyler v. Turkey,* ECtHR, Application No. 26973/95, Judgment of 10 May 2001, paras. 79–80; *Demades v. Turkey,* ECtHR, Application No. 16219/90, Judgment of 31 October 2003, paras. 31–37; *Selçuk and Asker v. Turkey,* ECtHR, Applications Nos. 23184/94–23185/94, Judgment of 21 April 1998, paras. 86–87; *Bilgin v. Turkey,* ECtHR, Application No. 23819/94, Judgment of 16 November 2000, paras. 108–109; *Ayder and Others v. Turkey,* ECtHR, Application No. 23656/94, Judgment of 8 January 2004, paras. 119–121; *Moldovan and Others (2) v. Romania,* ECtHR, Applications Nos. 41138/98, 64320/01, Judgment of 12 July 2005, paras. 105, 108–110.

938 See, for example, *López Ostra v. Spain,* ECtHR, Application No. 16798/90, Judgment of 9 December 1994, paras. 51, 56–58; *Guerra and Others v. Italy,* ECtHR, GC, Application No. 14967/89, Judgment of 19 February 1998, para. 60; *Taskin and Others v. Turkey,* ECtHR, Application No. 46117/99, Judgment of 10 November 2004, paras. 115–126; *Moreno Gomez v. Spain,* ECtHR, Application No. 4143/02, Judgment of 16 November 2004, paras. 60–63; *Fadeyeva v. Russia,* ECtHR, Application No. 55723/00, Judgment of 9 June 2005, paras. 94–105, 116–134.

939 See, for example, *Akdivar and Others v. Turkey,* ECtHR, *op. cit.*, fn. 937, para. 88; *Cyprus v. Turkey,* ECtHR, *op. cit.*, fn. 410, paras. 187–189; *Yöyler v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 79–80; *Demades v. Turkey,* ECtHR, *op. cit.*, fn. 937, para. 46; *Xenides-Arestis v. Turkey,* ECtHR, Application No. 46347/99, Judgment of 22 December 2005, paras. 27–32; *Selçuk and Asker v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 86–87; *Bilgin v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 108–109; *Ayder and Others v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 119–121. In *Oneryildiz v. Turkey,* ECtHR, GC, Application No. 48939/99, Judgment of 30 November 2004, the Court decided that the applicant's proprietary interest in a precarious hut built irregularly in State-owned land was of a sufficient nature to be considered a 'possession' in the sense of Article 1 of Protocol 1 ECHR.

940 *Yöyler v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 74–76; *Selçuk and Asker v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 77–80; *Bilgin v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 100–104; *Moldovan and Others (2) v. Romania,* ECtHR, *op. cit.*, fn. 937, paras. 111, 113–114.

941 See, fn. 932.

from violating it".[942] There is also a "duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority".[943]

The European Court has held that neither the right to life (Article 2 ECHR) nor any other provision of the ECHR "can be interpreted as conferring on an individual a right to enjoy any given standard of living".[944] However, it has found that in certain cases where, contrary to standards or duties in its own national law, the State fails to provide for the basic material needs of asylum seekers, the extreme poverty and destitution that results, in combination with uncertainty as to how long such destitution will continue, will violate the freedom from inhuman or degrading treatment under Article 3 ECHR.[945] In such cases, the particular vulnerability of asylum seekers and their need for particular protection by the State, are factors that heighten the State's obligations to provide them with decent material conditions.[946]

The European Committee on Social Rights has found that certain rights of the *European Social Charter (revised)* are of fundamental importance since they are connected to the right to life,[947] and are therefore available to all on the territory, despite the treaty limitation to citizens and migrants legally present on the territory.

II. Specific rights of significance for migrants

This Section outlines the international human rights law jurisprudence related to certain ESC rights that have particular significance for migrants, and which may be useful in litigation on migrants' rights. The rights dealt with are the right to an adequate standard of living, including the right to food, to water and sanitation and to adequate housing;

942 *Street Children Case,* IACtHR, *op. cit.*, fn. 932, para. 144.

943 *Yakye Axa Indigenous Community v. Paraguay,* IACtHR, *op. cit.*, fn. 932, para. 162.

944 *Wasilewski v. Poland,* ECtHR, Application No. 32734/96, Admissibility Decision, 20 April 1999, para. 3. See also, *Pavlyulynets v. Ukraine,* ECtHR, Application No. 70767/01, Judgment of 6 September 2005, para. 28.

945 *M.S.S. v. Belgium and Greece,* ECtHR, *op. cit.*, fn. 324, paras. 250–263; *Rahimi v. Greece,* ECtHR, *op. cit.*, fn. 703, paras. 87–94.

946 *Ibid*., para. 251.

947 *FIDH v. France,* ECSR, *op. cit.*, fn. 903, para. 30; *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, para. 33.

the right to the highest attainable standard of health; the right to social security; and the right to education. The right to work, workplace rights, and other related rights are addressed separately in Chapter 6.

1. The right to an adequate standard of living

Article 11 ICESCR provides that "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".[948] Other rights, whose respect and realisation are necessary to the attainment of an adequate standard of living—for example the right to water and sanitation—are also protected by Article 11.[949]

The right to a continuous improvement of living conditions is an obligation of progressive realisation. The other rights contained in Article 11—including the right to food, water and housing—include obligations of immediate effect and core elements that must be realised immediately.[950]

a) The right to water and sanitation

The right to water "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use".[951] The right to water is intrinsically linked with the right to life and human dignity, as well as with the right to the highest attainable standard of health, the right to housing and the right to food.[952] Water must be **available,** and be of sufficient **quality** to be safe and healthy.[953] States have an immediate obligation to ensure access to the minimum essential amount of safe water, on a **non-discriminatory** basis,[954] es-

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948 Article 11.1 ICESCR. See, Article 14.2(h), ICEDAW; Article 27 CRC; Article 70, ICRMW; Article 28, CRPD. See also, CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 44; *Concluding Observations on Japan,* CERD, *op. cit.*, fn. 935, para. 177; *Concluding Observations on Gambia,* CRC, *op. cit.*, fn. 935, para. 450.

949 See, CESCR, *General Comment No. 15, op. cit.*, fn. 148, para. 3.

950 CESCR, *General Comment No. 3, op. cit.*, fn. 147, para. 10. See also, CESCR, *General comment No. 14, op. cit.*, fn. 37, para. 43; and *General Comment No. 19, The right to social security,* CESCR, UN Doc. E/C.12/GC/19, 4 February 2008, para. 59.

951 CESCR, *General Comment No. 15, op. cit.*, fn. 148, para. 2. The right to water is also recognized explicitly in some human rights treaties: Article 14.2(h) CEDAW; Article 24.2(c) CRC; Article 28.2(a) CRPD; Articles 20, 26, 29, 46 of the *Convention (III) relative to the Treatment of Prisoners of War,* Geneva, 12 August 1949 (III Geneva Convention); Articles 85, 89, 127, *IV Geneva Convention;* Articles 54 and 55 *API to the Geneva Conventions;* and Articles 5 and 14 *APII of the Geneva Conventions.* A more detailed analysis is contained in See, CESCR, *General Comment No. 15, op. cit.*, fn. 148, to which we remand.

952 See, *ibid.*, paras. 1 and 3.

953 See, *ibid.*, para.12.

954 See, *ibid.*, para. 13.

pecially for disadvantaged or marginalised groups.[955] States should give particular attention to those categories of people who have traditionally encountered difficulties in the enjoyment of such right, including refugees, asylum-seekers and migrants.[956] All persons or groups who have been denied their right to water must have access to an effective judicial or other appropriate remedy which can provide reparation, including restitution, compensation, satisfaction and guarantees of non-repetition, in case of violation.[957]

The right to sanitation is fundamental to human dignity and privacy, and is linked to the right to safe water supplies and resources, as well as to rights to health and housing.[958] It requires States to progressively extend safe sanitation services, taking into account the particular needs of women and children.[959]

b) The right to food

Article 11.1 provides for the right to adequate food. Article 11.2 ICESCR recognises "the fundamental right of everyone to be free from hunger",[960] which is a right of immediate effect. In accordance with this right, a State is "obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[961]

The CESCR has recognised that the right to food is linked to the inherent dignity of the human person and indispensible for the fulfilment of other human rights.[962] The African Commission too stressed that the right to food "is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation."[963]

The right to adequate food is fully realised when "every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement".[964] While some aspects of this right are likely to be realised only progressively, the obligation under Article 11.2 to ensure freedom from hunger is of immediate effect, being a core obligation of the right to food. The

955 See, *ibid.*, para. 37.

956 See, *ibid.*, para. 16.

957 See, *ibid.*, para. 55.

958 See, *ibid.*, para. 29.

959 See, *ibid.*, para. 29. See also, Article 14.2 CEDAW; Article 24.2 CRC.

960 Article 11.2 ICESCR. See also Article 24.2(c) CRC; Article 28.1 CRPD.

961 CESCR, *General Comment No. 12, op. cit.*, fn. 148, para. 14.

962 *Ibid*., para. 4.

963 *SERAC and CESR v. Nigeria,* ACommHPR, *op. cit.*, fn. 29, para. 65.

964 CESCR, *General comment No. 12, op. cit.*, fn. 148, para. 6.

same applies to the obligation to respect, and in most instances protect, the existing access to adequate food or means for its procurement. The right to adequate food implies the **availability** of "food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture", and the **accessibility** "of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights".[965]

The CESCR has emphasised that unjustified discrimination in access to food, or in means of its procurement, will violate Article 11,[966] and that States must ensure access to an effective judicial or other appropriate remedy which can provide reparation, including restitution, compensation, satisfaction and guarantees of non-repetition, for violations of the right to food.[967]

c) Right to adequate housing

The right to adequate housing[968] is likely to be of particular relevance to migrants. It is protected as part of the right to an adequate standard of living in Article 11 ICESCR, and is also expressly protected in a number of global and regional instruments. It is distinct from civil and political rights of respect for the home,[969] which are related to the right to respect for private life, although there is some overlap in protection with this right. The right to adequate housing, as protected under ESC rights treaties, establishes a right to adequate shelter and accommodation and entails duties to respect, protect and fulfil. The right to housing includes rights to: security of tenure, which requires legal protection against forced eviction, harassment and other threats; the right to have adequate housing with facilities essential for health, security, comfort and nutrition; financial costs associated with housing at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised; housing that is habitable, safe, protects from the elements and from disease and provides adequate space; housing that is accessible to those entitled to it; and that is located so as to allow

965 *Ibid*., para. 8.

966 *Ibid*., para. 18.

967 See, *ibid.*, para. 32.

968 See, Article 11.1 ICESCR; Article 25.1 UDHR; Article 5(e)(iii) ICERD; Article 14.2 CEDAW; Article 27.3 CRC; Article 28.1 and 28.2(d) CRPD; Article XI ADRDM; Articles 16 and 31 ESC(r); Article 16, *Protocol to the ACHPR on the Rights of Womenin Africa;* Article 10 of the *Declaration on Social Progress and Development,* GA resolution 2542(XXIV), 11 December 1969; section III (8) of the *Vancouver Declaration on Human Settlements,* 1976 (Report of Habitat: United Nations Conference on Human Settlements (United Nations publication, Sales No. E.76.IV.7 and corrigendum); chap. I); Article 8(1), *Declaration on the Right to Development,* General Assembly resolution No. 41/128, UN Doc. A/RES/41/128, 4 December 1986; and *Workers' Housing Recommendation (R115),* ILO, adopted on 28 June 1961.

969 See, Article 17 ICCPR, Article 8 ECHR, Article IX ADRDM, Article 11 ACHR, Article 10 ACRWC, Article 12 UDHR.

access to employment, health-care services, schools, child-care centres and other social facilities.[970]

The CESCR foresees that aspects of the right to housing should be judicially enforceable, whether against the State or private third parties. Legal actions might be aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; seeking compensation following an illegal eviction; challenges against illegal action carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; lawsuits against any form of discrimination in the allocation and availability of access to housing; and complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating collective or class action suits in situations involving significantly increased levels of homelessness.[971]

It should be noted that particularly poor conditions of housing might amount to cruel, inhuman or degrading treatment under Article 16 CAT and equivalent provisions in other treaties.[972]

i) Forced evictions

The prohibition of forced evictions is one aspect of the right to housing that is of immediate effect and breaches should be able to be challenged in court, whether the eviction is by State or third party actors.[973] The CESCR defines "forced eviction" as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[974] Eviction affects not only several ESC rights, but may also, depending on the circumstances, affect

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970 *General Comment No. 4, The right to adequate housing,* CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 13 December 1991, para. 8. The European Committee on Social Rights takes a similar approach in its jurisprudence. See, *European Roma Rights Centre (ERRC) v. Greece,* ECSR, Complaint No. 15/2003, Merits, 8 December 2004, para. 24. The Committee found a 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 regards to Roma (see §§ 42–43). See also, *ERRC v. Italy,* ECSR, Complaint No. 27/2004, Merits, 7 December 2005, para. 35; *ERRC v. Bulgaria,* ECSR, Complaint No. 31/2005, Merits, 18 October 2006, para. 34; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France,* ECSR, Complaint No. 39/2002, Merits, 5 December 2007, para. 74; *ERRC v. France,* ECSR, Complaint No. 51/2008, Merits, 19 October 2009, para. 46. On the protection of right to adequate housing by Articles 16 and 31, see, *ERRC v. Bulgaria,* ECSR, paras. 15–18. However, the right to adequate housing under the European Social Charter, at least on its face, covers only foreigners of other Contracting States lawfully resident in the territory of the State.

971 CESCR, *General Comment No. 4, op. cit.*, fn. 970, para. 17.

972 *Concluding Observations on Slovenia,* CAT, *op. cit.*, fn. 353, para. 211.

973 *General Comment No. 7, The right to adequate housing: forced evictions,* CESCR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 20 May 1997, para. 8.

974 *Ibid*., para. 3.

civil and political rights, such as "the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions."[975] Consequently, if the domestic legal system does not allow for legal actions directly protecting against forced evictions under the right to housing, the matter may sometimes be brought to court under other rights protected by international human rights law, such as the right to respect for the home.[976]

In order not to be arbitrary, under the CESCR, evictions must be carried out in compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. They must be precisely provided for by law, in primary legislation, must be in accordance with a legitimate aim, and proportionate to the aim pursued.[977] Evictions must take place pursuant to a precise, fair and open procedure, with the opportunity for genuine consultation with those affected, information made available within a reasonable time[978] and reasonable notice for all affected persons prior to the scheduled date of eviction. The evicted person must be provided with legal remedies and, where possible, legal aid to persons who are in need of it to seek redress from the courts.[979]

In particular "[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[980]

The ECSR has held that "illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure, and these should be sufficiently protective of the rights of the persons concerned."[981]

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975 *Ibid*., para. 4.

976 Article 17 ICCPR, Article 8 ECHR, Article IX ADRDM, Article 11 ACHR, Article 10 ACRWC, Article 12 UDHR.

977 See, CESCR, *General Comment No. 7, op. cit.*, fn. 973, para. 14, which refers also to CCPR, *General Comment No. 16, op. cit.*, fn. 791.

978 See, Miloon Kothari, "Basic Principles and Guidelines on development-based evictions and displacement", in *Annual Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living,* UN Doc. A/HRC/4/18, 5 February 2007, Annex 1.

979 CESCR, *General Comment No. 7, op. cit.*, fn. 973, para. 15.

980 *Ibid*., para. 16. See also, *Concluding Observations on Norway,* CESCR, UN Doc. E/C.12/1/Add.109, 13 May 2005, para. 38.

981 *ERRC v. Greece,* ECSR, *op. cit.*, fn. 970, para. 51; *ERRC v. Bulgaria,* ECSR, *op. cit.*, fn. 970, para. 51; *International Movement ATD Fourth World (ATD) v. France,* ESCR, Complaint No. 33/2006, Merits, 5 December 2007, paras. 77–78; *FEANTSA v. France,* ECSR, *op. cit.*, fn. 970, paras. 85–86; *ERRC v. France,* ECSR, *op. cit.*, fn. 970, para. 67.

Evictions must be justified and carried out in conditions that respect the dignity of the persons concerned. Alternative accommodation must be made available. The law must establish procedures and timing of the eviction, provide legal remedies and offer legal aid to those who need it to seek redress to courts. Finally, the system must provide for compensation. Legal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction.[982]

It should also be noted that forced evictions, either by the State or by private parties, may amount to cruel, inhuman or degrading treatment, for example when this involves destruction of the home, or is based on discriminatory grounds.[983]

ii) Discrimination in housing and equal application to migrants

The enjoyment of the right to housing, including the prohibition of arbitrary forced evictions, must not be subject to any form of discrimination, whether caused by actions of the State or of third parties.[984] This principle applies to non-citizens, regardless of their status.[985] Furthermore, the *ILO Convention No. 97* and the *European Social Charter (revised)* both provide for the obligation of host countries to apply a treatment no less favourable than that which it applied to its own nationals, without discrimination in respect of nationality, race, religion or sex, in respect of accommodation.[986]

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982 See, *ERRC v. Italy,* ECSR, *op. cit.*, fn. 970, para. 41; *ERRC v. Bulgaria,* ECSR, *op. cit.*, fn. 970, para. 52; *ATD v. France,* ECSR, *op. cit.*, fn. 981, paras. 77–78; *FEANTSA v. France,* ECSR, *op. cit.*, fn. 970, paras. 85–86; *ERRC v. France,* ECSR, *op. cit.*, fn. 970, para. 68.

983 *Yöyler v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 74–76; *Selçuk and Asker v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 77–80; *Bilgin v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 100–104; *Moldovan and Others (2) v. Romania,* ECtHR, *op. cit.*, fn. 937, paras. 111, 113–114. See, *Sudan Human Rights Organisations and Others v. Sudan,* ACommHPR, Communications Nos. 279/03 and 296/05, 45th Ordinary Session, May 2009, para. 159.

984 CESCR, *General Comment No. 4, op. cit.*, fn. 970, para. 6; CESCR, *General Comment No. 7, op. cit.*, fn. 973, para. 10. See also, *Concluding Observations on Belgium,* CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/1995/22 (1995), p. 34, para. 157; *Concluding Observations on Denmark,* CESCR, *op. cit.*, fn. 188, paras. 21 and 34; *Concluding Observations on Cyprus,* CESCR, *op. cit.*, fn. 784, para. 21; *Concluding Observations on Luxembourg,* CERD, UN Doc. CERD/C/LUX/CO/13, 18 April 2005, para. 17; *Concluding Observations on France,* CERD, UN Doc. CERD/C/FRA/CO/16, 18 April 2005, para. 12.

985 CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 32. See, Article 5(e)(iii) ICERD. See also, *Concluding Observations on Luxembourg,* CERD, *op. cit.*, fn. 984, para. 17; *Concluding Observations on France,* CERD, *op. cit.*, fn. 984, para. 12. The principle has also been upheld by the Council of Europe Committee of Ministers in *Recommendation R(88)14 of the Committee of Ministers to member states on migrants' housing,* adopted by the Committee of Ministers on 22 September 1988 at the 419th meeting of the Ministers' Deputies.

986 Article 6.1, *Migration for Employment Convention (Revised) (C97),* ILO, adopted on 1 July 1949; and Article 19.4.3 ESC(r). Article 19 ESC(r), contrary to almost all provisions of that treaty, is applicable to all migrant workers and foreigners, regardless of their status or provenience.

As for the regime applicable under international law for refugees and asylum-seekers, the *Geneva Refugee Convention* provides that "States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances".[987]

The Committee on the Elimination of Discrimination Against Women has recommended with regard to women migrant workers that States should, under Articles 2(c), (f), and 3 of the CEDAW, "provide temporary shelter for women migrant workers who wish to leave abusive employers, husbands or other relatives and provide facilities for safe accommodation during trial".[988]

The European Court of Human Rights has ruled that, when a State decides to provide housing benefits, it must do so in a way that is compliant with Article 14 ECHR[989] which prohibits unjustified discrimination in the enjoyment of other ECHR rights "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." However, the Court has also ruled that, while immigration status constitutes one of the prohibited grounds of discrimination under Article 14 ECHR (see, Section I, 4), it is justifiable to discriminate in the prioritization for the assignment of housing benefits by disfavouring migrants who are undocumented or that are present in the national territory on the condition that they had no recourse to public funds, as this specific discrimination"pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants".[990]

The European Committee on Social Rights has ruled that the right to shelter (Article 31.2 ESC(r)) is to be granted to all migrants, regardless of their status.[991] It requires the State to provide shelter as long as the undocumented migrants are under its jurisdiction and unable to provide housing for themselves. The living conditions of the shelter "should be such as to enable living in keeping with human dignity".[992] The Committee found that, "since

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987 Article 21, *Geneva Refugee Convention*.

988 CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(c)(iv).

989 *Bah v. the United Kingdom, op. cit.*, fn. 899, para. 40.

990 *Ibid*., para. 50.

991 See, *DCI v. the Netherlands,* ECSR, *op. cit.*, fn. 906, paras. 46–48. The Committee reads the obligation to provide shelter for undocumented unaccompanied children also under Article 17.1(c) ESC(r): the obligation to "provide protection and special aid from the State for children and young persons temporarily or definitively deprived of their family's support". On the same line, CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(i).

992 *DCI v. the Netherlands,* ECSR, *op. cit.*, fn. 906, para. 62. For full reasoning on content of right to shelter see paras. 61–65.

in the case of unlawfully present persons no alternative to accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect of their human dignity."[993] The Committee has also further determined that "failure to accommodate [undocumented] minors shows, in particular, that the Government has 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,"[994] in breach of their right to to appropriate social, legal and economic protection under Article 17.1 ESC(r). Furthermore, failure to appropriately accommodate undocumented children or young persons, whether accompanied or not by their family, breaches the State's obligation to take "the necessary measures to guarantee these minors the special protection against physical and moral hazards required by Article 7, §10, thereby causing a serious threat to their enjoyment of the most basic rights, such as the right to life, to psychological and physical integrity and to respect for human dignity."[995]

The European Committee of Social Rights also affirmed that lack of accommodation for children and young persons leads to violations of their right to access health services and of the obligation of States to prevent epidemic and endemic diseases under Article 11 ESC(r). The Committee has specifically ruled 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."[996]

iii) Protection of the right to housing through civil and political rights

The ECHR affords protection from destruction of homes[997] and forced evictions[998] under the right to respect for the home and family and

[993] *Ibid*., para. 62.

[994] *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, para. 82.

[995] *Ibid*., para. 97.

[996] *Ibid*., para. 117.

[997] *Akdivar and Others v. Turkey,* ECtHR, *op. cit.*, fn. 937.

[998] *Mentes v. Turkey,* ECtHR, GC, Application No. 23186/94, Judgment of 28 November 1997.

private life (Article 8 ECHR). Article 8 requires that State action which interferes with a person's home or displaces them from it must be adequately prescribed by law, serve a legitimate aim, be necessary in a democratic society and be proportionate to the aim pursued. However, the Court has emphasised that Article 8 does not recognise a right to be provided with a home.[999] The Court also held that, in applying the proportionality test, "it is highly relevant whether or not the home was established unlawfully."[1000] Moreover, if no alternative accommodation is available the interference is more serious than where such accommodation is available.[1001] Article 8 also requires procedural safeguards to be available to ensure a fair decision process in cases where the right to respect for the home is at issue.[1002]

The *European Convention* also affords protection for housing rights through the right to property (Article 1 Protocol 1 ECHR). However, in order to fall within the application of this provision, there must be a property right in the home itself.[1003] Article 1 of Protocol 1 prohibits arbitrary deprivation of possessions. It recognises that States are entitled to control the use of property in accordance with the public interest.[1004] Any such interference with property rights must be adequately prescribed by law and be proportionate to the public interest served.[1005]

The African Commission has found that arbitrary eviction and expropriation of houses constitutes a violation of the right to property (Article 14 ACHPR).[1006] Although the Charter does not contain an express right

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999 *Chapman v. United Kingdom,* ECtHR, GC, Application No. 27238/95, Judgment of 18 January 2001, para. 99. See also, *Beard v. United Kingdom,* ECtHR, GC, Application No. 24882/94, Judgment of 18 January 2001, para. 110; *Coster v. United Kingdom,* ECtHR, GC, Application No. 24876/94, Judgment of 18 January 2001, para. 113; *Lee v. United Kingdom,* ECtHR, GC, Application No. 25289/94, Judgment of 18 January 2001, para. 101; *Smith v. United Kingdom,* ECtHR, GC, Application No. 25154/94, Judgment of 18 January 2001, para. 106.

1000 *Chapman v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 102. See also, *Beard v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 113; *Coster v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 116; *Lee v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 104; *Smith v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 109.

1001 *Chapman v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 103. See also, *Beard v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 114; *Coster v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 117; *Lee v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 105; *Smith v. United Kingdom,* ECtHR, *op. cit.*, fn. 999, para. 110.

1002 See, *Connors v. the United Kingdom,* ECtHR, *op. cit.*, fn. 936, para. 83.

1003 The situation of "possession" will not have to be established *de jure* by showing property titles, but, in absence of adverse claims, can be established also by situations *de facto*, such as the fact that the occupants built the house or lived there for generations (the last being rarely applicable to migrants). See, *Dogan and Others v. Turkey,* ECtHR, Applications Nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, paras. 138–139.

1004 See, Article 1 Protocol 1 ECHR.

1005 *Chassagnou and Others v. France,* ECtHR, GC, Applications Nos. 25088/94–28331/95–28443/95, Judgment of 29 April 1999.

1006 *Malawi African Association and Others v. Mauritania,* ACommHPR, Communications Nos. 54/91, 61/91, 98/93, 164/97–196/97, 27th Ordinary Session, 11 May 2000, paras. 127–128.

to housing, the African Commission has stated that "the corollary of the provisions protecting the right to enjoy the best attainable state of mental and physical health [...], the right to property, and the protection accorded to the family" mean that the right to shelter or housing, including protection from forced evictions are effectively engaged under the Charter.[1007]

2. Health

The right to health, or, more precisely, the right to the highest attainable standard of health, is recognised in numerous international instruments.[1008] It encompasses both the liberty to control one's own health and body, and the entitlement to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.[1009] As the CESCR has noted, "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[1010] The right to health requires that healthcare be available and accessible to all without discrimination. It must be affordable, including to socially disadvantaged groups, and culturally accessible to minorities.[1011]

The CESCR has clarified that States have a core obligation to ensure the satisfaction of minimum essential levels of healthcare rights.[1012] These core obligations are:

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger;

1007 *SERAC and CESR v. Nigeria,* ACommHPR, *op. cit.*, fn. 29, paras. 60–63.

1008 Article 12 ICESCR; Article 25.1 UDHR; Article 5(e)(iv) ICERD; Articles 11.1(f) and 12 CEDAW; Article 24 CRC; Article 25 CRPD; Article 11 ESC(r); Article 16 ACHPR; Article 10, *Protocol of San Salvador;* Article XI ADRDM; Article 14, *Protocol to the ACHPR on the Rights of Women in Africa;* Article 14 ACRWC; *Constitution of the World Health Organisation,* adopted 19 June to 22 July 1946. The right to health has been proclaimed by the Commission on Human Rights, as well as in the *Vienna Declaration and Programme of Action* of 1993 and other international instruments.

1009 CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 8.

1010 *Ibid*., para. 4.

1011 *Ibid*., para. 12

1012 *Ibid*., para. 43. Definition of primary health care is also enshrined in the *Declaration of Alma-Ata,* adopted 6–12 September 1978 at the International Conference on Primary Health Care.

- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- To provide essential drugs;
- To ensure equitable distribution of all health facilities, goods and services;
- To adopt and implement a national public health strategy and plan of action; the process by which the strategy and plan of action are devised, as well as their content, should give particular attention to all vulnerable or marginalised groups;
- To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- To provide immunisation against major infectious diseases;
- To take measures to prevent, treat and control epidemic and endemic diseases;
- To provide education and access to information on significant health problems.[1013]

a) Non-discrimination in healthcare and equal application to migrants

As with all ESC rights, States must respect the principle of non-discrimination and the prohibition of retrogressive measures that affect the right to health.[1014] The duty of non-discrimination in regard to the right to health includes discrimination towards migrants and asylum-seekers, regardless of their status.[1015] This is confirmed by the CERD and CESCR:

[1013] Taken verbatim from *ibid.*, paras. 43–44.

[1014] *Ibid*., para. 30.

[1015] See, *ibid.*, para. 34. See also, *Concluding Observations on Serbia and Montenegro,* CESCR, UN Doc. E/C.12/1/Add.108, 13 May 2005, para. 60; *Concluding Observations on Italy,* CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/2001/22 (2001), p. 34, paras. 123 and 138; *Concluding Observations on Belgium,* CESCR, UN Doc. E/C.12/BEL/CO/3, 3 December 2007, paras. 21 and 35; *Concluding Observations on France,* CESCR, UN Doc. E/C.12/FRA/CO/3, 16 May 2008, paras. 26 and 46. See also, *Concluding Observations on Kyrgyzstan,* CRC, Report of the Committee on the Rights of the Child on its 24th Session, UN Doc. CRC/C/97 (2000), p. 51, para. 311; *Concluding Observations on Slovenia,* CRC, UN Doc. CRC/C/15/Add.230, 26 February 2004, paras. 54–55; *Concluding Observations on Oman,* CRC, UN Doc. CRC/C/OMN/CO/2, 29 September 2006, para. 46; *Concluding Observations on the Netherlands,* CRC, UN Doc. CRC/C/NLD/CO/3, 30 January 2009, paras. 51–52; *Concluding Observations on Sweden,* CRC, 2009, *op. cit.*, fn. 209, paras. 60–61. See also, *Concluding Observations on Bhutan,* CEDAW, *op. cit.*, fn. 489, paras. 29–30; *Concluding Observations on Ecuador,* CMW, *op. cit.*, fn. 502, paras. 39–40; CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(i) and (l); CEDAW, *General Recommendation No. 24, op. cit.*, fn. 29. Indeed, CEDAW also recommended that "special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women [...]", CEDAW, *General Recommendation No. 24, op. cit.*, fn. 29, para. 6.

CERD has affirmed that States have the obligation to "[e]nsure [...] the right of non-citizens to an adequate standard of physical and mental health by, *inter alia,* refraining from denying or limiting their access to preventive, curative and palliative health services".[1016] The CESCR has determined that "[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care."[1017] Nevertheless, this is a minimum requirement. When a health-care system normally provides treatment beyond primary and emergency medical care, the exclusion of asylum-seekers, or documented or undocumented migrant workers and members of their families from the system would violate Article 12 ICESCR read together with Article 2, Article 5 ICERD, or (in cases involving children) Article 24 CRC.[1018]

The CRC has stressed that, "[w]hen implementing the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health under article 24 of the Convention, States are obligated to ensure that unaccompanied and separated children have the same access to health care as children who are [...] nationals."[1019] It also pointed out that, under Article 39 CRC, States have the obligation to "provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally appropriate and gender-sensitive mental health care should be developed and qualified psychosocial counselling provided."[1020] The Executive Committee of UNHCR has stressed that the minimum core of protection for refugee or asylum-seeker children is higher than for adults. On the right to health, they have an immediate right to the highest attainable standard of health,[1021] and States are under the obligation to provide "medical or other special care, including rehabilitation assistance, to assist the social reintegration of refugee children and adolescents, especially those that are unaccompanied or orphaned."[1022] The Human Rights Committee

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1016 CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 36 (based on Article 5(e)(iv) ICERD), and CESCR, *General Comment No. 14, op. cit.*, fn. 37, para. 34, which specifically includes asylum-seekers and illegal migrants.

1017 CESCR, *General comment No. 19, op. cit.*, fn. 950, para. 37.

1018 See, *Concluding Observations on Italy,* CESCR, *op. cit.*, fn. 1015, paras. 123 and 138; *Concluding Observations on Belgium,* CESCR, *op. cit.*, fn. 1015, paras. 21 and 35; *Concluding Observations on France,* CESCR, *op. cit.*, fn. 1015, paras. 26 and 46. See also, *Concluding Observations on Slovenia,* CRC, *op. cit.*, fn. 1015, paras. 54–55; *Concluding Observations on the Netherlands,* CRC, *op. cit.*, fn. 1015, paras. 51–52; *Concluding Observations on Sweden,* CRC, 2009, *op. cit.*, fn. 209, paras. 60–61; *Concluding Observations on Norway,* CERD, UN Doc. CERD/C/NOR/CO/18, 19 October 2006, para. 21.

1019 CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 46.

1020 *Ibid*., para. 48.

1021 *Conclusion No. 84,* UNHCR, *op. cit.*, fn. 214, para. (a)(iii).

1022 *Ibid*. para. (b)(vi).

has suggested that certain grave practices against the health of people, particularly women, may amount to a violation of the right to life.[1023]

The *ILO Convention No. 97* provides for duties for State Parties related to the right to health of migrants. They pertain to medical examinations, care and hygiene before the migration journey, during the journey and on arrival.[1024]

As highlighted in the previous section on the right to housing, the European Committee of Social Rights stressed particularly the connection of the right to housing with the right to health, finding that lack of adequate accommodation for children and young persons may lead to violations of their right to access health services and may breach the obligation of States to prevent epidemic and endemic diseases under Article 11 ESC(r). Indeed, the Committee considered "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."[1025]

b) Protection of the right to health through civil and political rights

The European Court of Human Rights, although it has not expressly recognised a right to health, has found that the right to respect for private and family life "is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants [and might be] applicable to [...] complaints about insufficient funding of [health] treatment."[1026]

According to the Court, the right to life (Article 2 ECHR) might also enter into play as "[i]t cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2 [and] an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".[1027] The Court also found that the right to life (Article 2 ECHR)

[1023] See, CCPR, *General Comment No. 28, op. cit.*, fn. 22, para. 10.

[1024] Article 5, *Migration for Employment Convention (Revised) (C97),* ILO.

[1025] *DCI v. Belgium,* ECSR, *op. cit.*, fn. 904, para. 117.

[1026] *Pentiacova and Others v. Moldova,* ECtHR, Application No. 14462/03, Admissibility Decision, 4 January 2005; *Sentges v. the Netherlands,* ECtHR, Application No. 27677/02, Admissibility Decision, 8 July 2003; *Powell v. United Kingdom,* ECtHR, Application No. 45305/99, Admissibility Decision, 4 May 2000.

[1027] *Ibid*. See also, *Powell v. United Kingdom,* ECtHR, *op. cit.*, fn. 1026; *Cyprus v. Turkey,* ECtHR, *op. cit.*, fn. 410, para. 219; *Nitecki v. Poland,* ECtHR, Application No. 65653/01, Admissibility Decision, 21 March 2002.

"require[s] States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives."[1028] The Court has, however, stressed that "where a [...] State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients" then errors of judgment on the part of health professionals or negligent co-ordination among health professionals in the treatment of a particular patient will not violate the State's positive obligations under Article 2 ECHR.[1029] In practice, when the authorities were or ought to have been aware of the need for appropriate treatment in order to avert a real and immediate risk to life, and failed to take timely measures to provide such treatment, then Article 2 ECHR may be violated.[1030] The Court has also ruled that, "just as it is not open to a State authority to cite lack of funds or resources as an excuse for not honouring a judgment debt [...], the same principle applies *a fortiori* when there is a need to secure the practical and effective protection of the right protected by Article 2, a right fundamental in the scheme of the Convention".[1031]

The European Court of Human Rights has also recognised that States have a positive duty under the right to a family life (Article 8 ECHR) and the right to life (Article 2) to ensure that the right to a healthy environment is respected and guaranteed both by public authorities and private entities and individuals.[1032]

The Inter-American Court of Human Rights has held that "States are responsible for regulating and supervising the rendering of health services, so that the rights to life and humane treatment may be effectively protected. All of this requires setting up a legal system which effectively respects and guarantees the exercise of such rights, and supervising permanently and effectively the rendering of services on which life and humane treatment depend."[1033] The Court therefore affirmed an obligation of States to grant a minimum standard of the right to health and to supervise its implementation both by public and private entities in light of the right to life and humane treatment (Articles 4 and 5 ACHR).[1034]

1028 *Calvelli and Ciglio v. Italy,* ECtHR, GC, Application No. 32967/96, Judgment of 17 January 2002, para. 49. See also, *Erikson v. Italy,* ECtHR, Application No. 37900/97, Admissibility Decision, 26 October 1999; *Nitecki v. Poland,* ECtHR, *op. cit.*, fn. 1027.

1029 *Panaitescu v. Romania,* ECtHR, Application No. 30909/06, Judgment of 10 April 2012, para. 28.

1030 *Ibid*., para. 36.

1031 *Ibid*., para. 35.

1032 See, *López Ostra v. Spain,* ECtHR, *op. cit.*, fn. 938, paras. 51–58 (Article 8 ECHR); *Oneryildiz v. Turkey,* ECtHR, *op. cit.*, fn. 939, paras. 71, 90, 94–96 (Article 2 ECHR); *Guerra and Others v. Italy,* ECtHR, *op. cit.*, fn. 938, paras. 56–60.

1033 *Albán-Cornejo et al. v. Ecuador,* IACtHR, Series C No. 171, Judgment of 22 November 2007, para. 121.

1034 See, *ibid.*, paras. 117–122.

The African Commission has held that "[d]enying people food and medical attention [...] constitutes a violation of Article 4 [right to life]"[1035] as well as of the right to health (Article 16 ACHPR). The African Commission has determined that the right to health includes a duty to protect citizens from adverse consequence of pollution, whether caused by State or private action, in addition to the duties of States under the right to a healthy environment (Article 24 ACHPR).[1036] The African Commission has also found that the "failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine"[1037] constitutes a violation of the right to enjoy the best attainable state of physical and mental health.

3. Social Security

The right to social security is recognised by several international human rights treaties and instruments.[1038] Under the CESCR, it includes "the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia,* from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents."[1039]

The CESCR has also defined the minimum core content of the right to social security. This includes:

a) To ensure access to a social security scheme that provides a minimum essential level of benefits that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education;

b) To ensure the right to access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalised individuals and groups;

c) To respect existing social security schemes and protect them from unreasonable interference.[1040]

[1035] *Malawi African Association and Others v. Mauritania,* ACommHPR, *op. cit.*, fn. 1006, paras. 120 and 122.

[1036] *SERAC and CESR v. Nigeria,* ACommHPR, *op. cit.*, fn. 29, paras. 52–53.

[1037] *Free Legal Assistance Group and Others v. Zaire,* ACommHPR, *op. cit.*, fn. 892, para. 47.

[1038] Article 9 ICESCR; Article 5(e)(iv) ICERD; section III(f), *Declaration concerning the aims and purposes of the International Labour Organisation* (Declaration of Philadephia), adopted on 10 May 1944; Articles 22 and 25.1 UDHR; Articles 11.1(e) and 14.2(c) CEDAW; Article 26 CRC; Article XVI ADRDM; Article 9, *Protocol of San Salvador;* Articles 12, 13 and 14 ESC(r).

[1039] CESCR, General Comment No. 19, *op. cit.*, fn. 950, para. 2.

[1040] *Ibid*., para. 59.

a) Discrimination in social security and equal application to migrants

The duty to give immediate effect to obligations of non-discrimination also applies in relation to social security.[1041] The CESCR has recommended that States should give special attention to the social security needs of refugees, asylum-seekers, and non-nationals[1042] and has unequivocally stated that "Article 2, paragraph 2, prohibits discrimination on grounds of nationality".[1043] More precisely,

> *"[w]here non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. [...] Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."*[1044]

The CERD has determined that making distinctions between the treatment of nationals and non-nationals does not necessarily amount to impermissible discrimination under CERD. The CERD found it sufficient that access to social benefits did not discriminate among foreigners of different nationalities and treated all non-nationals on an equal footing,

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1041 *Ibid*., paras. 29–30, 40. See also, *Concluding Observations on Azerbaijan,* CESCR, UN Doc. E/C.12/1/Add.104, 14 December 2004, para. 48; *Concluding Observations on China,* CESCR, UN Doc. E/C.12/1/Add.107, 13 May 2005, paras. 96, 114 and 124; *Concluding Observations on Austria,* CESCR, UN Doc. E/C.12/AUT/CO/3, 25 January 2006, paras. 15 and 29 (on equal amount of social benefits); *Concluding Observations on Costa Rica,* CESCR, UN Doc. E/C.12/CRI/CO/4, 4 December 2007, para. 21; *Concluding Observations on Cyprus,* CESCR, *op. cit.*, fn. 784, para. 18; *Concluding Observations on Australia,* CESCR, UN Doc. E/C.12/AUS/CO/4, 12 June 2009, para. 20. See also, *Concluding Observations on Canada,* CERD, UN Doc. CERD/C/CAN/CO/18, 25 May 2007, para. 23 (including undocumented migrants and non-removable failed asylum-seekers); *Concluding Observations on Switzerland,* CERD, UN Doc. CERD/C/CHE/CO/6, 23 September 2008, para. 17. See, *Concluding Observations on Costa Rica,* CEDAW, Report of the Committee on the Elimination of Discrimination against Women to the General Assembly, 58th Session, UN Doc. A/58/38 (2003), p. 86, para. 63 (for women migrant workers and migrant domestic workers in formal and informal sector); *Concluding Observations on Lithuania,* CRC, UN Doc. CRC/C/LTU/CO/2, 17 March 2006, paras. 62–63 (access to social welfare for children regardless of their migration status).

1042 See, *ibid.*, para. 31.

1043 *Ibid*., para. 36.

1044 *Ibid*., paras. 36–38. See also, Article 9, *Migrant Workers (Supplementary Provisions) Convention (C143),* ILO.

allowing them the same possibility to apply for permanent residence, which would entitle them to the same benefits.[1045]

The *ILO Convention No. 97* and the *Geneva Refugee Convention* both affirm the obligation of a host country to apply to refugees, asylum seekers, and migrant workers, treatment no less favourable than that applied to its own nationals, without discrimination in respect of nationality, race, religion or sex, in respect of "social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme)".[1046] The *ILO Convention on Equality of Treatment (Social Security) (No. 118)* also affirms this principle.[1047]

Concerning refugees and asylum-seekers, the *Geneva Refugee Convention* mandates States to "accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals".[1048] On the enjoyment of social benefits, the Convention provides that "States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of [...] [s]ocial security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme)".[1049] The Convention nevertheless provides for restrictions to this right. The Convention accepts that "[t]here may be appropriate arrangements for the maintenance of acquired rights and rights in course

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1045 *D.R. v. Australia,* CERD, Communication No. 42/2008, Views of 15 September 2009, para. 7.1 (equally on the right to education, para. 7.2.); and *D.F. v. Australia,* CERD, Communication No. 39/2006, Views of 3 March 2008, paras. 7.1–7.2.

1046 Article 6.1, *Migration for Employment Convention (Revised) (C97),* ILO; and Article 24, *Geneva Refugee Convention*. These Articles also provides for specific limitations to this right. The Committee of Experts has found that such limitations might not imply or lead to an automatic exclusion of any given category of migrant workers from the benefits. See, *Representation (article 24)—2003—China, Hong Kong SAR—C097—Report of the Committee set up to examine the representation alleging non-observance by China—Hong Kong SAR of the Migration for Employment Convention (Revised), 1949 (No. 97) made under article 24 of the ILO Constitution by the Trade Union Congress of the Philippines (TUCP),* Document No. (ilolex): 162003CHN097 (*TUCP v. China,* ILO), para. 41.

1047 See, *Equality of Treatment (Social Security) Convention (C118),* ILO, adopted on 28 June 1962. It is not a highly ratified Convention, but some most developed countries are part of it. See for interpretation of the Committee of Experts, *Representation (article 24)—2003—Netherlands—C118—Report of the Committee set up to examine the representation made by the Confederation of Turkish Trade Unions (TURK-IS) under article 24 of the Constitution of the ILO, alleging non-observance by the Netherlands of the Equality of Treatment (Social Security) Convention, 1962 (No. 118),* Document No. (ilolex): 162003NLD118, Geneva, 9 November 2006 (*TURK-IS v. Netherlands,* ILO).

1048 Article 23, *Geneva Refugee Convention*.

1049 Article 24(1), *ibid.*

of acquisition",[1050] and that "[n]ational laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension."[1051]

Otherwise, the regime granted by the Convention is quite favourable to the refugee or asylum-seeker, provided that he or she is legally present on the territory. The Convention recognises that "[t]he right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State."[1052] In addition, it mandates States to "extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question."[1053]

b) Protection of rights to social security through civil and political rights

The right to social security is not only an ESC right but has also been applied under the umbrella of certain civil and political rights, and principally under the right to property.

The European Court of Human Rights has held that the right to benefits, such as emergency assistance, is a pecuniary right protected by the right to property (Article 1 of Protocol 1 ECHR), "without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay 'taxes or other contributions'."[1054] In the case of *Gaygusuz v. Austria,* the Court found that the non-recognition by the Austrian authorities of the applicant's right to emergency assistance based on the sole fact of his foreign nationality was unreasonable and in violation of the prohibition of non-discrimination (Article 14 ECHR).[1055] In *Koua Poirrez v. France,* the Court established that the same prohibition of discrimination on the sole basis of nationality applied to non-contributory social schemes.[1056] It must, however, be

[1050] Article 24(1)(b)(i), *ibid.*

[1051] Article 24(1)(b)(ii), *ibid.*

[1052] Article 24(2), *ibid.*

[1053] Article 24(3), *ibid.*

[1054] *Gaygusuz v. Austria,* ECtHR, Application No. 17371/90, Judgment of 16 September 1996, para. 41.

[1055] See, *ibid.*, paras. 41, 46–52

[1056] See, *Poirrez v. France,* ECtHR, Application No. 40892/98, Judgment of 30 September 2003, paras. 37–50.

stressed that in both cases the migrant workers concerned were legally resident. It is not clear if the European Court would apply the same regime to undocumented migrants.

The European Court has found that the right to respect for family life (Article 8 ECHR) covers maternity benefits[1057] and child benefits.[1058] In the case *Okpisz v. Germany,* the Court held that granting child benefits to non-nationals who were in possession of a stable permit and not to others constituted arbitrary discrimination under Article 14 ECHR read together with Article 8.[1059]

The Court also recognised as protected by the right to property the right to be a beneficiary of an old age insurance system, which cannot, however, be interpreted as entitling the person to a pension of a particular amount.[1060] The protection of the right to property is triggered once an individual has paid contributions to the pension scheme, and does not envisage an abstract right to have a pension.[1061] However, the Court has recognised that "the suspension of payment of a pension where [...] the [beneficiary] is neither a [national] citizen nor living within the [State]"[1062] does not constitute arbitrary deprivation of property as it is considered to fall within the legitimate restrictions of Article 1.2 of Protocol 1.

The Inter-American Court of Human Rights has ruled that it has competence to adjudicate the progressive realisation by a State Party of the right of social security, under Article 29 of the ACHR.[1063] It has furthermore recognised that a State will violate the human rights of a migrant worker, whether documented or not, "when it denies the right to a pension to a migrant worker who has made the necessary contributions and fulfilled all the conditions that were legally required of workers, or when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees."[1064] Both the Inter-American Court of Human Rights and

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1057 *Weller v. Hungary,* ECtHR, Application No. 44399/05, Judgment of 31 March 2009.

1058 *Okpisz v. Germany,* ECtHR, Application No. 59140/00, Judgment of 25 October 2005.

1059 *Ibid*., para. 34.

1060 *Müller v. Austria,* ECommHR, Plenary, Application No. 5849/72, Admissibility Decision, 16 December 1974; *X v. the Netherlands,* ECommHR, Plenary, Application No. 4130/69, Admissibility Decision, 20 July 1971; *National Federation of Self-Employed v. United Kingdom,* ECommHR, Plenary, Application No. 7995/77, Admissibility Decision, 11 July 1978, para. 2; *T. v. Sweden,* ECommHR, Plenary, Application No. 10671/83, Admissibility Decision, 4 March 1985; *Stigson v. Sweden,* ECommHR, Application No. 12264/86, Admissibility Decision, 13 July 1988; *Szrabjet and Clark v. United Kingdom,* ECommHR, Applications Nos. 27004/95 and 27011/95, 23 October 1997.

1061 See, fn. 1060.

1062 *X. v. Federal Republic of Germany,* ECommHR, Plenary, Application No. 6572/74, 4 March 1976.

1063 *"Five Pensioners" v. Peru,* IACtHR, Series C No. 98, Judgment of 28 February 2003, para. 147.

1064 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, para. 154.

the Inter-American Commission on Human Rights have found that "the proprietary effect of a pension regime to which persons have made contributions or met the respective legal requirements should be understood as falling within the scope of the right to property enshrined in Article 21 of the American Convention."[1065] Similar to the approach of the European Court of Human Rights, the Inter-American Commission allows for restrictions on such rights when they are provided for by law, respond to a legitimate aim to raise a social interest or to preserve the general well-being in a democratic society, and are proportional.[1066]

4. Education

The right to education[1067] is widely protected as an economic, social and cultural right, as well as by civil and political rights instruments.[1068]

It is well established that States have an obligation to provide free and compulsory primary education.[1069] This is an obligation of immediate effect, as are the obligations to "have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions",[1070] and "the liberty of individuals and bodies to establish and direct educational institutions".[1071]

While free secondary education and access to higher education are progressive obligations, States must respect the principle of non-discrimination and the prohibition of retrogressive measures.[1072] Indeed, as the Committee on the Rights of the Child pointed out "[d]iscrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and

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1065 *National Association of Ex-Employees v. Peru,* IACHR, *op. cit.*, fn. 892, para. 103; *"Five Pensioners" v. Peru,* IACtHR, *op. cit.*, fn. 1063, paras. 102–104.

1066 See, *ibid.*, para. 112.

1067 Article 13 ICESCR; Article 5(e)(v) ICERD; Article 10 ICEDAW; Articles 28 and 29 CRC; Articles 12.4, 30, 43.1(a), 45.1(a) and 45.4, ICRMW; Article 24 CRPD; Article XII ADRDM; Article 13, *Protocol of San Salvador;* Article 17 ACHPR; Article 2 P1 ECHR; Article 17.2 ESC(r); Article 12, *Protocol to the ACHPR on the Rights of Women in Africa;* Article 11 ACRWC.

1068 *General Comment No. 11, Plans of action for primary education,* CESCR, UN Doc. E/C.12/1999/4, 10 May 1999, para. 2

1069 Article 13.2(a) ICESCR. See, CESCR, *General Comment No. 13, op. cit.*, fn. 785, para. 6(b). See also, Article XII ADRDM; Article 13.3(a), *Protocol of San Salvador;* Article 11.3(a) ACRWC; Article 17.2 ESC(r) (free primary and secondary education).

1070 Article 13.3 ICESCR; Article 13.4, *Protocol of San Salvador;* Article 2 P1 ECHR.

1071 Article 13.4 ICESCR; Article 13.5, *Protocol of San Salvador.*

1072 See, Article 13.2(b) and (c) ICESCR; CESCR, *General Comment No. 13, op. cit.*, fn. 785, para. 43. See also, Article 13.3(b) and (c), *Protocol of San Salvador.*

is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities."[1073] The CRC, the CESCR, the CERD and the CMW have established that the non-discrimination requirement also applies to refugees, asylum-seekers, and regular and "illegal" migrants.[1074]

Under the *UNESCO Convention against Discrimination in Education,* the State Parties undertake to "give foreign nationals resident within their territory the same access to education as that given to their own nationals."[1075] This obligation is contained in Article 3, which enshrines obligations of immediate effect.

The CESCR has been clear that "education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination".[1076] In particular, "the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status."[1077] The

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[1073] *General Comment No. 1, Aims of Education,* CRC, UN Doc. CRC/GC/2001/1, 17 April 2001, para. 10.

[1074] See, CRC, *General Comment No. 6, op. cit.*, fn. 138, paras. 12 and 18. See also, *Concluding Observations on Czech Republic,* CRC, Report of the Committee on the Rights of the Child on its 32nd Session, UN Doc. CRC/C/124, 23 June 2003, p. 178, para. 376(a); *Concluding Observations on Kazakhstan,* CRC, Report of the Committee on the Rights of the Child on its 33rd Session, UN Doc. CRC/C/132, 23 October 2003, p. 129, para. 643(a); *Concluding Observations on Luxembourg,* CRC, UN Doc. CRC/C/15/Add.250, 31 March 2005, paras. 50–51; *Concluding Observations on Uzbekistan,* CRC, UN Doc. CRC/C/UZB/CO/2, 2 June 2006, paras. 57–58; *Concluding Observations on Jordan,* CRC, UN Doc. CRC/C/JOR/CO/3, 29 September 2006, paras. 81–82; *Concluding Observations on Qatar,* CRC, UN Doc. CRC/C/QAT/CO/2, 14 October 2009, paras. 60–61. *Concluding Observations on United Kingdom,* CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/1995/22 (1995), p. 52, para. 291; *Concluding Observations on Canada,* CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/1999/22 (1999), p. 63, para. 414 (equality in education loan programmes); *Concluding Observations on China,* CESCR, *op. cit.*, fn. 10414, paras. 66, 89, 101, 116, 126; *Concluding Observations on Norway,* CESCR, *op. cit.*, fn. 980, paras. 22 and 43; *Concluding Observations on Macedonia,* CESCR, UN Doc. E/C.12/MKD/CO/1, 24 November 2006, para. 48 (no separate schools); *Concluding Observations on Cyprus,* CESCR, *op. cit.*, fn. 784, para. 25 (obligation to report contact details of parents of foreign children enrolling in schools is direct and indirect discrimination in right of education); *Concluding Observations on Canada,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 57th Session, UN Doc. A/57/18 (2002), p. 56, para. 337; *Concluding Observations on Norway,* CERD, *op. cit.*, fn. 1018, para. 22; *Concluding Observations on New Zealand,* CERD, UN Doc. CERD/C/NZL/CO/17, 15 August 2007, para. 23; *Concluding Observations on Germany,* CERD, UN Doc. CERD/C/DEU/CO/18, 21 August 2008, para. 22; *Concluding Observations on Egypt,* CMW, UN Doc. CMW/C/EGY/CO/1, 25 May 2007, paras. 36–37; *Concluding Observations on Ecuador,* CMW, *op. cit.*, fn. 502, paras. 35–36 (indirect discrimination due to obstacles in registration at birth).

[1075] Article 3(e), *UNESCO Convention against Discrimination in Education,* adopted on 14 December 1960. See also, *World Declaration on Education for All and Framework for Action To Meet Basic Learning Needs,* UNESCO, adopted 5–9 March 1990, in particular Articles I, II, and III.

[1076] CESCR, *General Comment No. 13, op. cit.*, fn. 785, para. 6(b).

[1077] *Ibid*., para. 34.

Committee has expressly stated that "the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education [and] the failure to take measures which address *de facto* educational discrimination"[1078] constitute violations of Article 13 ICESCR.

Obligations of non-discrimination and to implement policies aimed at avoiding discrimination also arise from Article 5(e)(v) ICERD. Although Article 5 refers expressly to discrimination on grounds of national origin, but not of nationality, the CERD has clarified that, under Article 5, States must "[e]nsure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State Party; [and] [a]void segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education".[1079]

Regarding asylum-seekers and refugees, the *Geneva Refugee Convention* stipulates that, "Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education".[1080] In addition, they "shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships."[1081]

In relation to unaccompanied and separated children, the Committee on the Rights of the Child has made clear that "States should ensure that access to education is maintained during all phases of the displacement cycle. Every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered in line with articles 28, 29 (1) (c), 30 and 32 of the Convention and the general principles developed by the Committee. Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal

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1078 *Ibid*., para. 59.

1079 CERD, *General Recommendation No. 30, op. cit.*, fn. 18, paras. 30–31.

1080 Article 22.1, *Geneva Refugee Convention*. The UNHCR ExCo affirmed the right to education of refugee children is a fundamental right and "called upon States, individually and collectively, to intensify their efforts [...] to ensure that all refugee children benefit from primary education of a satisfactory quality, that respects their cultural identity and is oriented towards an understanding of the country of asylum", *Conclusion No. 47 (XXXVIII) on Refugee Children, ExCom, UNHCR, 38th session, 1987, para. (o). See also,* Conclusion No. 84, UNHCR, *op. cit.*, fn. 214, para. (b)(v).

1081 Article 22.2, *ibid.*

education, including vocational training at all levels. Access to quality education should also be ensured for children with special needs, in particular children with disabilities."[1082]

The Inter-American Court has specified that, "according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the CRC and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development."[1083]

The European Court considers the right to education (Article 2 of Protocol 1 ECHR) as one of the "most fundamental values of the democratic societies making up the Council of Europe."[1084] The right to education must not be denied to anyone and must not be restrictively interpreted.[1085] The Court has found that excluding children from education due to the lack of registration as regular migrants of the parents constituted a violation of the right to education.[1086] This right of access to education applies to primary and secondary education, in particular as the Court affirmed that "[t]here is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child's development".[1087] However, the Court left open a certain margin to apply differential measures on access to "tertiary" (college and university) education.[1088]

In the case *Ponomaryovi v. Bulgaria,* the European Court stated that, although Article 2 of Protocol No. 1 "cannot be interpreted as imposing a duty on the Contracting States to set up or subsidise particular ed-

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1082 CRC, *General Comment No. 6, op. cit.*, fn. 138, para. 41. See also, paras. 42–43 for more detail in measures to be taken.

1083 *Yean and Bosico Case,* IACtHR, *op. cit.*, fn. 281, para. 185.

1084 *Timishev v. Russia,* ECtHR, Applications Nos. 55762/00 and 55974/00, Judgment of 13 December 2005, para. 64.

1085 See, *ibid.*, para. 64.

1086 See, *ibid.*, paras. 65–67, presenting this case the applicants where Chechen citizens, therefore formally citizens of the Russian Federation, but they nevertheless required migration registration in other parts of the country to access education.

1087 *Ibid*., para. 64. See, *X. v. United Kingdom,* ECommHR, Plenary, Application No. 5962/72, Admissibility Decision, 13 march 1975; and, *15 Foreign Students v. United Kingdom,* ECommHR, Plenary, Application No. 7671/76, Admissibility Decision, 19 May 1977.

1088 See, *Karus v. Italy,* ECommHR, Application No. 29043/95, Admissibility Decision, 20 May 1998, where the European Commission found that establishing higher fees for foreign students to access Italian university did not violate the right to education, as the discrimination was reasonably justified by the aim of the Italian Government to have the positive effects of tertiary education to stay within the Italian economy. See also, *15 Foreign Students v. UK,* ECtHR, *op. cit.*, fn. 1087.

ucational establishments, any State doing so will be under an obligation to afford effective access to them [...]. Put differently, access to educational institutions existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1".[1089] The Court ruled that State authorities had breached the prohibition on discrimination in relation to the right to education (in this case, secondary education) under Article 2, Protocol 1 read together with Article 14 ECHR, because the applicants had to pay school fees only because of their nationality and immigration status. The Court found that, although it could be legitimate for the State to curtail the use by short-term and undocumented migrants of "resource-hungry" public services, by differentiating between categories of migrants in allowing access to such services,[1090] "unlike some other public services [...], education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 to the Convention [...]. It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions."[1091] Given the importance of this right in the Convention system, the European Court held that a stricter scrutiny applies in the assessment of the proportionality of the discrimination based on "nationality" or "immigration status" than when the enjoyment of other social benefits are at stake (see, for a comparison with the rights to housing, section II.1.c.ii).

[1089] *Ponomaryovi v. Bulgaria,* ECtHR, Application No. 5335/05, Judgment of 21 June 2011, para. 49.

[1090] *Ibid*., para. 54.

[1091] *Ibid*., para. 55.

CHAPTER 6: THE RIGHTS OF MIGRANTS AND REFUGEES AT WORK

I. Introduction

Already in 1919, the ILO Constitution, which constitutes a chapter of the Treaty of Versailles ending the First World War, declared that "universal and lasting peace can be established only if it is based upon social justice".[1092] These values were reaffirmed by the ILO's Philadelphia Declaration of 1944.[1093] Given the prevalence of economic reasons for migration, and the risks and discrimination which irregular migrants are likely to face in their terms and conditions of work, labour rights, including the right to work, and rights related to treatment in the workplace, are particularly significant for migrants. As protected under the ICESCR, ICEDAW, ICERD, the treaties of the ILO and regional human rights treaties, labour rights broadly encompass:

- the right to work, including the freedom from forced labour and the free choice of employment;
- workplace rights, including fair and equal remuneration, adequate conditions of employment, protection from unfair dismissal and reasonable working hours;
- non-discrimination in the enjoyment of the right to work and work-place rights;
- freedom of association and the right to form and join trade unions.

In 1998, the ILO Conference issued the *ILO Declaration on Fundamental Principles and Rights at Work* which declared as binding under the ILO Constitution the freedom to join and establish trade unions and freedom of assembly; the eradication of slavery, servitude and forced labour; the prohibition of child labour; and the principle of equality of treatment in labour.[1094] The Declaration extended the obligations under these rights to all 183 Member States of the ILO, regardless of whether they are parties to the relevant treaties, as the obligations are binding under the ILO Constitution. However, it must also be noted that the ILO Conventions do not approach the right to work as a "human right" or within a human rights framework.[1095]

[1092] *Constitution of the International Labour Organization,* adopted in 1919, Preamble (ILO Constitution).

[1093] *Declaration of Philadelphia,* Article 2(a).

[1094] *ILO Declaration on Fundamental Principles and Rights at Work,* adopted on 18 June 1998 (ILO 1998 Declaration).

[1095] See, Dr. Machteld Inge van Dooren, *The right to work: background paper,* submitted at the Day of the General Discussion on article 6 ICESCR organised by the CESCR, UN Doc. E/C.12/2003/12, 11 April 2003, para. 4.

II. The right to work

Article 6.1 ICESCR protects the right of everyone to the opportunity to earn a living by work freely chosen or accepted. The right to work as protected by Article 6 ICESCR is not an absolute right to obtain employment. It consists of the right not to be unfairly deprived of employment, and includes the prohibition of forced labour. The right to work is also protected by Article 5(e)(i) ICERD, Article 11 CEDAW, Article 23 UDHR, Article XIV ADRDM, Article 6 of the Protocol of San Salvador to the ACHR, and Article 1 of the European Social Charter (revised).[1096]

States may legitimately regulate or restrict the right to work of non-citizens or particular categories of non-citizens—those with particular types of work or residence permits, or asylum seekers. The Committee on the Elimination of Racial Discrimination has acknowledged that "State Parties may refuse to offer jobs to non-citizens without a work permit".[1097] However, different applications of the right to work of non-citizens and citizens, as well as differences between different categories of non-nationals, must be objectively justifiable and non-discriminatory on other grounds, such as race or ethnicity.

As to the treatment of refugees, the *Geneva Refugee Convention* provides 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".[1098] However, any restriction on the employment of non-nationals cannot be applied to refugees who have either completed three years' residence in the country; or have a spouse who is a national of the country, unless he or she abandoned them; or has one or more children possessing the nationality of the country.[1099] The duty to provide treatment equal to the most favourably treated non-nationals also applies when the refugee wishes to engage in liberal professions, agriculture, industry, handicrafts or commerce or to establish commercial or industrial companies.[1100]

A State Party to the *ILO Migration for Employment Convention (Revised) (No. 97)* of 1949 has the obligation "to maintain, or satisfy itself that

[1096] See also, Article 15, *EU Charter.* In particular paragraph 3: "Nationals 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."

[1097] CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 35.

[1098] Article 17.1, *Geneva Refugee Convention*.

[1099] Article 17.2, *ibid.*

[1100] Articles 18 and 19, *ibid.*

there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information."[1101]

1. Slavery and Servitude

The prohibition of slavery and servitude was one of the first human rights standards to be universally accepted in international law. Today slavery constitutes a crime under international law and its prohibition has been recognised as a peremptory norm of international law *(jus cogens).*[1102] Slavery is prohibited under numerous treaties, most notably the *Slavery Convention* 1926, which defines it as the "status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[1103] The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,* of 1956, requires States Parties to prohibit slavery-like practices including debt bondage, serfdom, forced marriage and the exploitation of child labour.[1104]

The Appeals Chamber of the *International Criminal Tribunal on the former Yugoslavia* has stressed the developing concept of slavery:

> *"[t]he traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. [...] The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on [...] the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection*

1101 Article 2, *Migration for Employment Convention (Revised)* (C97), ILO. See also, Article 19.1 ESC(r). Article 19 is applicable to all foreigners, although paragraph 4 makes explicit reference to "lawful migrants".

1102 Article 58, *Instructions for the Government of Armies of the United States in the Field (Lieber Code),* 24 April 1863; Article 6(c), *Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, (Nuremberg Tribunal),* adopted on 8 August 1945; Article 22, *Treaty of Versailles,* 1919; *Slavery Convention,* signed on 25 September 1926; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,* adopted on 7 September 1956; *Prosecutor v. Kunarac, Vukovic and Kovac,* International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, 12 June 2002, paras. 117–119; Article 7.1(c), Rome Statute; Article 4 UDHR; Article 6.1, ACHR; Article 8.1–2 ICCPR; Article 10.1 ArCHR; Article 5 ACHPR; Aticle 4.1 ECHR, Article 11.1 ICRMW.

1103 Article 1.1, *Slavery Convention.*

1104 Article 1, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.*

to cruel treatment and abuse, control of sexuality and forced labour".[1105]

Under the Rome Statute of the International Criminal Court, enslavement, when committed as part of a widespread or systematic attack directed against any civilian population, constitutes a crime against humanity.[1106]

The European Court of Human Rights has recently held that, for slavery to exist, there must be the exercise of a genuine right to ownership and a reduction of the status of the individual concerned to an "object". It considers that servitude entails a particularly serious form of denial of freedom, and an obligation, under coercion, to provide one's services, and it is linked with the concept of "slavery".[1107]

2. Forced labour

The prohibition of forced labour was also universally internationally accepted at an early stage, and it has attained *jus cogens* status.[1108] Within the ILO system, forced labour is prohibited by the *ILO Forced Labour Convention (No. 29)* of 1930, and the *ILO Abolition of Forced Labour Convention (No. 105)* of 1957. In international human rights law, its prohibition is enshrined in major international and regional human rights treaties as a right not subject to derogation.[1109]

a) What is forced labour?

The definition of forced and compulsory labour was established by the ILO in 1930 as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has

[1105] *Kunarac et al.,* ICTY, *op. cit.*, fn. 1102, paras. 117 and 119.

[1106] Article 7.1(c), *Rome Statute.*

[1107] *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 276. See also, *Van Droogenbroeck v. Belgium,* ECtHR, Plenary, Application No. 7906/77, Judgment of 24 June 1982, para. 58.

[1108] *4th General Survey on Eradication of Forced Labour,* ILO Committee of Experts on the Application of Conventions and Recommendations, 2007, Document No. (ilolex): 252007G03, para. 10. The European Court held that the prohibition of slavery, servitude and forced and compulsory labour "enshrines one of the basic values of the democratic societies making up the Council of Europe", *Siliadin v. France,* ECtHR, Application No. 73316/01, Judgment of 26 July 2005, paras. 82 and 112; *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 237, para. 283; *Zarb Adami v. Malta,* ECtHR, Application No. 17209/02, Judgment of 20 June 2006, para. 43. The African Commission held that "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being", *Malawi African Association and Others v. Mauritania,* ACommHPR, *op. cit.*, fn. 1006, 11 May 2000, para. 135.

[1109] Article 6.2 ACHR; Article 8.3 ICCPR; Article 11.2, 3 and 4 ICRMW; Article 10.2 ArCHR; Article 4.2-3 ECHR; Article 1.2 ESC(r), according to the interpretation of the European Committee on Social Rights in *International Federation of Human Rights Leagues (FIDH) v. Greece,* ECSR, Complaint No. 7/2000, Merits, 5 December 2000, paras. 17-18; Article 6 ICESCR (the CESCR has found that forced labour is a direct violation of Article 6, see, *General Comment No. 18,* The Right to Work, CESCR, UN Doc. E/C.12/GC/18, 24 November 2005, para. 32).

not offered himself voluntarily."[1110] The use of forced and compulsory labour by private parties is absolutely prohibited[1111] and "[n]o concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade".[1112] The Committee on Migrant Workers held that forced and compulsory labour "includes debt bondage, passport retention, and illegal confinement".[1113]

The Inter-American Court of Human Rights has interpreted the ILO definition, specifying that "the 'menace of a penalty' can consist in the real and actual presence of a threat, which can assume different forms and degrees", and the "'[u]nwillingness to perform the work or service' consists in the absence of consent or free choice when the situation of forced labour begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion."[1114]

The European Court has held that, for there to be forced or compulsory labour, there must be some physical or mental constraint, as well as some overriding of the person's will.[1115]

Forced labour may also arise in some situations when a worker has voluntarily agreed to perform work, but under economic constraint. The ILO Committee of Experts on the Application of Conventions and Recommendations has found that labour exacted under economic con-

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[1110] Article 2, *Forced Labour Convention (C29),* ILO, adopted on 28 June 1930. See, *4th General Survey on Eradication of Forced Labour,* ILO, *op. cit.*, fn. 1108, para. 10; *Representation (article 24)—2007—Chile—C029— Report of the committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No. 29), submitted under article 24 of the ILO Constitution by the Colegio de Abogados de Chile,* AG, Document No. (ilolex): 162007CHL029, Geneva, 11 November 2008, para. 28 (*Colegio de Abogados v. Chile,* ILO). The definition has been explicitly picked up in *Van der Mussele v. Belgium,* ECtHR, Plenary, Application No. 8919/80, Judgment of 23 November 1983, para. 32; *Case of the Ituango Massacres v. Colombia,* IACtHR, Series C No.148, Judgment of 1 July 2006, paras. 157-160; CESCR, *General Comment No. 18, op. cit.*, fn. 1109, para. 9. The Human Rights Committee recognizes the ILO definition but advances its own: "the term "forced or compulsory labour" covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed", *Faure v. Australia,* CCPR, Communication No. 1036/2001, Views of 23 November 2005, para. 7.5.

[1111] See, Articles 4, *Forced Labour Convention (C29),* ILO. See also, for forced labour as consequence of conviction, Article 6.3(a) ACHR.

[1112] Articles 5.1, *Forced Labour Convention (C29),* ILO.

[1113] CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 60.

[1114] *Case of the Ituango Massacres v. Colombia,* IACtHR, *op. cit.*, fn. 1110, paras. 161 and 164.

[1115] *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 276. See also, *Van Droogenbroeck v. Belgium,* ECtHR, *op. cit.*, fn. 1107, para. 58.

straint will amount to forced labour when the economic constraint has been created by the government; or when the government, although not creating the situation itself, exploits the situation by offering excessively low levels of remuneration. Even when it has not created the economic constraint itself, the government "might be held responsible for organizing or exacerbating economic constraints if the number of people hired by the Government at excessively low rates of pay and the quantity of work done by such employees had a knock-on effect on the situation of other people, causing them to lose their normal jobs and face identical economic constraints."[1116] Work experience in the context of education or training is generally considered not to constitute forced labour.[1117]

It must also be noted that the prohibition of forced labour is connected to the right to freely choose one's occupation. As the European Committee on Social Rights remarked, the prohibition of forced labour implies "the freedom of workers to terminate employment".[1118]

Certain specific kinds of compulsory labour exacted by the State are excluded from the definition of forced and compulsory labour by international human rights treaties as well as the *ILO Forced Labour Convention.* These include:

- any work or service required by compulsory military service laws for work of a purely military character, and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;
- any work or service which forms part of the normal civic obligations of members of the community as long as it is not applied discriminatorily and it is proportionally imposed in regard to volume and frequency of work;[1119]
- any work or service that is a consequence of a criminal conviction, or of detention or conditional release on the order of a court;

1116 *Representation (article 24)—1995—Senegal—C105—Report of the Committee set up to examine the representation made by the Senegal Teachers' Single and Democratic Trade Union (SUDES) under article 24 of the ILO Constitution alleging non-observance by Senegal of the Abolition of Forced Labour Convention, 1957 (No. 105),* Document No. (ilolex): 161997SEN105 (*SUDES v. Senegal,* ILO), para. 30.

1117 *Colegio de Abogados v. Chile,* ILO, *op. cit.*, fn. 1110, para. 28.

1118 *FIDH v. Greece,* ECSR, *op. cit.*, fn. 1109, para. 17. It found in the impossibility to terminate employment a violation of Article 1.2 ESC(r), i.e. freedom of choice of employment.

1119 *Colegio de Abogados v. Chile,* ILO, *op. cit.*, fn. 1110, paras. 33–38. The European Court of Human Rights adopts the same criteria in *Van der Mussele v. Belgium,* ECtHR, *op. cit.*, fn. 1110, paras. 32–46; *Zarb Adami v. Malta,* ECtHR, *op. cit.*, fn. 1108; *Schmidt v. Germany,* ECtHR, Application No. 13580/88, Judgment of 18 July 1994. See also, *Faure v. Australia,* CCPR, *op. cit.*, fn. 1110, para. 7.5: "to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant."

- any work or service exacted in cases of public emergency or calamity threatening the life or well-being of the community.[1120]

b) State obligations to prevent and investigate forced labour

The European Court of Human Rights, in particular, has emphasised that States have obligations not only to refrain from, but also to criminalise forced and compulsory labour practices and to effectively investigate, prosecute and sanction those who carry out such practices.[1121] The European Court has posited the principles of an effective investigation in these cases:

"The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion. For an investigation to be effective, 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 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. [...] In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, Member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories."[1122]

Box 16. A case of servitude and forced labour

The European Court of Human Rights considered the case of a girl who had arrived in France from Togo at the age of 15 years and 7 months with a person who had agreed with her father that she would work until her air ticket had been reimbursed,

[1120] See, Article 2, *Forced Labour Convention (C29),* ILO; Article 8.3(b) and (c) ICCPR; Article 6.2-3 ACHR; Article 11.3–4 ICRMW; Article 4.3 ECHR. Article 10 ArCHR provides for no exception, making thus the prohibition of forced labour absolute. As illustrated by Article 11.4 ICRMW, the first duty will not apply to migrant workers, while the work due as "civil obligations" might concern migrant workers and their families as long as it is imposed also on citizens.

[1121] See, *Siliadin v. France,* ECtHR, *op. cit.*, fn. 1108, paras. 89 and 112. See also, *Concluding Observations on Republic of Korea,* CESCR, *op. cit.*, fn. 244, para. 23; *Concluding Observations on Poland,* CESCR, UN Doc. E/C.12/POL/CO/5, 20 November 2009, para. 23; Principles 1 and 12-17, *OHCHR Trafficking Principles, op. cit.*, fn. 244.

[1122] *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 288–289; *C.N. v. the United Kingdom,* ECtHR, Application No. 4239/08, Judgment of 13 November 2012, para. 69.

that her immigration status would be regularised and that she would be sent to school. In reality, the girl's work was quickly "lent" to a couple. She worked in their house without respite for approximately fifteen hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised. She was accommodated in their home and slept in the children's bedroom. The European Court of Human Rights found that this situation did not amount to slavery, since it had not been demonstrated that the couple "exercised a genuine right of legal ownership"[1123] over the girl. Nevertheless, the Court found that this situation constituted servitude, since it amounted to "an obligation to provide one's services that is imposed by the use of coercion",[1124] and forced labour.

c) Access to a remedy against forced labour

The right of victims of forced labour to a remedy for the violation of this right is established under all of the human rights treaties that prohibit forced labour. This right exists notwithstanding the legal status of a person in a country. For example the UN Committee for the Elimination of All Forms of Discrimination Against Women has emphasised the need for access to effective legal remedies for undocumented women migrant workers coerced into forced labour.[1125]

Box 17. Human trafficking, forced labour and the European Court

While, under the UN and Council of Europe trafficking conventions, forced labour is one of the forms of exploitation which characterise human trafficking,[1126] in international human rights law the European Court of Human Rights has considered that human trafficking in itself falls within the prohibition of slavery, servitude or forced or compulsory labour.[1127] It has

[1123] *Siliadin v. France,* ECtHR, *op. cit.*, fn. 1108, para. 122.

[1124] *Ibid*., para. 124.

[1125] See also, *Concluding Observations on Saudi Arabia,* CEDAW, UN Doc. CEDAW/C/SAU/CO/2, 8 April 2008, para. 24.

[1126] Article 3, *UN Trafficking Protocol;* Article 4, Council of Europe Trafficking Convention.

[1127] *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 282. The Human Rights Committee finds that human trafficking is a violation of Article 3 (gender equality), Article 8 (forced labour) and Article 24 (children rights): see, *Concluding Observations on Greece,* CCPR, *op. cit.*, fn. 240, para. 10. The Committee against Torture finds that "human trafficking for the purpose of sexual and labour exploitation" falls under the practices prohibited by Article 16 CAT (cruel, inhuman or degrading treatment or punishment): see, *Concluding Observations on Spain,* CAT, *op. cit.*, fn. 240, para. 28. See also, Conclusion No. 90, UNHCR, *op. cit.*, fn. 240, para. (s).

also held that it "undoubtedly also amounts to inhuman and degrading treatment under Article 3 of the Convention".[1128]

In the case of *Rantsev v. Cyprus and Russia* the Court held that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment [...]. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions."[1129]

The European Court found that, "in addition to criminal law measures to punish traffickers, Article 4 [ECHR] requires Member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking".[1130] State authorities have a duty to protect an individual at risk of being trafficked or subject to forced or compulsory labour, if they are aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or is at real and immediate risk of being, trafficked or exploited, or subject to slavery, servitude or forced or compulsory labour.[1131] The duties to protect and to investigate belong not only to a particular State, but to all States through which the trafficking action developed, from the country of origin to that of destination. One of the measures of protection is to "consider adopting legislative or other appropriate measures that permit victims

[1128] *M. and Others v. Italy and Bulgaria,* ECtHR, Application No. 40020/03, Judgment of 31 July 2012, para. 106.

[1129] *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, para. 281.

[1130] *Ibid*., para. 284.

[1131] *Ibid*., para. 286. See also, *Concluding Observations on Republic of Korea,* CESCR, *op. cit.*, fn. 244, para. 23; *Concluding Observations on Poland,* CESCR, *op. cit.*, fn. 1121, para. 23; *Concluding Observations on Azerbaijan,* CEDAW, *op. cit.*, fn. 244, para. 75; *Concluding Observations on Bangladesh,* CEDAW, *op. cit.*, fn. 244, para. 457; *Concluding Observations on the Netherlands,* CEDAW, *op. cit.*, fn. 244, para. 212; *Concluding Observations on Lebanon,* CEDAW, *op. cit.*, fn. 244, paras. 28–29; *Concluding Observations on Spain,* CEDAW, 2004, *op. cit.*, fn. 244, para. 337; *Concluding Observations on Singapore,* CEDAW, *op. cit.*, fn. 244, paras. 21–22; *Concluding Observations on Guatemala,* CEDAW, *op. cit.*, fn. 244, paras. 23–24; *Concluding Observations on Spain,* CEDAW, 2009, *op. cit.*, fn. 244, paras. 21–22; *Concluding Observations on Switzerland;* CEDAW, *op. cit.*, fn. 244, paras. 29–30; *Concluding Observations on Greece,* CCPR, *op. cit.*, fn. 240, para. 10; *Concluding Observations on Thailand,* CCPR, *op. cit.*, fn. 244, para. 20; *Concluding Observations on Spain,* CAT, *op. cit.*, fn. 240, para. 28; Principle 1, *OHCHR Trafficking Principles, op. cit.*, fn. 244.

of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases".[1132]

3. Child Labour

The effective abolition of child labour is an obligation binding on all ILO Members.[1133] ILO standards establish that a child may not be employed in work activities before the age of completion of compulsory studies and, in any case, not before the age of 15.[1134] This general principle may be subject to limited exceptions in national law, for example in relation to artistic performances.[1135] Article 7 of the *European Social Charter (revised)* also prohibits work under the age of 15 but provides an exception for performing "prescribed light work", which must be very light in nature and duration.[1136] Article 10 of the ICESCR requires that States set a minimum age of employment, and the CESCR has found that States "must take effective measures, in particular legislative measures, to prohibit labour of children under the age of 16".[1137]

[1132] Article 7.1, *UN Trafficking Protocol.* This position is reiterated by the CEDAW in *Concluding Observations on Spain,* CEDAW, 2004, *op. cit.*, fn. 244, para. 337; *Concluding Observations on Pakistan,* CEDAW, *op. cit.*, fn. 245, para. 30 (victims of trafficking should be shielded from prosecutions on illegal migration); *Concluding Observations on Singapore,* CEDAW, *op. cit.*, fn. 244, paras. 21–22; *Concluding Observations on Lebanon,* CEDAW, *op. cit.*, fn. 244, paras. 28–29; *Concluding Observations on Denmark,* CEDAW, *op. cit.*, fn. 245, paras. 32–33. See Principles 3 and 7, *OHCHR Trafficking Principles, op. cit.*, fn. 244: "3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers"; "7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."

[1133] Article 2(c), *ILO 1998 Declaration*.

[1134] Article 2.3, *Minimum Age Convention (C138),* ILO, adopted on 26 June 1973 (ratified 155). Previous ILO Conventions have regulated specific sectors, or set the bar lower at 14 years of age: *Minimum Age (Industry) Convention (C5),* 1919 (ratified 4, denounced 68), Article 2; *Minimum Age (Industry) Convention (Revised) (C59),* 1937 (ratified 11; denounced 25), Article 2; *Minimum Age (Sea) Convention (C7),* 1920 (ratified 4, denounced 49), Article 2; *Minimum Age (Sea) Convention (Revised) (C58),* 1936 (ratified 17; denounced 34), Article 2; *Minimum Age (Fishermen) Convention (C112),* 1959 (ratified 8 denounced 21), Article 2; *Minimum Age (Underground Work) Convention (C123),* 1965 (ratified 22 denounced 19), Article 2; *Minimum Age (Agriculture) Convention (C10),* 1921 (ratified 5, denounced 50), Article 1; *Minimum Age (Non-Industrial Employment) Convention (C33),* 1932 (ratified 3, denounced 22), Articles 2, 3, 4. States must provide for minimum age of employment also under Article 32.2(a) CRC; Article 10 ICESCR; Article 7.1–2–3 ESC(r) (15 years; 18 years for dangerous and unhealthy occupation: prohibition during compulsory education); Article 34.3 ArCHR; Article 13(g), *Protocol to the ACHPR on the Rights of Women in Africa.*

[1135] Articles 4 and 8, *Minimum Age Convention (C138),* ILO.

[1136] Article 7.1 ESC(r). It also provides for minimum age of employment of 18 for dangerous and unhealthy occupations (Article 7.2). See, definition of "light work", in *International Commission of Jurists (ICJ) v. Portugal,* ECSR, Complaint No. 1/1998, 10 March 1999, Merits, paras. 28-31. Same principles, *de minimis,* in Article 7(f) *Protocol of San Salvador;* Article 15 ACRWC.

[1137] Article 10.3 ICESCR; CESCR, *General Comment No. 18, op. cit.*, fn. 1109, para. 24.

Where children are employed, the State has additional duties of protection. Article 10 ICESCR provides that "[c]hildren and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law."[1138] ILO Conventions also provide that, where children under the age of 18 are employed, they must be subject to medical examinations before and, periodically, during the employment, in order to determine whether they are fit for the work.[1139] Some types of night work for young persons under 18 are prohibited by ILO Conventions.[1140] The CRC obliges States to protect all children, including through penalties and regardless of their status, "from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."[1141]

The *ILO Worst Forms of Child Labour Convention* (No. 182) of 1999 requires States to prohibit and eliminate several work practices as regards children under 18:[1142]

- all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[1143]

1138 Article 10.3 ICESCR.

1139 See, *Medical Examination of Young Persons (Industry) Convention (C77),* ILO, adopted on 9 June 1946; *Medical Examination of Young Persons (Non-Industrial Occupations) Convention (C78),* ILO, adopted on 9 October 1946; *Medical Examination of Young Persons (Underground Work) Convention (C124),* ILO, 23 June 1965.

1140 Article 3, *Night Work of Young Persons (Industry) Convention (C6),* ILO, adopted on 28 November 1919 (ratified 51). See previous standards in *Night Work of Young Persons (Industry) Convention (C6),* ILO, adopted on 28 November 1919 (ratified 50, denounced 9); *Night Work of Young Persons (Non-Industrial Occupations) Convention (C79),* ILO, adopted on 9 October 1946 (ratification 20).

1141 Article 32.1 CRC. See also, Article 15.1 ACRWC; Article 7(f), *Protocol of San Salvador;* Article 7 ESC(r).

1142 Articles 1 and 2, *Worst Forms of Child Labour Convention (C182),* ILO, adopted on 17 June 1999.

1143 Article 3, *Worst Forms of Child Labour Convention (C182),* ILO. See also, CMW, General Comment No. 2, *op. cit.*, fn. 2, para. 61.

The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* also prohibits the sale of children, including for purposes of forced labour,[1144] and child prostitution.[1145] The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* prohibits the compulsory recruitment of children under the age of 18 into the armed forces and requires States to take measures to ensure that recruitment of those below the age of 18 is truly voluntary.[1146]

III. Workplace rights

International law protects rights at work in a number of ways. Firstly, each individual retains the full range of his or her human rights when he or she enters the workplace. In the case of employment in the private sector, the State has obligations to take positive steps to protect these rights. The circumstances of employment, working terms and conditions, and day-to-day work-place interactions may implicate a variety of human rights, and depending on the circumstances, may give rise to violations.

Secondly, international law provides for particular human rights protection that is specific to the work context. Such workplace rights, or aspects of them, are widely recognised in human rights treaties including, at a global level, ICESCR, ICERD, ICEDAW and the ICRMW[1147] and in general (with the exception of provisions of Part IV of the ICRMW) apply to all migrants, whether or not they are legally present on the territory. This contrasts with rights under ILO instruments, which for the most part protect only regular migrant workers.

These rights entail a range of obligations for the State in relation to the workplace. For example, the ICESCR includes the following rights:

- the right to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (Article 7(a)(i));

[1144] See, Articles 1, 2(a) and 3(a), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (OP-CRC-SC).

[1145] See, Articles 1, 2(b) and 3(b) OP-CRC-SC.

[1146] Articles 2 and 3, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OP-CRC-AC).

[1147] Articles 6, 7 and 8 ICESCR; Articles 5(e)(i) and 11 CEDAW; Article 27 ICERD; Article 23.1 UDHR; Articles 11, 25, 26, 40, 52, and 54 ICRMW; Article XIV ADRDM; Articles 6 and 7, *Protocol of San Salvador;* Article 15 ACHPR; Article 34 ArCHR; Articles 1, 2, 3, 4 ESC(r); Article 13, *Protocol to the ACHPR on the Rights of Women in Africa; Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,* Article 8; *Declaration on Social Progress and Development,* Article 6.

- the right to a decent living for workers and their families (Article 7(a)(ii));
- the right to safe and healthy working conditions (Article 7(b));
- the right to equal opportunity for everyone to be promoted in his or her employment to an appropriate higher level, subject to no considerations other than those of seniority and competence (Article 7(c));
- the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (Article 7(d));
- the right to non-discrimination in the realisation of all the components of the right to work and of workplace rights (Articles 6 and 7, read together with Article 2.2).[1148]

The Inter-American Court has identified within the minimum core of labour rights "the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation."[1149] It has noted that the safeguard of these rights for migrants is essential, based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration.[1150]

The *European Social Charter (revised)* includes the right to just conditions of work,[1151] the right to safe and healthy working conditions,[1152] the right to a fair remuneration,[1153] the right to protection in cases of termination of employment,[1154] the right of workers to the protection of their claims in the event of the insolvency of their employer,[1155] the right to dignity at work,[1156] and the right of workers with family re-

[1148] See also, article 7, *Protocol of San Salvador;* Articles 1, 2, 3 and 4 ESC(r); Articles 30 and 31, *EU Charter.*

[1149] *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, para. 157.

[1150] See, *ibid.*, para. 157.

[1151] Article 2, ESC(r).

[1152] Article 3, *ibid.*

[1153] Article 4, *ibid.*

[1154] Article 24, *ibid.*

[1155] Article 25, *ibid.*

[1156] Article 26, *ibid.*

sponsibilities to equal opportunities and equal treatment.[1157] However, these provisions of the *European Social Charter (revised)* cover only nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, i.e. States that are party to the European Social Charter, without prejudice to the rights of refugees or stateless persons under the *Geneva Refugee Convention* and the *Statelessness Convention 1954*.[1158] Nevertheless, those States which have accepted the obligations contained in Article 19 ESC have undertaken "to secure for [migrant] 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 [...] remuneration and other employment and working conditions [and] to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons".[1159]

One of the main means by which migrants' workplace rights are impaired is the withholding of their documents by private actors, whether employers, family members or others, as it creates a bond of dependency of the migrant towards the documents' withholder, and impedes migrants' access to their rights, including their labour rights. This practice has been addressed by several treaty bodies.[1160] For example, CEDAW has urged States to ensure that employers and recruiters do not confiscate or destroy travel or identity documents and to train law enforcement officers to protect against such abuses.[1161] The practice is also addressed by Article 21 of the ICRMW which provides: "It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the pass-

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1157 Article 27, *ibid.*

1158 *Appendix to the European Social Charter (Revised),* Scope of the Revised European Social Charter in terms of persons protected.

1159 Article 19.4–5 ESC(r).

1160 See, *Concluding Observations on the Republic of Korea,* CCPR, UN Doc. CCPR/C/KOR/CO/3, 28 November 2006, para. 12; *Concluding Observations on Japan,* CCPR, *op. cit.*, fn. 517, para. 24; *Concluding Observations on Kuwait,* CESCR, UN Doc. E/C.12/1/Add.98, 7 June 2004, para. 17; *Concluding Observations on Lebanon,* CERD, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 53rd Session, UN Doc. A/53/18 (1998), p. 42, paras. 175 and 184; *Concluding Observations on Italy,* CERD, UN Doc. CERD/C/ITA/CO/15, 16 May 2008, para. 17; *Concluding Observations on Syrian Arab Republic,* CMW, UN Doc. CMW/C/SYR/CO/1, 2 May 2008, paras. 31–32.

1161 CEDAW, *General Recommendation No. 26, op. cit.*, fn. 8, para. 26(d).

port or equivalent document of a migrant worker or a member of his or her family."[1162]

1. Non-discrimination and workplace rights

A range of international instruments and standards contain requirements of non-discrimination in relation to workplace rights, these are addressed below. The specific protection from discrimination on the basis of sex, as it applies to women migrant workers, is dealt with in Section 2 below. It should be noted that the prohibition of discrimination, in particular as it relates to minimum work conditions, such as unfair dismissal, vacation, overtime and pay is an obligation of immediate effect (see, Chapter 5, Section I.2).[1163] The CESCR has also recognised that the right to fair wages and equal remuneration for work of equal value without distinction of any kind is of immediate effect.[1164]

a) ICESCR and ICERD

The prohibition of discrimination in relation to workplace rights under the CESCR and CERD covers migrant workers and their families, regardless of legal status or documentation.[1165] The CESCR has been clear that the "Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[1166] Although disparate treatment of migrants or categories of migrants in respect of access to employment may be lawful, it can seldom be justified in relation to rights in the workplace. The CERD has stated that under ICERD, States must: "take effective measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes and effects; [...] to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault."[1167] The CERD also defined the general principles applicable to all migrants: "while State Parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the

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1162 Article 21 ICRMW.

1163 CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 7; CESCR, *General Comment No. 18, op. cit.*, fn. 1109, para. 19; Article 7 ICRMW; *Concluding Observations on Republic of Korea,* CESCR, *op. cit.*, fn. 244, para. 14; *Concluding Observations on Japan,* CCPR, *op. cit.*, fn. 517, para. 24; *Concluding Observations on Kuwait,* CESCR, *op. cit.*, fn. 1160, para. 16.

1164 CESCR, *General Comment No. 3, op. cit.*, fn. 147, para. 5. See also, Article 15 ACHPR.

1165 CESCR, *General Comment No. 18, op. cit.*, fn. 1109, para. 18.

1166 CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 30.

1167 CERD, *General Recommendation No. 30, op. cit.*, fn. 18, paras. 33–34.

enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated".[1168]

b) ILO Conventions

The *ILO Migration for Employment Convention (Revised) (No. 97)* of 1949 mandates States to eliminate discrimination based on nationality, race, religion or sex, towards immigrants **lawfully within their territory** by assuring them a treatment not less favourable than that of their nationals in respect of "remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons".[1169] The Committee of Experts of the ILO found that the fact that "higher wages are being paid to local domestic helpers than those paid to foreign domestic helpers, or to those national workers in comparable job categories, [...] would contravene the Convention's goal of equal treatment between migrant workers and nationals as regards remuneration."[1170] Furthermore, it declared that the imposition of a special tax on foreign workers, or on the employers of foreign workers, which has the effect of considerably reducing the salary of a migrant worker in comparison to that of a national, is in breach of the equality of treatment with regard to remuneration (Article 6.1(a)(i) Convention No. 97).[1171]

The *ILO Migrant Workers (Supplementary Provisions) Convention (No. 143)* of 1975 provides in its Article 1 that States "undertake to respect the basic human rights of all migrant workers".[1172] This provision concerns all migrant workers, regardless of their status.[1173] It is the only provision of the two ILO Conventions directly dealing with migrant workers that does not exclude undocumented migrants from its application. The Committee of Experts has clarified that "basic human rights" refers to "the fundamental human rights contained in the international instruments adopted by the UN in this domain, which include some fundamental rights of workers."[1174]

[1168] *Ibid*., para. 35

[1169] Article 6.1(a)(i), *Migration for Employment Convention (Revised) (C97),* ILO. The same is expressed by Article 19.4.1 ESC(r). The ILO Convention has been ratified by only 49 States.

[1170] *TUCP v. China,* ILO, *op. cit.*, fn. 1046, para. 32.

[1171] *Ibid*., paras. 35–37.

[1172] Article 1, *Migrant Workers (Supplementary Provisions) Convention (C143),* ILO. The ILO Convention has been ratified by only 23 States.

[1173] *General Survey on Migrant Workers,* ILO Committee of Experts on the Application of Conventions and Recommendations, 1999, Document No. (ilolex): 251999G01, para. 297.

[1174] *Ibid*., para. 296. Footnote No. 19 referes to UDHR, ICCPR, ICESCR, ICRMW, etc.

The ILO Conventions No. 111 and 158 do not cover discrimination based on nationality, i.e. between nationals and non-nationals.[1175] Nevertheless, the ILO Committee of Experts has clarified that "while ILO Conventions are deemed to establish minimum standards and should be interpreted as such by the ILO supervisory bodies, including this Committee, these Conventions do not preclude Member States from using their provisions in order to grant more favourable conditions to the workers concerned. Once granted, however, more favourable conditions could not be revoked simply on the grounds that they go beyond the minimum protection prescribed by the Convention in question."[1176] This principle is also enshrined in the ILO Constitution.[1177] As a consequence, the principle of non-discrimination covering non-nationals, which comes from other international law instruments, may be applicable by reference also to these ILO Conventions. The *ILO Domestic Workers Convention No. 189*[1178] is also notable in this respect, as it contains specific provisions to address discrimination and abusive practices against migrant domestic workers in its Article 15.

c) ICRMW

Article 25 ICRMW, which applies to all migrants regardless of legal status, sets out obligations of equal treatment of migrant workers. The ICRMW provides that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration, conditions of work and terms of employment, including on overtime, hours of work, weekly rest, holiday with pay, safety, health, termination of employment relationship, minimum age of employment, and restriction on work.[1179] These rights are not sub-

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1175 See, *Representation (article 24)—1998—Ethiopia—C111, C158—Report of the Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No.158), made under article 24 of the ILO Constitution by the National Confederation of Eritrean Workers (NCEW),* Document No. (ilolex): 161998ETH111, Geneva, 12 November 2001 (*NCEW v. Ethiopia,* ILO), para. 31; and, *Representation (article 24)—1997—Spain—C097, C111, C122—Report of the Committee set up to examine the representation alleging non-observance by Spain of the Migration for Employment Convention (Revised), 1949 (No. 97), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Employment Policy Convention, 1964 (No. 122), made under article 24 of the ILO Constitution by the General Confederation of Labour of Argentina (CGT),* Document No. (ilolex): 161998ESP097 (*CGT v. Spain,* ILO), para. 35.

1176 *TURK-IS v. Netherlands,* ILO, *op. cit.*, fn. 1047, para. 46.

1177 Article 19.8, *ILO Constitution,* which reads: "In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation."

1178 *Convention concerning decent work for domestic workers (C189),* ILO, entered into force on 5 September 2013.

1179 Article 25.1 ICRMW. See, also, *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,* Article 8.1(a).

ject to derogation in private contracts or because of the irregular stay status of the migrant worker.[1180] The Committee on Migrant Workers has clarified that the list of rights in Article 25 is not exhaustive and the "equal treatment principle also covers any other matter that, according to national law and practice, is considered a working condition or term of employment, such as maternity protection."[1181]

The ICRMW also requires States Parties to take positive measures to protect equality of treatment for irregular migrants, and provides that "employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity".[1182] Furthermore, the Committee has stated that "States parties shall provide for appropriate sanctions for employers who derogate from the principle of equality of treatment in private employment contracts with migrant workers in an irregular situation, and ensure that those migrant workers have access to labour courts or other judicial remedies when their rights are violated and without fear of being deported".[1183] The Committee has dedicated its first General Comment to the category of migrant domestic workers, who are particularly at risk of exploitation.[1184]

d) Geneva Refugee Convention

Under the *Geneva Refugee Convention*, a refugee lawfully present on the territory of a State enjoys equal treatment to nationals in "remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining".[1185] In addition, "[t]he right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State."[1186]

e) Inter-American system

The Inter-American Court of Human Rights, whose approach to discrimination against migrants was addressed in Chapter 5, has stated that "[a] person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment,

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[1180] Article 25.2–3 ICRMW.

[1181] CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 62. See also, paras. 63 and 64.

[1182] Article 25.3 ICRMW.

[1183] CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 64.

[1184] CMW, *General Comment No. 1, op. cit.*, fn. 485.

[1185] Article 24.1(a), *Geneva Refugee Convention*.

[1186] Article 24.2, *ibid.*

irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination."[1187] Even "if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers."[1188] The Court has also emphasised the obligation to take measures to prevent discrimination against migrants by private employers: "The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards",[1189] which must be interpreted according to the principle of the application of the standard that best protects the individual, in this case the migrant worker.[1190]

2. Non-Discrimination and Women Migrant Workers

In addition to the workplace issues outlined above, migrant women may face a range of particular concerns in the workplace including multiple and intersectional forms of *de jure* and *de facto* discrimination due to their status as migrants and as women. Acute problems can arise due to ingrained and systemic workplace discrimination against women in general, including in relation to pregnancy,[1191] inadequate legal regulation of female-dominated occupations, including the informal sector, work-place gender-based violence and abuse and discriminatory migration and residency schemes and regulations.

International law and standards protect women migrants from the direct, indirect, *de facto* and *de jure* gender discrimination they may face in the workplace[1192] and from discrimination which may arise due to their status as non-nationals, refugees, migrant workers, as well as from discrimination on the basis of race or ethnicity.[1193] Moreover, in-

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1187 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, paras. 133 and 134.

1188 *Ibid*., para. 136.

1189 *Ibid*., paras. 148, 146–147 and 149, 160.

1190 See, *ibid.*, para. 156.

1191 For a specific overview of the international standards relevant to pregnancy and work-place rights see section 4(d) below.

1192 Article 11 CEDAW; Articles 3, 6 and 7 ICESCR; *General Comment No. 16, op. cit.*, fn. 22; CCPR, *General Comment No. 28, op. cit.*, fn. 22.

1193 See analysis in Section 1 above.

ternational law and standards require that, where women may face intersectional or multiple forms of discrimination due to a combination of circumstances, this must be the subject of targeted action.[1194]

In its *General Comment No. 26,* CEDAW has addressed the human rights abuses and violations that women migrant workers may face and has highlighted specific steps which States must take to comply with their international obligations to guarantee women migrant workers rights on a basis of equality. These include: (i) lifting discriminatory restrictions on migration, including those which exclude women from certain categories of work or exclude female-dominated occupations from visa-schemes; (ii) ensuring the legal protection of women migrant workers rights, including through ensuring that female-dominated occupations are protected by labour laws and health and safety laws; (iii) repealing discriminatory residency regulations which predicate women's residency on the sponsorship of an employer or spouse; (iv) ensuring women migrants have real and effective access to legal remedies in the case of abuse, including by ensuring potential loss of work-permits or earnings do not impede in law or practice with their recourse to remedies; (v) taking concrete and meaningful steps in practice to guarantee women migrant workers enjoyment of particular rights which may be at risk due to their employment situation, including freedom of movement, personal integrity and freedom from torture or other cruel, inhuman and degrading treatment. The Committee has also highlighted the fact that the Convention is applicable to all categories of women migrants.[1195]

Other treaty bodies have also addressed the workplace situation of women migrant workers. For example, in an individual complaint against the Netherlands, CERD found that a woman's rights under ICERD were violated due to her dismissal when pregnant due to discrimination based on sex and status as a non-national.[1196]

3. Particular Workplace Rights

a) Fair remuneration

The *ILO Protection of Wages Convention No. 95* of 1949 (96 ratifications) requires that "[w]ages payable in money shall be paid only in legal tender, and payment in the form of promissory notes, vouchers or coupons, or in

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1194 CESCR, *General Comment No. 20, op. cit.*, fn. 22, para. 17. See also, CESCR, *General Comment No. 16, op. cit.*, fn. 22, para. 5; CEDAW, *General Recommendation No. 25, op. cit.*, fn. 31, para.12; CCPR, *General Comment No. 28, op. cit.*, fn. 22, para. 30. CERD, *General Recommendation No. 25, op. cit.*, fn. 21, paras. 1 and 2.

1195 CEDAW, *General Comment No. 26, op. cit.*, fn. 8.

1196 *Yilmaz-Dogan v. the Netherlands,* CERD, Communication No. 1/1984, Views of 29 September 1988. See also, CMW, *General Comment No. 1, op. cit.*, fn. 485,

any other form alleged to represent legal tender, shall be prohibited."[1197] Under the Convention, wages must be paid directly and regularly to the worker concerned except as may be otherwise provided by national laws or regulations and employers are prohibited from limiting in any manner the freedom of the worker to dispose of his or her wages.[1198] States are required to pursue measures to "promote [...] equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof",[1199] including discrimination based on "race, colour, sex, religion, political opinion, national extraction or social origin".[1200] In addition, the Convention specifies that wages and salaries shall respect the principle of equal remuneration for men and women workers for work of equal value.[1201]

The particular issue of women workers' remuneration has also been addressed in human rights instruments and by a number of the human rights bodies. For example Article 11(d) of CEDAW specifies that States should ensure the right of women, "to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work." CEDAW has underlined women's right to remuneration, specifying that "unpaid work constitutes a form of women's exploitation that is contrary to the Convention". For its part CESCR has noted that rights to just and favourable conditions of work under Article 7 of the ICESCR require States to "identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist...adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace."[1202]

b) The right to rest and leisure

The right to rest and leisure is recognised by the CESCR and several ILO instruments. ILO Conventions state that a worker must benefit in

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[1197] Art. 3.1, *Protection of Wages Convention (C95),* ILO, adopted on 1 July 1949. The Convention provides also with more detailed provisions. We will report here only those of a general character.

[1198] Articles 5, 6, 12.1, *ibid.*

[1199] Article 2, *Discrimination (Employment and Occupation) Convention (C111),* ILO, adopted on 25 June 1958.

[1200] Article 1(a), *ibid.*

[1201] *Equal Remuneration Convention (C100),* ILO, adopted on 29 June 1951. See, *General Recommendation No. 13, Equal remuneration for work of equal value,* CEDAW, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.II), 1989; *General Recommendation No. 16, Unpaid women workers in rural and urban family enterprises,* CEDAW, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.II), 1991, after articles 2(c) and 11(c), (d) and (e) CEDAW.

[1202] CESCR, *General comment No. 16, op. cit.*, fn. 22, paras. 23–24. The same standards are obligations under Article 11.1(a), (b), (c), (d) CEDAW; Article 4.3 ESC(r).

every period of seven days from a period of rest comprising at least 24 consecutive hours,[1203] and that, as a principle, the work-time shall not exceed eight hours in the day and forty-eight hours in the week.[1204] Other Conventions address requirements for paid holidays.[1205] The *European Social Charter (revised)* provides for a right to a minimum of four weeks of paid holidays per year.[1206] The ADRDM provides for a right to leisure time, although it does not spell out any precise conditions.[1207] Several ILO Conventions deal with specific aspects of the right to safe and healthy working conditions.[1208]

c) Termination of employment

The *ILO Termination of Employment Convention (No. 158)* of 1982 provides for obligations regarding the end of the employment relationship at the initiative of the employer. This Convention has not yet met with wide ratification.[1209] Nevertheless, its content might be used by other international human rights authorities in consideration of the State's obligations relating to the right to work and the prohibition of unfair dismissal.[1210] The basic principle is that "[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or

[1203] *Weekly Rest (Industry) Convention (C14),* ILO, adopted on 17 November 1921; *Weekly Rest (Commerce and Offices) Convention (C106),* ILO, Adopted on 26 June 1957.

[1204] See, Article 2, *Hours of Work (Industry) Convention (C1),* ILO, Adopted on 28 November 1919; Article 3, *Hours of Work (Commerce and Offices) Convention (C30),* ILO, adopted on 28 June 1930.

[1205] *Holidays with Pay Convention (Revised) (C132),* ILO, adopted on 24 June 1970 (6 days per year—ratified 40, denounced 14); *Holidays with Pay (Sea) Convention (C54),* ILO, adopted on 24 October 1936 (9 to 12 days/year—ratified 4, denounced 2); *Holidays with Pay (Agriculture) Convention (C101),* ILO, adopted on 26 June 1952 (ratified 34, denounced 12); *Holidays with Pay Convention (Revised), (C132),* ILO, adopted on 24 June 1970 (3 weeks—ratified 35).

[1206] Article 2.3 ESC(r).

[1207] Article XV ADRDM.

[1208] *Benzene Convention (C136),* ILO, adopted on 23 June 1971; *Occupational Cancer Convention (C139),* ILO, adopted on 24 June 1974; *Working Environment (Air Pollution, Noise and Vibration) Convention (C148),* ILO, Adopted on 20 June 1977; *Occupational Safety and Health Convention (C155),* ILO, adopted on 22 June 1981; *Protocol of 2002 to the Occupational Safety and Health Convention (P155),* ILO, adopted on 20 June 1981; *Occupational Health Services Convention (C161),* ILO, adopted on 25 June 1985; *Asbestos Convention (C162),* ILO, adopted on 24 June 1986; *Chemicals Convention (C170),* ILO, adopted on 25 June 1990; *Prevention of Major Industrial Accidents Convention (C174),* ILO, adopted on 22 June 1993; *Safety and Health in Mines Convention (C176),* ILO, adopted on 22 June 1995; *Safety and Health in Agriculture Convention (C184),* ILO, adopted on 21 June 2001. See, an application of the correspondent Article 2.4 ESC(r) in *STTK ry and They ry v. Finland,* ECSR, Complaint No. 10/2000, Merits, 17 October 2001.

[1209] As of January 2014 there were 35 State Parties, see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312303.

[1210] Article 7(d), *Protocol of San Salvador;* Article 24 ESC(r); Article 13(c), Protocol to the ACHPR on the Rights of Women in Africa; Article 11.2(a), CEDAW; Article 54.1(a) ICRMW.

service."[1211] The Convention lists a series of reasons for which termination of employment is prohibited: "union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of, a workers' representative; the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; age, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave[;] [t]emporary absence from work because of illness or injury".[1212]

The ILO Convention provides that workers must be given an opportunity to contest the allegations made in order to terminate the employment for reasons related to the worker's conduct or performance.[1213] They are "entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."[1214] If the termination is unjustified, these bodies, "if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, [...] shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."[1215] In any case, workers are entitled to a reasonable period of notice.[1216] The Convention provides that "[a]dequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention."[1217]

Two important provisions of the ICRMW, which concern only migrants who have entered the country in a regular situation, are Article 49.2 and Article 51. They require time to be allowed for a migrant worker who has become unemployed to seek another job before being deprived of his or her authorisation of residence. Article 49.2 states that "[m]igrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior

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[1211] Article 4, *Termination of Employment Convention (C158),* ILO, adopted on 22 June 1982.

[1212] Articles 5 and 6, *ibid.*

[1213] See, Article 7, *ibid.*

[1214] Article 8.1, *ibid.* On the powers of the deciding bodies see Article 9.

[1215] Article 10, *ibid.*

[1216] See, Article 11, *ibid.* See also, Article 4.4 ESC(r).

[1217] Article 2.3, *ibid.*

to the expiration of their work permits or similar authorizations."[1218] Another provision, Article 51, was included in order to afford the same protection to migrants who are not permitted freely to choose their remunerated activity, except where the authorisation of residence is expressly dependent upon the specific remunerated activity for which they were admitted. The Committee on Migrant Workers has applied this last provision on two occasions, where the State has not allowed sufficient time to the migrant worker to find alternative employment and linked automatically the loss of employment with the expiration of the residence authorisation.[1219] An analysis of the drafting history of the ICRMW suggests that Article 51 was introduced in order to protect migrants from those work permits that are linked to a single employer and that would, consequently, impede employment by another employer. The provision implicitly allows for limitations in work permits as to the kind of work to be performed.[1220]

Some of the content of these Articles is reflected in comments of the Human Rights Committee in the examination of the principle of non-discrimination and the right to private and family life.[1221] The Committee has held that States have an obligation to guarantee full and effective access to personal documents to migrants and that, in order to provide a remedy for these violations, a State should "consider establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents."[1222]

The African Commission has found that an abrupt expulsion without recourse to national courts can "severely compromise [...] the [migrant's] right to continue working [...] under equitable and satisfactory conditions", resulting in loss of employment in violation of the right to work (Article 15 ACHPR).[1223]

[1218] See also, Article 8, *Migrant Workers (Supplementary Provisions) Convention (C143),* ILO, which applies this principle in an absolute way for migrant workers and members of their family present in the territory for more than five years.

[1219] See, *Concluding Observations on Azerbaijan,* CMW, UN Doc. CMW/C/AZE/CO/1, 19 May 2009, paras. 34–35; and *Concluding Observations on El Salvador,* CMW, UN Doc. CMW/C/SLV/CO/1, 4 February 2009, paras. 35 and 36.

[1220] See, *Report of the Open-Ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families,* Third Committee, 43rd session, UN Doc. A/C.3/43/1, 20 June 1988, paras. 53–66. The representative of Italy has clarified this approach to the text, that was proposed by Finland on behalf of the Scandinavian and Mediterranean Group with amendments by the USA. The rejection of the proposal by the Netherlands confirms this reading. Articles 51 and 49(2) were strongly opposed by the Federal Republic of Germany.

[1221] See, *Concluding Observations on Thailand,* CCPR, *op. cit.*, fn. 244, para. 23.

[1222] *Ibid*., para. 23.

[1223] *IHRDA v. Republic of Angola,* ACommHPR, *op. cit.*, fn. 395, para. 76.

d) Pregnancy

A range of international legal provisions require that women's employment not be terminated due to pregnancy, that women not be subject to pre-migration or pre-hiring pregnancy testing, and that pregnant women be afforded paid maternity leave or social security protection. The Human Rights Committee has held that practices such as requests by employers of pregnancy tests before hiring violate the principle of gender equality in light of the right to privacy (Articles 3 and 17, ICCPR).[1224]

Article 11 of CEDAW provides, among other things, that States Parties must, "prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave" and that they must "introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances." Article 10 of the ICESCR requires that "during a reasonable period before and after childbirth…working mothers should be accorded paid leave or leave with adequate social security benefits."[1225] The Human Rights Committee has held that practices such as mandatory pregnancy tests before hiring are not permissible under Articles 3 and 17 of the ICCPR.[1226] The ILO Maternity Protection Conventions provides additional protection in this context.[1227]

IV. Freedom of association in labour rights: the right to form and join a trade union

Freedom of association is widely protected by global and regional human rights treaties, including by Article 22 ICCPR and Article 8 ICESCR.[1228] It is also protected in instruments of the ILO, including the 1919 ILO Constitution,[1229] and the ILO Philadelphia Declaration of 1944.

The right to join, not to join and to establish a trade union was recognised by *ILO Convention No. 87* of 1948. It is a directly enforceable

[1224] CCPR, *General Comment No. 28, op. cit.*, fn. 22, para. 20. See also, CEDAW, *General Recommendation No. 24, op. cit.*, fn. 29, para. 22.

[1225] Article 10.2 ICESCR.

[1226] See, fn. 1224.

[1227] *Maternity Protection Convention (C3),* ILO, adopted on 28 November 1919 (29 Parties, 5 Denounced); *Maternity Protection Convention (Revised) (C103),* ILO, adopted on 28 June 1952 (ratified 30, denounced 11); *Maternity Protection Convention (C183),* ILO, Adopted on 15 June 2000 (ratified 18). While these have not met with wide ratification they can be used as a tool of interpretation of the obligations arising from CEDAW and other treaties. The Conventions apply irrespective of nationality.

[1228] Article 22 ICCPR; Article 8 ICESCR; Articles 20 and 23.4 UDHR; Article 10 ACHPR; Article 35 ArCHR; Article XXII ADRDM; Article 16 ACHR; Article 8, *Protocol of San Salvador;* Article 11 ECHR; Article II.19.4(b) ESC(r). See, on trade unions angle, *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,* Article 8.1(b); Article 5 ESC(r).

[1229] Preamble, *ILO Constitution.*

right which can be claimed in court. Article 2 of the ILO Convention sets out the basic principle:

> *"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."*

As declared by the ILO Congress in 1998, this right entails an obligation to promote and realise freedom of association, which is binding on all Members of the ILO, even those who are not parties to Convention No. 87.[1230] Freedom of association includes the freedom of the organisations to draw up their own constitutions and rules, elect their representatives, organise their administration and formulate their programmes,[1231] the right of the organisations not to be subject to dissolution or suspension by the administrative authority,[1232] and the right of the organisations to establish and join federations and confederations, whether national or international.[1233] The exercise of these rights by the organisations must respect national law, which "shall not be such as to impair, nor shall it be so applied as to impair, the guarantees" contained in the Convention.[1234] Finally, freedom of association consists also in a right not to join a trade union.[1235]

Freedom of association, in trade union matters, has been described by the Inter-American Court of Human Rights as being "of the utmost importance for the defence of the legitimate interests of the workers, and falls under the *corpus juris* of human rights."[1236] Moreover, the Court has specified that this safeguard "has great importance based on the principle of the inalienable nature of such rights, which all workers possess, **irrespective of their migratory status,** and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration".[1237]

1230 Article 2, *ILO 1998 Declaration.*

1231 Article 3, *Freedom of Association and Protection of the Right to Organise Convention (C87),* ILO, adopted on 9 July 1948. Other relevant ILO Conventions are *Right to Organise and Collective Bargaining Convention (C98),* ILO, adopted on 1 July 1949; and *Rural Workers' Organisations Convention (C141),* ILO, adopted on 23 June 1975.

1232 Article 4, *ibid.*

1233 Article 5, *ibid.*

1234 Article 8, *ibid.*

1235 See, *Young, James and Webster v. United Kingdom,* ECtHR, Plenary, Application No. 7601/76; 7806/77, Judgment of 13 August 1981, paras. 52, 57; *Sorensen and Rasmussen v. Denmark,* ECtHR, GC, Applications Nos. 52562/99 and 52620/99, Judgment of 11 January 2006; *Sigurjonsson v. Iceland,* ECtHR, Application No. 16130/90, Judgment of 30 June 1993. See also, Article 10.2 ACHPR; Article 8.3, *Protocol of San Salvador.*

1236 *Baena-Ricardo et al. v. Panama,* IACtHR, Series C No. 72, Judgment of 2 February 2001, para. 158.

1237 *Advisory Opinion on Undocumented Migrants,* IACtHR, *op. cit.*, fn. 33, para. 157 (emphasis added).

Central to the ILO Convention is the stipulation that freedom of association may not be restricted for *non-citizens,* as it must be guaranteed "without distinction whatsoever".[1238] According to international human rights law, the exercise of freedom of association can be restricted when the restrictions are:

- prescribed by law;
- necessary in a democratic society;[1239]
- in the interest of national security or public safety, public order, the protection of health and morals or the protection of the rights and freedoms of others.[1240]
- Non-discriminatory.

In particular, no restriction must be based on distinctions between citizens and non-citizens, as has been found in the conclusions of several human rights authorities.[1241] For example, the Committee on Economic, Social and Cultural Rights has found that the restrictions on participation in and "the prohibition on aliens occupying positions of responsibility within a trade union is contrary to the Covenant".[1242]

Article 5 ICERD prohibits race discrimination in relation to freedom of assembly and association and the right to form and join trade unions.[1243] Despite the fact that Article 1.2 of the ICERD allows for distinctions between citizens and non-citizens, the Committee on the Elimination of Racial Discrimination has clarified that this Article "must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the

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1238 Article 2, *Freedom of Association and Protection of the Right to Organise Convention (C87),* ILO. See also, Article 6.1(a)(ii), *Migration for Employment Convention (Revised) (C97),* ILO.

1239 For an interpretation of "necessity" in trade union cases see, *Young, James and Webster v. United Kingdom,* ECtHR, *op. cit.*, fn. 1235, para. 63.

1240 See, Article 22.2 ICCPR; Article 26.2 and 40.2 ICRMW; Article 16.2 ACHR; Article 8.2, *Protocol of San Salvador;* Article 27.2 ACHPR; Article 11.2 ECHR (which adds as ground "prevention of disorder and crime"); Article 35.2 ArCHR. See also, *Baena-Ricardo et al. v. Panama,* IACtHR, *op. cit.*, fn. 1236, paras. 156–159, 168–170; *Gorzelik and Others v. Poland,* ECtHR, GC, Application No. 44158/98, Judgment of 17 February 2004, paras. 64–65.

1241 See, *Concluding Observations on the Republic of Korea,* CCPR, *op. cit.*, fn. 1160, para. 12; *Concluding Observations on El Salvador,* CESCR, Report of the Committee on Economic, Social and Cultural Rights to the UN Economic and Social Council, UN Doc. E/1997/22 (1997), p. 34, para. 165; *Concluding Observations on Kuwait,* CESCR, *op. cit.*, fn. 1160, para. 38; *Concluding Observations on Costa Rica,* CESCR, *op. cit.*, fn. 1041, para. 20; *Concluding Observations on Mexico,* CMW, *op. cit.*, fn. 491, para. 36; *Concluding Observations on Ecuador,* CMW, *op. cit.*, fn. 502, para. 42; *Concluding Observations on the Philippines,* CMW, UN Doc. CMW/C/PHL/CO/1, 14 July 2009, para. 3.

1242 *Concluding Observations on El Salvador,* CESCR, *op. cit.*, fn. 1241, para. 165; *Concluding Observations on Costa Rica,* CESCR, *op. cit.*, fn. 1041, para. 20

1243 Article 5(d)(ix) and (e)(ii) ICERD.

Universal Declaration of Human Rights, the ICESCR and the ICCPR."[1244] It has also determined that many of the rights provided for by Article 5, including freedom of association and the right to form and join trade unions, must be guaranteed to all human beings regardless of their migration status.[1245]

Article 26 of the ICRMW also spells out the right to join trade unions, while Article 40, which applies only to documented migrants and their families, also includes the right to establish trade unions. The only additional specification, in comparison with the freedom of association and trade union rights guaranteed by general human rights and labour treaties, is the right "to seek the aid and assistance of any trade union".[1246] The Committee on Migrant Workers has stated that, although Article 26 does not provide for a right to establish trade unions for undocumented migrant workers, if "read together with other international human rights instruments, may create broader obligations for States parties to both instruments".[1247]

ILO Convention No. 98 mandates States to protect workers from acts of anti-union discrimination, including making the employment of a worker subject to the condition that he or she shall not join a union or shall relinquish trade union membership; or causing the dismissal of or otherwise prejudicing a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.[1248]

The *Geneva Refugee Convention* establishes that "[a]s regards non-political and non-profit-making associations and trade unions the 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."[1249] As noted above, the protection offered by international human rights law is wider, because it also protects the freedom of association of undocumented migrants and asylum-seekers.

[1244] CERD, *General Recommendation No. 30, op. cit.*, fn. 18, para. 2.

[1245] See, *ibid.*, paras. 3 and 35.

[1246] Article 26.1(c) ICRMW. Article 8.1(a) of the *Protocol of San Salvador* is also declaratory of customary international law and justiciable through the Inter-American Commission on Human Rights as from Article 19 of the same Protocol.

[1247] CMW, *General Comment No. 2, op. cit.*, fn. 2, para. 65.

[1248] Article 1, *Right to Organise and Collective Bargaining Convention (C98),* ILO (160 ratifications). See other Articles for more detail.

[1249] Article 15, *Geneva Refugee Convention*.

ANNEX 1: THE CHOICE OF AN INTERNATIONAL MECHANISM: A CHECKLIST

I. Which mechanism you can use

a) Applicability of international obligations

1. What human rights treaties is the relevant State party to?
2. Have any reservations or interpretative declarations been made by the State concerned?
3. Are all such reservations and declarations valid and permissible (i.e. is it permitted by the treaty; is it contrary to the object and purpose of the treaty?)

b) Temporal jurisdiction

1. Have the relevant treaties already entered into force?
2. Had the treaty entered into force before the facts of the case took place?
3. If separate ratification or agreement is necessary for the individual or collective complaints mechanism relevant to the treaty, has this taken place?

c) Territorial jurisdiction

1. Did the acts complained of take place within the territory of the State concerned, or otherwise come under its authority or control so as to fall within its jurisdiction?
2. Does the human rights body to which the complaint is to be sent have jurisdiction over the State concerned?

d) Material jurisdiction

1. Do the facts on which the complaint is based constitute violations of human rights treaty provisions?
2. Which mechanisms are competent to hear complaint on these human rights claims?

e) Standing

1. Does the proposed applicant have standing to bring a case under the individual or collective complaints mechanism concerned?

f) Time-limits

1. Is the case lodged within permitted time limits for the particular international mechanism concerned? If not, are other international mechanisms still available?

II. Choice of mechanism: strategy

a) One or more bodies?

1. Is it possible to submit the case to one or more mechanisms?
2. Do any of the mechanisms exclude complaints that have been or are being considered by others?
3. Can different elements of the same case be brought before different bodies?

b) Which body is more convenient?

1. Under which mechanism has the case strongest chances of success?
2. Which treaty or mechanism includes the strongest or most relevant guarantees, or the strongest jurisprudence on the relevant point?
3. Which mechanism provides the strongest system of interim measures if the case requires it? Are the interim measures of one or another mechanism more respected by the State?
4. Which mechanism can provide the strongest remedies to the applicant?
5. Which mechanism assures the strongest system of enforcement of final decisions?

c) Effect in the domestic system

1. Are the decisions of the court or tribunal concerned binding or non-binding?
2. What is the effect of the mechanism's decisions on the national system? Is there any possibility of re-opening national proceedings following the decision of the international tribunal?
3. What is the political impact of the mechanism's decision in the State concerned?

ANNEX 2: INTERNATIONAL LEGAL REMEDIES AND THEIR USE

I. Using international mechanisms and remedies

There are a number of international mechanisms, judicial and non-judicial, that may be available to migrants seeking remedies to violations of legal venues to enforce rights.

International human rights mechanisms allowing individual petitions include:

- **Judicial mechanisms:** International courts receive individual petitions or applications, and have competence to interpret and apply human rights instruments, declare whether the treaty has been violated, and prescribe appropriate remedies in the individual case considered. Their decisions are binding, and must be executed by the concerned State. International human rights judicial mechanisms include: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights.
- **Quasi-judicial mechanisms:** These bodies have all the characteristics of the judicial mechanisms, except that their decisions are not binding. They include: the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), the European Committee on Social Rights (ECSR), the Inter-American Commission on Human Rights (IACHR), the African Commission on Human and Peoples' Rights (ACHPR), the Committee on Migrant Workers (CMW), the Committee on the Rights of the Child (CRC), the Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED) and the Committee on Economic, Social and Cultural Rights (CESCR).
- **Non-judicial mechanisms:** Non-judicial mechanisms are bodies or organs that have no specific mandate to supervise a particular treaty and whose decisions or views are not binding. Their legitimacy generally derives from the treaty establishing the international or regional organisations from which they emanate, rather than from a particular human rights treaty. This is the case with the Special Procedures established by the UN Human Rights Council.

1. Preliminary requirements

a) Jurisdiction (Temporal, material and territorial)

International judicial and quasi-judicial bodies can adjudicate on any alleged violation according to the law subject to their jurisdiction. This concept is not to be confused with the "competence" of a court or tribunal to hear a particular case. In international law, jurisdiction of an international body equates with the reach of international responsibility of a State. It divides, therefore, into three categories: temporal jurisdiction (jurisdiction *ratione temporis*—concerning the period of time within which the State is bound by the international obligation); material jurisdiction (jurisdiction *ratione materiae*—concerning the limits of the subject-matter of the State obligation), and territorial jurisdiction (jurisdiction *ratione loci*—concerning the territorial reach of the State's responsibility).

i) Temporal jurisdiction ("ratione temporis")

The basic principle of international law is that an international mechanism has jurisdiction to adjudicate on alleged violations of international law that occurred after the obligation to respect the obligation entered into force for the State concerned.[1250] This principle applies equally to international human rights mechanisms, so that they have jurisdiction only over facts or acts that arose only after the entry into force of the relevant treaty for the State Party.[1251]

However, the principle applies differently to different situations:

- **Instantaneous fact/act:** the simplest situation occurs when the fact or act to be contested is an instantaneous one. In this case, it suffices to check whether the act occurred before or after the entry into force of the relevant treaty;[1252]
- **Continuous fact/act:** when the breach of the obligation has a continuing character, then the wrongful fact or act continues until the situation of violation is ended. Examples include enforced disappearances or arbitrary detentions, when the person continues to be disappeared (his whereabouts continue to be unknown) or detained even after the entry into force of the treaty, regardless

[1250] See, Article 13, *ILC Draft Articles on State Responsibility.* See, *inter alia*, *Island of Palmas* (Netherlands/USA), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928); *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C.H. White et Kate and Anna,* UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902). See also, *Northern Cameroons (Cameroon v. United Kingdom),* ICJ, Preliminary Objections, 2 December 1963, ICJ Reports 1963, p. 15, at p. 35; *Certain Phosphate Lands in Nauru (Nauru v. Australia),* ICJ, Preliminary Objections, 26 June 1992, ICJ Reports 1992, p. 240, at pp. 253–255, paras. 31–36.

[1251] See, *X. v. Germany,* ECommHR, Application No. 1151/61, *Recuil des decisions,* p. 119 (1961).

[1252] See, Article 14.1, *ILC Draft Articles on State Responsibility.*

of whether the situation originated from an act/fact that occurred before that date.[1253] This case must be distinguished from breaches of international obligations which occurred and ended before the entry into force of the treaty but still have effects after the entry into force of the treaty. In such cases, the mechanism will however be able to adjudicate collateral violations: for example the lack of investigation into responsibility for violations of human rights law, if the State did not remedy it before the entry into force of the treaty.[1254]

- **Breach of obligation to prevent:** this situation occurs when the State has an obligation to prevent a given event, but fails to do so. The breach extends over the entire period during which the event continues and remains in violation of that obligation.[1255]

ii) Material jurisdiction ("ratione materiae")

This kind of jurisdiction relates to the treaty or the international obligation of which the international mechanism is the "guardian". It means that it is not possible to raise before an international mechanism human rights violations that are not covered by the relevant treaty.

In assessing whether there is material jurisdiction, it should be borne in mind that evolutive interpretation has led to an expansion of the scope of certain human rights. For example, it is possible to argue against a forced eviction under the ICCPR and the ECHR claiming a violation of the right to respect for the home and for private and family life. Also, the creation of conditions of life leading to a situation of destitution might constitute a violation of the right to life (see, Box No. 14, and Chapter 5, Section II.1(c)(iii)). The boundaries between civil and political and social, economic and cultural rights, and among different treaties must not be viewed strictly and a careful analysis of the mechanisms' jurisprudence is recommended.

The "Human Rights Committee" (HRC) is competent *ratione materiae* for breaches of the *International Covenant on Civil and Political Rights* (ICCPR); the "Committee against Torture" (CAT) for the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the "Committee on the Elimination of Racial Discrimination" (CERD) for the *International Convention on the*

[1253] See, *Blake v. Guatemala,* IACtHR, Series C No. 36, Judgment of 24 January 1998, para. 67; *X. v. Switzerland,* ECommHR, Application No. 7601/75, Admissibility Decision, 12 July 1976. On continuing violations in the context of enforced disappearances, see, *Serrano Cruz Sisters v. El Salvador,* IACtHR, *op. cit.*, fn. 853, paras. 100 and 105.

[1254] See, Article 14.2, *ILC Draft Articles on State Responsibility.* See, *Lovelace v. Canada,* CCPR, Communication No. R.6/24, Views of 30 July 1981. See, *Moldovan and Others (2) v. Romania,* ECtHR, *op. cit.*, fn. 937, paras. 104–106.

[1255] See, Article 14.3, *ibid.*

Elimination of All Forms of Racial Discrimination (ICERD): the "Committee on the Elimination of Discrimination against Women" (CEDAW) for the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); and the "Committee on Migrant Workers" (CMW) for the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW); the "Committee on the Rights of the Child" (CRC) for the *Convention on the Rights of the Child* (CRC), the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (OP-CRC-SC), and the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* (OP-CRC-AC); the "Committee on the Rights of Persons with Disabilities" (CRPD) for the *Convention on the Rights of Persons with Disabilities* (CRPD); the "Committee on Enforced Disappearances" for the *International Convention on the Protection of All Persons from Enforced Disappearance;* and the "Committee on Economic, Social and Cultural Rights" (CESCR) for the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

At a regional level, the European Court of Human Rights (ECtHR) is competent to hear complaints referring to the *European Convention for the Protection of Human Rights and Fundamental Freedoms.* The European Committee on Social Rights (ESCR) is competent for collective complaints against the States Parties to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* ("Additional Protocol of 1995") and those who accepted the collective complaint mechanism through a declaration under Article D of the *European Social Charter (revised).* The ESCR is competent to consider complaints only against those rights of the European Social Charter by which the State Party has undertaken to be bound.[1256]

The Inter-American Commission on Human Rights (IACHR), established by the OAS Charter,[1257] is competent[1258] to consider alleged violations of *American Declaration of the Rights and Duties of Man,* the *American Convention on Human Rights* and of the right to establish and join trade unions and the right to education under the *Additional Protocol to the*

[1256] See, Article 11, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (AP-ESC); and Article A (Part III), ESC(r).

[1257] Article 106, *Charter of the Organisation of American States* (OAS Charter).

[1258] See, Article 23, *Rules of Procedure of the Inter-American Commission on Human Rights,* approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009, and modified on 2 September 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on 1 August 2013 (IACHR Rules of Procedure). Other human rights treaties of IACHR competence are the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty,* the *Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons,* and/or the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará".*

American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador".[1259] The Commission has found also that Articles 26 and 29 ACHR may allow this body to consider violations of economic, social and cultural rights contained in the Protocol of San Salvador.[1260] The Inter-American Court of Human Rights (IACtHR) has subject-matter jurisdiction for violations of the *American Convention on Human Rights* (ACHR) only against States that have accepted it through a declaration done under Article 62 ACHR. It can also adjudicate on violations of the right to establish and join trade unions and the right to education under the *"Protocol of San Salvador".*[1261]

The African Commission on Human and Peoples' Rights (ACHPR) is competent to hear individual complaints for violations of the *African Charter on Human and Peoples' Rights* (ACHPR) against the States Parties.[1262] The African Court on Human and Peoples' Rights has the competence to hear complaints for breach of the *African Charter* and of any other human rights instrument ratified by a State Party to the Protocol establishing the Court.[1263]

iii) Territorial jurisdiction ("ratione loci")

The jurisdiction *ratione loci* establishes the geographical reach of the State's human rights obligations. Most of the time, an alien will have clearly entered the State's jurisdiction when he or she accesses its territory. It is indisputable that States must guarantee, secure and protect the human rights of everyone who is on their territory.[1264] This also occurs when the alien is present in an "international zone" or *"zone d'attente"* of an airport.[1265]

However, States do not only have the obligation to secure and protect human rights to everyone that is present on their territory, but also to

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[1259] See, Article 19.6, *Protocol of San Salvador.* See, *National Association of Ex-Employees v. Peru,* IACHR, *op. cit.*, fn. 892, para. 69; *Pensioners of the National Agricultural Development Bank (BANDESA) v. Guatemala,* IACHR, Petition No. 1380–06, Report No. 102/09, Admissibility Decision, 29 October 2009, para. 24; *Tena Colunga et al. v. Mexico,* IACHR, Petition No. 2582/02, Report No. 44/04, Admissibility Decision, 13 October 2004, paras. 39–40; *Meneses de Jiménez v. Colombia,* IACHR, Petition No. 2779–02, Report No. 50/10, Admissibility Decision, 18 March 2010, paras. 45–46.

[1260] See, *Sanchez Villalobos and Others v. Costa Rica,* IACHR, Petition No. 12.361, Report No. 25/04, Admissibility Decision, 11 March 2004, para. 52; *Meneses de Jiménez v. Colombia,* IACHR, *op. cit.*, fn. 1259, para. 46.

[1261] See, Article 19.6, *Protocol of San Salvador.* See, *Baena-Ricardo et al. v. Panama,* IACtHR, *op. cit.*, fn. 1236, para. 97.

[1262] Article 55 ACHPR.

[1263] Article 3, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (P-ACHPR on African Court).

[1264] Article 2.1 ICCPR; Article 2.1 CRC; Article 7 ICRMW; Article 1 ECHR; Article 1.1 ACHR; Article 3.1 ArCHR.

[1265] *Amuur v. France,* ECtHR, *op. cit.,* fn. 45, paras. 52-53.

all persons under their jurisdiction. The term "jurisdiction" has a wider reach than the national territory of the State. It applies to all persons who fall under the authority or the effective control of the State's authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, where the State exercises effective control.[1266] Furthermore, where persons or groups acting under State authority act outside their State's territory, so as to bring victims of violations under their authority, bring the person or the property concerned by the acts within the State's jurisdiction, regardless of the territory in which the acts took place or where the person or the property were present.[1267]

For example, the European Court of Human Rights has found that jurisdiction had extraterritorial reach in various situations, even outside the territory of States Parties to the European Convention of Human Rights—including in northern Iraq,[1268] Kenya,[1269] Sudan,[1270] Iran,[1271] in a UN neutral buffer zone,[1272] and in international waters.[1273] Human

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[1266] See, fn. 46.

[1267] See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ, *op. cit.*, fn. 46, para. 109; *Lopez Burgos v. Uruguay,* CCPR, *op. cit.*, fn. 46, paras. 12.1–12.3; *Ciliberti de Casariego v. Uruguay,* CCPR, *op. cit.*, fn. 46; *General Comment No. 31,* CCPR, *op. cit.*, fn. 46, para. 10; *Issa and Others v. Turkey,* ECtHR, *op. cit.*, fn. 46, para. 71; *Öcalan v. Turkey,* ECtHR, *op. cit.*, fn. 47, para. 91; *Ramirez v. France,* ECommHR, *op. cit.*, fn. 47; *W.M. v. Denmark,* ECommHR, Application No. 17392/90, Admissibility Decision, 14 October 1992, paras. 1–2; *Drozd and Janousek v. France and Spain,* ECtHR, Plenary, Application No. 12747/87, 26 June 1992, para. 91; *Loizidou and Others v. Turkey,* ECtHR, GC, Application No. 15318/89, 23 March 1995, para. 62; *Ilascu and Others v. Moldova and the Russian Federation,* ECtHR, GC, Application No. 48787/99, 4 July 2001; *Freda v. Italy,* ECommHR, Plenary, Application No. 8916/80, Admissibility Decision, 7 October 1980 para. 3; *X. v. United Kingdom,* ECommHR, Application No. 7547/76, Admissiblity Decision, 15 December 1977, para. 81; *X. v. Federal Republic of Germany,* ECommHR, Application No. 1611/62, Admissiblity Decision, 25 September 1965; *Cyprus v. Turkey,* ECommHR, Plenary, Applications nos. 6780/74–6950/75, 26 May 1975, paras. 8 and 10; *Hess v. United Kingdom,* ECommHR, Application No. 6231/73, Admissibility Decision, 28 May 1975; *X and Y v. Switzerland,* ECommHR, Applications Nos. 7289/75–7349/76, Admissibility Decision, 14 July 1977, para. 2; *W. v. United Kingdom,* ECommHR, Application No. 9348/81, 28 February 1983, para. 5; *Victor Saldaño v. Argentina,* IACHR, *op. cit.*, fn. 46, para. 17; *Coard et al. v. United States,* IACHR, *op. cit.*, fn. 46, para. 37; *Al-Skeini and Others v. United Kingdom,* ECtHR, GC, Application no. 55721/07, Judgment of 7 July 2011, paras. 133–142; *Hirsi Jamaa and Others v. Italy,* ECtHR, *op. cit.*, fn. 46, paras. 73–82. See also, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,* 29 February 2012, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf; and their commentary available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf.

[1268] *Issa and Others v. Turkey,* ECtHR, *op. cit.*, fn. 46

[1269] *Öcalan v. Turkey,* ECtHR, *op. cit.*, fn. 47.

[1270] *Ramirez v. France,* ECommHR, *op. cit.*, fn. 47.

[1271] *Pad and Others v. Turkey,* ECtHR, *op. cit.*, fn. 47.

[1272] *Isaak and Others v. Turkey,* ECtHR, *op. cit.*, fn. 47.

[1273] *Xhavara and Others v. Italy and Albania,* ECtHR, *op. cit.*, fn. 46; and, *Women on Waves and Others v. Portugal,* ECtHR, *op. cit.*, fn. 46.

rights obligations apply in unmodified form to a State exercising extra-territorial jurisdiction—for example, an occupying power, a military base abroad or a state operating an extra-territorial detention centre—as has been authoritatively affirmed regarding comparable obligations under CAT, the ICCPR, the ECHR,[1274] by the Inter-American Commission on Human Rights[1275] and the Refugee Convention.[1276]

Of particular relevance for migrants is the fact that the State's jurisdiction may extend in certain situations to international waters. The IACHR has found that the interception and return of asylum-seekers, on the high seas, to their country of origin constituted a violation of their right to seek asylum in a foreign country, as granted by the ADRDM and the ACHR.[1277] The Grand Chamber of the European Court of Human Rights has clearly stated that measures of interception of boats, including on the high seas, fall within the jurisdiction of the State implementing the interception. From the moment of effective control of the boat, all the persons on it fall within the jurisdiction of the intercepting State, which must secure and protect their human rights.[1278] The Committee against Torture has also held that the seizure of a boat in international waters, and even the control over the passengers in foreign territory in order to proceed with their identification and repatriation, attracted the jurisdiction of the State which had control over them.[1279] The same principles apply in the context of rescue operations at sea, analysed in Chapter 1.

In a case concerning human trafficking, the European Court of Human Rights has held that there jurisdiction was established for the State of origin of the person trafficked in so far as its obligations to protect the concerned person from trafficking were engaged.[1280]

1274 See, *inter alia*, *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, *op. cit.*, fn. 391; *Al-Skeini and Others v. United Kingdom,* ECtHR, *op. cit.*, fn. 1267, paras. 133–142.

1275 See, *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 163, 168 and 171.

1276 *Concluding Observations on USA,* CAT, *op. cit.*, fn. 46, para. 20; *Concluding Observations on USA,* CCPR, *op. cit.*, fn. 323; UNHCR, *The Scope and Content of the Principle of Non-refoulement*, Opinion, Sir Elihu Lauterpacht CBE QC, Daniel Bethlehem, Barrister, paras. 62–67, concludes that: "the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs,* whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc." See also, para. 242. See further, UNHCR, *Advisory Opinion on the Extraterritorial Application, op. cit.*, fn. 293; CAT, *General Comment No. 2, op. cit.*, fn. 31, paras. 7, 16 and 19; Nowak and McArthur, *op. cit.*, fn. 391, p.129, para.4; p.147, para. 72 and p. 199, para. 180–1; CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 10–11; *Concluding Observations on United Kingdom,* CAT, *op. cit.*, fn. 391, paras. 4(b) and 5(e).

1277 *Haitian Interdictions Case,* IACHR, *op. cit.*, fn. 46, paras. 156, 157 and 163.

1278 See, *Hirsi Jamaa and Others v. Italy,* ECtHR, *op. cit.*, fn. 46, paras. 73–82; *Medvedyev and Others v. France,* ECtHR, *op. cit.*, fn. 51, paras. 62–67.

1279 *J.H.A. v. Spain,* CAT, *op. cit.*, fn. 266, para. 8.2.

1280 *Rantsev v. Cyprus and Russia,* ECtHR, *op. cit.*, fn. 236, paras. 206–208.

b) Standing

The terms *"locus standi"* or "standing" address the question of who is entitled to enter an application or submit a complaint for a human rights violation before an international mechanism. Whilst some international mechanisms with a judicial or quasi-judicial character provide for standing for individuals to bring complaints, others allow for "collective complaints" by groups.

- **Individual Complaints:** some mechanisms allow only for the victims of a violation, or for those petitioning on his or her behalf to lodge a complaint. Certain mechanisms allow for general human rights NGOs to lodge a complaint on behalf of victims, even without their direct authorisation, although it must be demonstrated that it would have been impossible or very difficult to obtain authorisation for reasons independent from the victims themselves.
- **Collective Complaints:** This mechanism allows organisations to challenge a general legal or factual situation which gives rise to or has the potential to give rise to human rights violations, without naming individual complaints.

i) Standing to bring individual application: the meaning of "victim"

In individual complaints mechanisms, standing is generally accorded to persons who are "victims" of a human rights violation. Victims may be either direct or indirect. A victim is generally a person directly affected by the violation of the human rights concerned.[1281] However, particular cases might arise when the direct cause and effect is more blurred. For example, the existence of a law that potentially impedes the individual in asserting his or her rights, although the person has not yet breached the law, may put the individual in the situation of "victim", if the risk of the law being applied when the action contrary to it is taken is more than a theoretical possibility.[1282] Furthermore, laws might violate the individual's right even when the individual cannot be aware of it, because the law makes such awareness impossible, for example in the case of some types of surveillance.[1283] Individuals may also be indirect victims

[1281] Companies might be victims too, but due to the scope of this Guide we will deal only with individuals.

[1282] See, *Mauritian Women Case,* CCPR, *op. cit.*, fn. 55; *Toonen v. Australia,* CCPR, Communication No. 488/1992, Views of 31 March 1994, paras. 8.2 and 9. See, *Dudgeon v. United Kingdom,* ECtHR, Plenary, Application No. 7525/76, Judgment of 22 October 1981; *Norris v. Ireland,* ECtHR, Plenary, Application No. 10581/83, Judgment of 26 October 1988; *Open Door and Well Woman v. Ireland,* ECtHR, Plenary, Applications nos. 14234/88; 14235/88, Judgment of 29 October 1992; *Campbell and Cosans v. United Kingdom,* ECommHR, Applications Nos. 7511/76; 7743/76, Report of 16 May 1980.

[1283] *Klass and Others v. Germany,* ECtHR, Plenary, Application No. 5029/71, Judgment of 6 September 1978.

of a violation or might suffer from what could be called "collateral violations". It is recognised, for example, that the relatives of a victim of torture or disappearance might find their right not to be subject to ill-treatment violated by the mere fact of having been exposed to this situation.[1284] Finally, in cases of expulsion which might infringe a State's human rights obligations, because they could be contrary to the principle of *non-refoulement* or disproportionally interfere with the right to respect for family life, an individual can be a victim despite the fact that potential and not actual violations are at issue (see, Chapter 2).

ii) Mechanisms for individual complaints

Universal treaty bodies do not provide for collective complaints. The general rule is that complaints may be submitted by individuals who claim to be victims of a violation by the State Party of any of the rights set forth in human rights treaty for which the treaty body has competence.[1285] If the violation concerns a group of people, they can submit as a group.[1286] The complaint may be submitted by the individual personally or by a third party acting on behalf of the individual or groups

[1284] See, *Quinteros Almeida v. Uruguay,* CCPR, Communication No. 107/1981, Views of 21 July 1983, para. 14; *Staselovich and Lyashkevich v. Belarus,* CCPR, Communication No. 887/1999, Views of 3 April 2003, para. 9.2. See, *Kurt v. Turkey,* ECtHR, *op. cit.*, fn. 724.

[1285] See, Article 1, *Optional Protocol to the International Covenant on Civil and Political Rights* (OP-ICCPR); Article 2 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* adopted by General Assembly resolution No. 63/117, UN Doc. A/RES/63/117, 10 December 2008 (OP-ICESCR); Article 2, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (OP-CEDAW); Rule 113(a), *Rules of Procedure of the Committee against Torture,* UN Doc. CAT/C/3/Rev.6, 13 August 2013 (CAT Rules of Procedure); Rule 91(b), *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* (CERD Rules of Procedure). See also, Rule 68.1, *Rules and Procedures of the Committee on the Elimination of Discrimination against Women,* UN Doc. A/56/38 (SUPP), as amended by A/62/38 (SUPP, Chapter V) (CEDAW Rules of Procedure); Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities,* UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure); Rule 68, *Rules of Procedure of the Committee on Enforced Disappearances,* UN Doc. CED/C/1, 22 June 2012 (CED Rules of Procedure).

[1286] This requirement, valid for all treaty bodies, is made explicit in Article 2 OP-ICESCR and Article 2 OP-CEDAW. See also, Rule 68.1, *CEDAW Rules of Procedure;* Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* not yet into force (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities,* UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure).

alleging to be victims, with their authorisation.[1287] Another issue is whether third persons or entities may act on behalf of the individuals or groups claiming to be victims, without their authorisation. Treaty bodies generally allow for this on condition that the person or entity applying must justify the absence of authorisation, for example, because the victim is in a particular situation of risk or vulnerability which prevents him or her from availing of the communication procedure, or because the violation is so massive that it is impossible to obtain the authorisation of all the people affected.[1288]

The **European Court of Human Rights** receives applications from various entities—individual persons, NGOs, or group of individuals—who claim to be a victim (either direct or indirect) of the alleged violation.[1289] Applications cannot be anonymous, but the Court may grant leave to anonymity of the claim in its communication to other parties or the public, when the applicant has adduced sufficient reasons to justify this departure from the rule.[1290]

As for the **Inter-American Commission on Human Rights,** any person or group of persons, or any non-governmental entity legally recognised in one or more Member States of the Organization of American States (OAS), may lodge petitions containing complaints of violation of this Convention by a State.[1291] In practice, however, the IACHR frequently requests that the author of any complaint be either a victim or a relative of a victim or have a mandate to act by the victim or by

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1287 See, Rule 96(b), *Rules of Procedure of the Human Rights Committee,* UN Doc. CCPR/C/3/Rev.10, 11 January 2012 (CCPR Rules of Procedure); Article 2 OP-ICESCR; Rule 113(a), *CAT Rules of Procedure;* Rule 91(b), *CERD Rules of Procedure;* Article 2 OP-CEDAW. See also, Rule 68(1), *CEDAW Rules of Procedure;* Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* not yet into force (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,* UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities,* UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure); Rule 68, *Rules of Procedure of the Committee on Enforced Disappearances,* UN Doc. CED/C/1, 22 June 2012 (CED Rules of Procedure).

1288 See, Rule 96(b), *CCPR Rules of Procedure;* Article 2 OP-ICESCR; Rule 91(b), *CERD Rules of Procedure;* and Article 2, OP-CEDAW. See also, Rule 68.1, *CEDAW Rules of Procedure.* See, Rule 13, *CRC Rules of Procedure:* "communications may be submitted on behalf of the alleged victim(s) without such express consent, provided that the author(s) can justify her/his/their action and the Committee deems it to be in the best interests of the child. If possible, the alleged victim(s) on whose behalf the communication is presented may be informed of the communication and her/his/their views shall be given due weight in accordance with her/his/their age and maturity".

1289 Article 34 ECHR.

1290 Rule 47.4, *Rules of the Court*, ECtHR, 1 January 2014, Strasbourg (ECtHR Rules of Procedure). See for details of applications, the entire Rule 47.

1291 Article 44 ACHR.

a relative of the victim. The Commission has clearly stated that "[t]he applicant must claim to be a victim of a violation of the Convention, or must appear before the Commission as a representative of a putative victim of a violation of the Convention by a State Party. It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the American Convention, it is necessary that the law has been applied to her detriment."[1292]

iii) Mechanisms for collective complaints: ECSR

The collective complaints system of the **European Committee on Social Rights** does not provide for a right of individual application. It does confer the standing to make a complaint on certain organisations, namely:

- International organisations of employers and trade unions;
- Other international non-governmental organisations which have consultative status with the Council of Europe and have been placed on a list established for this purpose by the Governmental Committee;
- Representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint;
- National non-governmental organisations with competence in the matters governed by the Charter, which have been allowed by the Contracting State of origin to lodge complaints against it.[1293]

iv) Individual and collective complaints: the ACHPR

Article 55 ACHPR does not place any restrictions on who can submit cases to the **African Commission on Human and Peoples' Rights.** The Commission has interpreted this provision as giving *locus standi* to victims and their families, as well as NGOs and others acting on their behalf, even when they are not representatives of the victims. Indeed, for the African Commission, "the African Charter does not call for the identification of the victims of a Communication. According to the terms of Article 56(1), only the identification of the author or authors of the Communication is required."[1294] This position is an established principle of the African Commission's jurisprudence.[1295]

[1292] *Montoya González v. Costa Rica,* IACHR, Case 11.553, Report No. 48/96, Admissibility Decision, 16 October 1996, para. 28.

[1293] Articles 1 and 2, AP-ESC.

[1294] *FIDH, National Human Rights Organisation (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v. Senegal,* ACommHPR, Communication No. 304/2005, 40th Ordinary, 15–29 November 2006, para. 40.

[1295] See, as reference, *Malawi African Association and Others v. Mauritania,* ACommHPR, *op. cit.*, fn. 1006. See also, *Mgwanga Gunme et al. v. Cameroon,* ACommHPR, Communication No. 266/2003, 45th Ordinary Session, 13–27 May 2009, para. 67.

The *African Charter on the Rights and Welfare of the Child* (ACRWC) has established an African Committee of Experts on the Rights and Welfare of the Child to monitor its implementation by State Parties.[1296] Article 44 ACRWC provides that the Committee "may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter."[1297] The Committee is therefore competent to hear both individual and collective complaints.

v) Mechanisms of indirect access

Individuals cannot directly bring a complaint to the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights. They generally take cases brought by a lower human rights mechanism (IACHR or ACHPR) or by a State.

For the **Inter-American Court of Human Rights** only a State Party and the Inter-American Commission have the right to submit a case to the Court.[1298] However, in cases before the Court, alleged victims, their next of kin or their duly accredited representatives are allowed to participate in the proceedings by submitting pleadings, motions and evidence, autonomously, throughout the proceedings. They may also request the adoption of provisional measures.[1299]

The **African Court on Human and Peoples' Rights** accepts only cases submitted to the Court by the Commission, the State Party which has lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of human rights violation, and by African Intergovernmental Organisations. The Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute the cases directly before it.[1300] NGOs will therefore need to have previous approval by the African Commission, while individuals will have to ask the permission of the Court, most probably on a case-by-case basis. The Interim Rules of Procedures do not say that the Court "may entitle", but that these last two kind of applicants "are entitled" to submit cases to the Court, suggesting that, in its work, the Court will not unfavourably exercise discretion on granting *locus standi* to individuals.[1301] The

1296 Article 32 ACRWC.

1297 Article 44.1 ACRWC.

1298 Article 61.1 ACHR.

1299 See, Article 27, *Rules of Procedure of the Inter-American Court of Human Rights,* approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009 (IACtHR Rules of Procedure).

1300 Article 5, *P-ACHPR on African Court.*

1301 Article 33, *Interim Rules of the Court,* done at Arusha, Tanzania, 20 June 2008, entered into force on 20 June 2008 (ACtHPR Rules of Procedure).

provisions will not change in the new *Statute of the African Court of Justice and Human Rights.*[1302]

2. Admissibility requirements

Admissibility requirements must be fulfilled before a complaint is examined on the merits. They are contained in the human rights treaty establishing the competence of the human rights body to hear individual or collective complaints. Generally, these requirements are very similar for all human rights bodies and, even when some are not specifically provided for in the treaty, they are usually upheld by the competent human rights body on the basis of the uniform interpretation of international human rights law. As for the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, since these bodies do not hear individual complaints directly, the admissibility criteria are the same as those of their lower bodies, the IACHR and the ACHPR.

a) Exhaustion of domestic remedies

It is a general standard of international human rights law that, before bringing a case before an international legal mechanism, an applicant must have first exhausted the domestic remedies available. The rationale of the principle lies in the fact that, as it is the international responsibility of the State as a whole that is challenged, the State must have had the possibility to redress that human rights violation domestically, before an international forum should be made available. However, only those remedies that are effective need to be exhausted. If several effective and adequate remedies are available, it is sufficient to exhaust only one of them.[1303]

A domestic remedy is **"adequate"** only when it is able to address that particular human rights violation according to international human rights law standards.[1304] A complaint under a substantial provision containing a right under international human rights law must be arguable before the

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[1302] Article 30, *Protocol on the Statute of the African Court of Justice and Human Rights,* adopted by the 11th Ordinary Session of the Assembly of the African Union in Sharm El-Sheikh, Egypt, 1 July 2008 (not yet in force) (ACJHR Statute).

[1303] See, *T.W. v. Malta,* ECtHR, GC, Application No. 25644/94, Judgment of 29 April 1999, para. 34; *Iatridis v. Greece,* ECtHR, GC, Application No. 31107/96, Judgment of 25 March 1999, para. 47. A comprehensive restatement of the European Convention's admissibility criteria together with the European Court's jurisprudence is available in the *Practical Guide on Admissibility Criteria* produced by the Research Division of the European Court of Human Rights, and available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

[1304] See, *Danyal Shafiq v. Australia,* CCPR, *op. cit.*, fn. 687, para. 6.4; *Vélez Loor v. Panama,* IACHR, Case 92-04, Report No. 95/06, Admissibility Decision, 23 October 2006, para. 36; *Velasquez Rodriguez v. Honduras,* IACtHR, *op. cit.*, fn. 799, para. 64; *Godinez Cruz v. Honduras,* IACtHR, Series C No. 5, Judgment of 20 January 1989, para. 67; *Garbi and Corrales v. Honduras,* IACtHR, Series C, No. 6, Judgment of 15 March 1989, para. 88; *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, para. 121; *Soldatenko v. Ukraine,* ECtHR, *op. cit.*, fn. 361, para. 49; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, para. 446.

domestic remedial mechanism.[1305] It is not necessary that the specific article of the human rights treaty be used as a ground of judicial review. It is sufficient that the substance of the human rights claim be arguable.[1306]

The domestic remedy must also be **"effective",** i.e. able to ascertain and redress the potential violation once this is established. It must have the power to give binding orders that reverse the situation of violation of the person's rights or, if that is impossible, provide adequate reparations. Reparation includes, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[1307] Remedies whose decisions do not have binding force or whose decisions or the implementation of them are at the discretion of a political body are not deemed to be effective.[1308] Furthermore, particularly in cases of expulsions, the remedy must have the power to suspend the situation of potential violation when the lack of suspension would lead to irreparable harm/irreversible effects for the applicant while the case is being considered.[1309]

The remedy must also have certain characteristics of **due process of law.**[1310] It must be independent, which means that it must not be subject to interference by the authorities against which the complaint is brought.[1311] It must afford due process of law for the protection of the right or rights alleged to be violated, must be accessible by every-

1305 *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 99.

1306 See, *Fressoz and Roire v. France,* ECtHR, GC, Application No. 29183/95, Judgment of 21 January 1999, paras. 33–37; *Castells v. Spain,* ECtHR, Application No. 11798/85, Judgment of 23 April 1992, paras. 24–32.

1307 Articles 19–23, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.* See also, ICJ, *Practitioners Guide No. 2, op. cit.*, fn. 480, Chapters VI and VII.

1308 See, *Madafferi and Madafferi v. Australia,* CCPR, *op. cit.*, fn. 460, para. 8.4; *C. v. Australia,* CCPR, *op. cit.*, fn. 350, para. 7.3; *L.Z. B. v. Canada,* CAT, Communication No. 304/2006, Views of 15 November 2007, para. 6.4; *L.M.V.R.G. and M.A.B.C. v. Sweden,* CAT, Communication No. 64/1997, Views of 19 November 1997, para. 4.2; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, para. 446. However, there must be evidence in practice that the discretion of the political power does not lead to a predictable decision according to legal standards. It must be evident that the discretion is absolute. Otherwise, the applicant has a duty to try to exhaust also that remedy. See, *Danyal Shafiq v. Australia,* CCPR, *op. cit.*, fn. 687, para. 6.5. See also, Article 22.5(b) CAT; Article 4.1 OP-CEDAW; Article 77.3(b) ICRMW.

1309 See, *Dar v. Norway,* CAT, Communication No. 249/2004, Views of 16 May 2007, paras. 6.4–6.5; *Tebourski v. France,* CAT, *op. cit.*, fn. 353, paras. 7.3–7.4; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 90; *Jabari v. Turkey,* ECtHR, Application No. 40035/98, Admissibility Decision, 28 October 1999; *Bahaddar v. the Netherlands,* ECtHR, Application No. 25894/94, Judgment of 19 February 1998, paras. 47 and 48; *Soldatenko v. Ukraine,* ECtHR, *op. cit.*, fn. 361, para. 49; *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 101; *Gebremedhin v. France,* ECtHR, *op. cit.*, fn. 602, paras. 66–67.

1310 See, Article 46 ACHR; and Article 31, *IACHR Rules of Procedure.*

1311 See, CCPR, *General Comment No. 31, op. cit.*, fn. 46, para. 15; *Keenan v. United Kingdom,* ECtHR, *op. cit.*, fn. 769, para. 122; *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 101; *Judicial guarantees in states of emergency,* IACtHR, Advisory Opinion OC-9/87, 6 October 1987, para. 24.

one, and must not constitute a denial of justice.[1312] This will require the provision of free legal advice, where necessary to ensure access to the procedure.[1313] The remedy must afford the applicant sufficient time to prepare the case, so as to allow a realistic possibility of using the remedy.[1314]

A particular situation arises under the **Committee on Elimination of Racial Discrimination** (CERD). Under the ICERD, any State Party may establish a national body to consider petitions regarding violation of ICERD rights.[1315] In countries where such bodies exist, before his or her communication can be considered as admissible, the complainant must first demonstrate that he or she did not obtain satisfaction from this body.[1316]

i) Exceptions to the principle

There are situations in which an applicant is not required to exhaust domestic remedies. In general, this arises where the remedy lacks effectiveness, adequateness, or due process of law characteristics. Below we list the most typical cases of exception to the rule of the exhaustion of domestic remedies, although other situations may also arise where exhaustion of domestic remedies is not required. A remedy need not be pursued:

- If it can be incontrovertibly proven that it was **bound to fail.**[1317] This might occur when the remedy is subject to a consistent practice or jurisprudence, or the legal system has a normative framework, which makes it virtually impossible for the individual case to succeed.[1318]
- If the **legal system as such fails to provide conditions for the effectiveness** of the remedy, e.g. because of lack of effec-

[1312] See, *Vélez Loor v. Panama,* IACHR, *op. cit.*, fn. 1304, para. 36. On access, see also, *Concluding Observations on Mexico,* CMW, *op. cit.*, fn. 491, paras. 25–26; *Concluding Observations on Egypt,* CMW, *op. cit.*, fn. 1074, paras. 22–23; Concluding Observations on Bolivia, CMW, *op. cit.*, fn. 502, paras. 23–24; *Airey v. Ireland,* ECtHR, Application No. 6289/73, Judgment of 9 October 1979.

[1313] *Ibid*., para. 45.

[1314] See, *Muminov v. Russia,* ECtHR, *op. cit.*, fn. 343, para. 90; *Bahaddar v. the Netherlands,* ECtHR, *op. cit.*, fn. 1309, para. 45; *Alzery v. Sweden,* CCPR, *op. cit.*, fn. 364, para. 8.2.

[1315] Article 14.2 ICERD. However, this provision is not utilised in practice.

[1316] Article 14.5 ICERD. See also, Rule 91(e), CERD Rules of Procedure.

[1317] See, *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 89; *Kleyn and Others v. the Netherlands,* ECtHR, GC, Applications Nos. 39343/98–39651/98–43147/98–46664/99, Judgment of 6 May 2003, para. 156; *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, paras. 121–124;

[1318] See, *Salah Sheekh v. the Netherlands,* ECtHR, *op. cit.*, fn. 317, paras. 121–124; *Kleyn and Others v. the Netherlands,* ECtHR, *op. cit.*, fn. 1317, para. 156; *Johnston and Others v. Ireland,* ECtHR, Plenary, Application No. 9697/82, Judgment of 18 December 1986, para. 44; *Open Door and Well Woman v. Ireland,* ECtHR, *op. cit.*, fn. 1282, paras. 47–52; *Keegan v. Ireland,* ECtHR, *op. cit.*, fn. 200, para. 39.

tive investigation, or where it is a consistent practice not to follow or implement court orders in particular situations, or where there is a situation of conflict or impunity.[1319] The European Court has held that remedies where the granting of relief is purely discretionary need not be exhausted.[1320]

- If the process to obtain or access to the remedy is **unreasonably prolonged.**[1321]
- If the victim does **not have access to the remedy** due to a lack of legal representation, whether because of the unavailability of legal aid, threat of reprisals, or restrictions on access to lawyers in detention. This doctrine has been developed by the European Court of Human Rights,[1322] the Inter-American Court of Human Rights[1323] and the African Commission on Human and Peoples' Rights.[1324] The ACHPR has also found a remedy to be inaccessible for a group of Sierra Leonean refugees expelled by Guinea because they would have been in "constant danger of reprisals and punishment", they constituted an "impractical number of potential plaintiffs" for the capacity of the judicial system, and the exhaustion of Guinean remedies would have required them to return to a country where they suffered persecution.[1325]

1319 See, *Akdivar and Others v. Turkey,* ECtHR, *op. cit.*, fn. 937, paras. 69–77; *Isayeva, Vusupova and Bazayeva v. Russia,* Applications nos. 57947/00–57948/00–57949/00, Judgment of 24 February 2005, paras. 143–153; *A.B. v. the Netherlands,* ECtHR, Application No. 37328/97, Judgment of 29 January 2002, paras. 63–74; *Velasquez Rodriguez v. Honduras,* IACtHR, *op. cit.*, fn. 799, para. 68; and, *IHRDA v. Republic of Angola,* ACommHPR, *op. cit.*, fn. 395, para. 39, where the swift execution of the expulsion which did not even allow the applicant to gather their belonging was enough evidence of the impossibility to seize and exhaust domestic remedies. See also, *ZLHR and IHRD v. Zimbabwe,* ACommHPR, *op. cit.*, fn. 395, para. 56. See also, Article 46 ACHR, and Article 31, *IACHR Rules of Procedure.*

1320 *Buckley v. United Kingdom,* ECommHR, Application No. 20348/92, Admissibility decision, 3 March 1994.

1321 See, *Zundel v. Canada,* CCPR, *op. cit.*, fn. 503, para. 6.3; *Z.U.B.S. v. Australia,* CERD, Communication No. 6/1995, Views of 25 January 2000, para. 6.4; *Vélez Loor v. Panama,* IACHR, *op. cit.*, fn. 1304, para. 36; *Velasquez Rodriguez v. Honduras,* IACtHR, *op. cit.*, fn. 799, para. 93; *Tanli v. Turkey,* ECommHR, Plenary, Application No. 26129/95, Admissibility Decision, 5 March 1996. See also, Articles 2 and 5.2(b) OP-ICCPR; Article 3.1 OP-ICESCR; Article 22.5(b) CAT; Rule 113(e), CAT Rules of Procedure; Article 14.7(a) ICERD; Rule 91(e), *CERD Rules of Procedure;* Article 4.1 OP-CEDAW; Article 77.3(b) ICRMW; Article 7(e) OP-CRC-CP; Rule 16, *CRC Rules of Procedure;* Article 2(d) OP-CRPD; Article 31.2(d) CED; Article 46 ACHR; Article 31, *IACHR Rules of Procedure;* and Article 56.5 ACHPR.

1322 *Airey v. Ireland,* ECtHR, *op. cit.*, fn. 1312; *Reed v. United Kingdom,* ECommHR, Plenary, Application No. 7630/76, Admissibility Decision, 6 December 1979; *Öcalan v. Turkey,* ECtHR, GC, *op. cit.*, fn. 47.

1323 See, *Exceptions to the exhaustion of domestic remedies,* IACtHR, Advisory Opinion OC-11/90, 10 August 1990, paras. 30–35. See also, Article 46 ACHR, and Article 31, IACHR Rules of Procedure.

1324 *Dr. Curtis Francis Doebbler v. Sudan,* ACommHPR, Communication No. 235/2000, 46th Ordinary Session, 11–25 November 2009, paras. 116–117.

1325 *AIHRD v. Republic of Guinea,* ACommHPR, *op. cit.*, fn. 578, paras. 32–36.

Whenever there are doubts as to the effectiveness, adequateness, impartiality or independence of a remedy, "mere doubts about the effectiveness of local remedies or the prospect of financial costs involved"[1326] do not absolve the applicant from pursuing them. However, "where an applicant is advised by counsel that an appeal offers no prospects of success, that appeal does not constitute an effective remedy".[1327]

b) Time limitations

The **Human Rights Committee** provides no time limits for the communication of the complaint. However, in case of a prolonged delay from the exhaustion of domestic remedies, the Committee will require a reasonable justification for it. Otherwise, it will declare the complaint inadmissible for abuse of the right of submission.[1328] It has recently restated this approach in its *Rules of Procedure* where it is established that "a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies (...), or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication".[1329] The **Committee against Torture** does not apply a specific time limit, but has stated that it will not admit communication received after an "unreasonably prolonged" period.[1330] Neither the **OP-CEDAW,** the **Committee on Enforced Disappearance** nor the **OP-CRPD** impose a time limit, but it is likely that it will follow the Human Rights Committee's jurisprudence. The **OP-ICESCR** and the **OP-CRC-CP** will require a time limit of one year after the exhaustion of the domestic remedies, unless the applicant can demonstrate that it was not possible to submit the communication within that time.[1331] **CERD** provides that the communication must be submitted within six months of the exhaustion of domestic remedies, including the "national CERD body", "except in cases of duly verified exceptional circumstances".[1332]

1326 *A. v. Australia,* CCPR, *op. cit.*, fn. 656, para. 6.4; *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 89; see, *inter alia*, *Pellegrini v. Italy,* ECtHR, Application No. 77363/01, Admissibility Decision, 26 May 2005; *MPP Golub v. Ukraine,* ECtHR, Application No. 6778/05, Admissibility decision of 18 October 2005; and *Milosevic v. the Netherlands,* ECtHR, Application No. 77631/01, Admissibility decision of 19 March 2002.

1327 *Na v. United Kingdom,* ECtHR, *op. cit.*, fn. 309, para. 89; *Selvanayagam v. United Kingdom,* ECtHR, No. 57981/00, Admissibility decision of 12 December 2002; *McFeeley v. United Kingdom,* ECommHR, *op. cit.*, fn. 4061, p. 44.

1328 Article 3 OP-ICCPR. See, *Gobin v. Mauritius,* CCPR, Communication No. 787/1997, Views of 20 August 2001, para. 6.3.

1329 Rule 96(c), *CCPR Rules of Procedure.*

1330 Rule 113(f), *CAT Rules of Procedure.*

1331 Article 3.2(a) OP-ICESCR; Article 7(h), OP-CRC-CP.

1332 Article 14.5 ICERD; Rule 91(f), *CERD Rules of Procedure.*

The **European Court of Human Rights** may only deal with the matter if it is submitted to the Court within a period of six months after exhaustion of domestic remedies.[1333] The date of submission is "the date on which an application form satisfying the [formal] requirements of [Rule 47] is sent to the Court. The date of dispatch shall be the date of the postmark. Where it finds it justified, the Court may nevertheless decide that a different date shall be considered to be the date of introduction".[1334] The **Inter-American Commission on Human Rights** requires that the petition or communication must be lodged within a period of six months from the date on which the party alleging violation of his or her rights has been notified of the decision that exhausted the domestic remedies. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time. For this purpose, the Commission considers the date on which the alleged violation of rights occurred and the circumstances of each case.[1335] The **African Commission on Human and Peoples' Rights'** rules provide that the communications must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.[1336]

c) Duplication of procedures or similar requirements

Generally, a complaint will be inadmissible if the same matter has already been examined by the human rights body or has been or is being examined under another procedure of international investigation or settlement.[1337] This requirement must however be interpreted restrictively. A complaint can be introduced if the case submitted to another body was submitted by a third party without authorisation by the victim or a family member, if the human rights violations claimed were different, if it raised different factual allegations than the ones presented, or if the complaint was sent to a non-judicial body, such as a Special Rapporteur.[1338]

1333 Article 35.1 ECHR. Where there are no available domestic remedies, the case should be submitted within six months of the facts complained of. For an extensive explanation of the six month requirement, see *Lutete Kemevuako v. the Netherlands,* ECtHR, Application No. 65938/09, Admissibility decision of 1 June 2010.

1334 Rule 47.6, *ECtHR Rules of Procedure.* See rule 47 below at fn. 1354.

1335 See also, Article 46.2, ACHR, and Article 32, *IACHR Rules of Procedure.*

1336 Article 56.6 ACHPR.

1337 Article 5.2(a) OP-ICCPR; Rule 96(e), *CCPR Rules of Procedure;* Article 3.2(c) OP-ICESCR; Article 22.5(a) CAT; Rule 113(d), *CAT Rules of Procedure;* Article 4.2(a) OP-CEDAW; Article 77.3(a) ICRMW; Article 7(d), OP-CRC-CP; Article 2(c), OP-CRPD; Article 31.2(c), CED; Article 35.2(b) ECHR; Articles 46 and 47 ACHR; Article 33, *IACHR Rules of Procedure;* Article 56.7 ACHPR.

1338 See, in treaty law, Article 56.7 ACHPR. See also, on identity of applicants, *Folgero and Others v. Norway,* ECtHR, Application No. 15472/02, Judgment of 29 June 2007; on difference of human rights complaints, *Smirnova and Smirnova v. Russia,* ECtHR, Application No. 46133/99 and 48183/99, Judgment of 24 July 2003. See also, *Baena-Ricardo et al. v. Panama,* IACtHR, Series C No. 61, Preliminary Objections, Judgment of 18 November 1999, para. 53; *Durand and Ugarte,* IACtHR, Series C No. 50, Preliminary Objections, Judgment of 28 May 1999, para. 43 (on different applicants for same case).

There is an exception for the Human Rights Committee, which applies this rule only to complaints **pending** before another international procedure. If the other procedure has ended, it is still possible for the Human Rights Committee to hear the same case.[1339] Article 31.2(c) also refers only to pending complaints, which suggests that the Committee on Enforced Disappearances may align its approach to that of the Human Rights Committee.[1340]

d) Significant disadvantage

Protocol 14 to the ECHR introduced a new admissibility requirement for the European Court of Human Rights: that of "significant disadvantage". Protocol 14 to the ECHR now allows the Court to declare inadmissible an application when "the applicant has not suffered a **significant disadvantage,** unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".[1341]

Applying the new criterion, the European Court of Human Rights has held cases inadmissible for lack of significant disadvantage where alleged violations of fair trial guarantees or the right to property had led to pecuniary losses of 150, 90 or 1 euros and the financial situation of the applicant was not "such that the outcome of the case would have had a significant effect on his personal life".[1342] The Court held that it must take into consideration "both the applicant's subjective perceptions and what is objectively at stake in a particular case",[1343] and it recognised that "a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest".[1344]

Furthermore, the Court will also have to ascertain whether the examination is, nonetheless, required by the respect for human rights as defined in the Convention and the Protocols. The Court has found this not to be the case when "the relevant law has changed and similar issues have been resolved in other cases before it".[1345] Finally, the Court will

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1339 *Correia de Matos v. Portugal,* CCPR, Communication No. 1123/2002, Views of 18 April 2006, para. 6.2.

1340 Articel 31.2(c), CPED.

1341 Article 35.3(b) ECHR (emphasis added). The requirement has been interpreted up to now in *Petrovich Korolev v. Russia,* ECtHR, Application No. 25551/05, Admissibility decision of 1 July 2010; *Mihai Ionescu v. Romania,* ECtHR, Application No. 36659/04, Admissibility decision of 1 June 2010; *Rinck v. France,* ECtHR, Application No. 18774/09, Admissibility decision of 19 October 2010.

1342 *Mihai Ionescu v. Romania,* ECtHR, *op. cit.*, fn. 1341, para. 35.

1343 *Petrovich Korolev v. Russia,* ECtHR, *op. cit.*, fn. 1341.

1344 *Ibid*.

1345 *Mihai Ionescu v. Romania,* ECtHR, *op. cit.*, fn. 1341, para. 37.

verify whether the case has not been duly considered by a domestic tribunal, which has been interpreted as a duty to ascertain that no denial of justice occurred at the domestic level.[1346]

According to the OP-ICESCR, the CESCR "may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a **clear disadvantage,** unless the Committee considers that the communication raises a serious issue of general importance".[1347] However, this provision does not constitute an admissibility criterium. The wording "if necessary" means that the "clear disadvantage" test is discretionary and likely to be used by the Committee on Economic, Social and Cultural Rights only in exceptional circumstances.

e) Other grounds

All UN Treaty Bodies, the ECtHR, the IACHR, and the ACHPR will reject as inadmissible petitions which are anonymous, which constitute an abuse of right of submission, or that are incompatible with the provisions of the human rights treaty of their concern.[1348] CAT, CEDAW, CESCR, the European Court, and the IACHR explicitly exclude from admissibility complaints which are manifestly unfounded or insufficiently substantiated,[1349] although this requirement will be considered also by the other treaty bodies.

The OP-ICESCR excludes, moreover, complaints which are exclusively based on reports disseminated by mass media.[1350] The ACHPR will not consider communications written in disparaging or insulting language directed against the State concerned or its institution or to the Organisation of African Unity.[1351]

The ECSR provides two specific grounds of inadmissibility, due to the collective complaint system:

- **Subject-matter:** non-governmental organisations may lodge a complaint only in respect of those matters regarding which they have been recognised as having particular competence.[1352]

1346 *Petrovich Korolev v. Russia,* ECtHR, *op. cit.*, fn. 1341.

1347 Article 4 OP-ICESCR (emphasis added).

1348 Article 3 OP-ICCPR; Rule 96(a), (c) and (d), *CCPR Rules of Procedure;* Article 3.2(d) to (g) OP-ICESCR; Article 22.2 CAT; Rule 113(b) and (c), *CAT Rules of Procedure;* Rule 91, *CERD Rules of Procedure;* Article 4.2 OP-CEDAW; Article 77.2 ICRMW; Article 7(a), (b), (c) OP-CRC-CP; Article 2(a) and (b) OP-CRPD; Article 31.2(a) and (b) CED; Articles 35.2(a) and 35.3(a) ECHR; Article 47 ACHR; Article 34, *IACHR Rules of Procedure;* Article 56.1 ACHPR.

1349 Article 4.2(c) OP-CEDAW; Article 22.2 CAT; Rule 113(b) and (c), *CAT Rules of Procedure;* Article 3.2(d) to (g) OP-ICESCR; Article 7(f) OP-CRC-CP; Article 2(e) OP-CRPD; Articles 35.2(a) and 35.3(a) and (b) ECHR; Article 47 ACHR; Article 34, *IACHR Rules of Procedure.*

1350 Article 3.2(d) to (g) OP-ICESCR.

1351 Article 56.3 ACHPR.

1352 Article 3 AP-ESC.

- **Other Grounds:** complaints must be lodged in writing, relate to a provision of the Charter accepted by the State Party and indicate in what respect the State Party has not ensured the satisfactory application of the provision.[1353]

Although it is not properly an admissibility ground, the European Court of Human Rights has modified its Rule 47, with effect from 1 January 2014, according to which, from now on, the Court will have the power to refuse to examine an application that does not satisfy all the formal requirements of this Rule. As noted above, the six months time limit of Article 35 ECHR will stop running from the moment of receipt of an application fully compliant with these formal requirements.[1354]

3. Interim measures

Interim, precautionary or provisional measures are orders issued by the international mechanism in the preliminary phase of the international dispute in order to assure that a situation of potential violation does not lead to irreparable harm from before the case can be adjudicated on the merits. Interim or provisional measures are often indicated in situations of expulsions, where the international body requests the State to stay the expulsion measure until a final decision is reached. Interim measures might also be prescribed for a situation of forced eviction, where a stay of the eviction is ordered before the final ruling.

Interim measures are a corollary of the right to international petition and have therefore been held to be binding on the States which have accepted the international individual complaints mechanism.[1355]

They are an essential element of procedure before international tribunals, with particular significance for tribunals that adjudicate on human rights, and are widely recognised as having binding legal effect. The binding nature of interim measures has its roots in both procedure and substance: it is necessary, first, to preserve the rights of the parties from irreparable harm, protecting against any act or omission that

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1353 Article 4 AP-ESC.

1354 See, Rule 47, *ECtHR Rules of Procedure.* Under Article 4 of the new Protocol No. 15 to the ECHR, the time limit for applications to the Court is reduced to four months. The Protocol, approved on 24 June 2013, is not yet into force and requires the ratification of all Contracting Parties to the ECHR.

1355 See, *LeGrand (Germany v. United States of America),* ICJ, *op. cit.*, fn. 837, at p. 503, para. 103; *Zhakhongir Maksudov and Others v. Kyrgyzstan,* CCPR, *op. cit.*, fn. 324, paras. 10.1–10.3; *Dar v. Norway,* CAT, *op. cit.*, fn. 1309, paras. 16.3–16.5; *Brada v. France,* CAT, Communication No. 195/2002, Views of 24 May 2005, para. 13.4; *Pelit v. Azerbaijan,* CAT, *op. cit.,* fn. 339, para. 10.2; *Tebourski v. France,* CAT, *op. cit.*, fn. 353, paras. 8.2–9; *Singh Sogi v. Canada,* CAT, *op. cit.*, fn. 334, paras. 10.2–10.11; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434, paras. 470–473; *Mamatkulov and Askarov v. Turkey,* ECtHR, *op. cit.*, fn. 441, paras. 100–112; *Al-Sadoon and Mufti v. United Kingdom,* ECtHR, *op. cit.*, fn. 439, paras. 160–161.

would destroy or remove the subject matter of an application, would render it pointless, or would otherwise prevent the Court from considering it under its normal procedure;[1356] and second, to permit the Court to give practical and effective protection to the Convention rights by which the Member States have undertaken to abide.[1357]

The binding nature of interim measures has been recognised by the International Court of Justice,[1358] the European Court of Human Rights,[1359] the Inter-American Court of Human Rights,[1360] the Inter-American Commission on Human Rights,[1361] the African Commission on Human and Peoples' Rights,[1362] the Human Rights Committee[1363] and

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1356 *Mamatkulov and Askarov v. Turkey,* ECtHR, *op. cit.*, fn. 441, paras. 101–108; *Paladi v. Moldova,* ECtHR, Application No 39806/05, Judgment of 10 March 2009, para. 87; *Ben Khemais v. Italy,* ECtHR, *op. cit.*, fn. 361, para. 81.

1357 *Ibid*., para. 125; *Aloumi v. France,* ECtHR, Application No. 50278/99, Judgment of 17 January 2006, para. 103.

1358 *LeGrand (Germany v. United States of America),* ICJ, *op. cit.*, fn. 837, at p. 503, para. 102.

1359 *Mamatkulov and Askarov v. Turkey,* ECtHR, *op. cit.*, fn. 441; *Shamayev and Others v. Georgia and Russia,* ECtHR, *op. cit.*, fn. 434; *Aloumi v. France,* ECtHR, *op. cit.*, fn. 1260; *Paladi v. Moldova,* ECtHR, *op. cit.*, fn. 1356; *Aleksanyan v. Russia,* ECtHR, *op. cit.*, fn. 769; *Shtukaturov v. Russia,* ECtHR, Application No. 44009/05, Judgment of 27 March 2008; *Ben Khemais v. Italy,* ECtHR, *op. cit.*, fn. 361, *Savriddin Dzhurayev v. Russia,* ECtHR, Application No. 71386/10, Judgment of 25 April 2013, para. 213: "The crucial significance of interim measures is further highlighted by the fact that the Court issues them, as a matter of principle, in truly exceptional cases on the basis of a rigorous examination of all the relevant circumstances. In most of these, the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm in breach of the core provisions of the Convention. This vital role played by interim measures in the Convention system not only underpins their binding legal effect on the States concerned, as upheld by the established case-law, but also commands the utmost importance to be attached to the question of the States Parties' compliance with the Court's indications in that respect [...]. Any laxity on this question would unacceptably weaken the protection of the Convention core rights and would not be compatible with its values and spirit [...]; it would also be inconsistent with the fundamental importance of the right of individual application and, more generally, undermine the authority and effectiveness of the Convention as a constitutional instrument of European public order [...]".

1360 *Chunimá v. Guatemala,* IACtHR, Series E, Order of the Court of 15 July 1991; *James v. Trinidad and Tobago,* IACtHR, Series E, Order of the Court of 24 November 2000; *Loayza Tamayo v. Peru,* IACtHR, Series E, Order of the Court of 13 December 2000; *Haitians and Dominican nationals of Haitian origin in the Dominican Republic v. the Dominican Republic,* IACtHR, Order of the Court of 14 September 2000. See further the extrajudicial comments of Asdrúbal Aguiar, former judge of the Inter-American Court of Human Rights, "Apuntes sobre las medidas cautelares en la Convención Americana sobre Derechos Humanos", in *La Corte y el sistema Interamericano de Derechos Humanos,* Rafael Nieto Navia, Editor, 1994, p. 19.

1361 See, Letter to Center for Constitutional Rights and Centro por la Justicia y el Derecho Internacional (CEJIL) from the Inter-American Commission on Human Rights, *Ref: Djamel Ameziane, Precautionary Measures No. 211-08, United States,* 20 August 2008, available at http://ccrjustice.org/files/2008-08-20 IACHR Initial Response.pdf.

1362 *International Pen and Others v. Nigeria,* ACommHPR, Communications Nos. 137/94, 139/94, 154/96 and 161/97, 24th Ordinary Session, 31 October 1998, para. 114.

1363 *Piandiong v. the Philippines,* CCPR, Communication No. 869/1999, Views of 19 October 2000, para. 5.1; *Khalilov v. Tajikistan,* CCPR, Communication No. 973/2001, Views of 13 April 2005, para. 4.1; *Mansaraj and Others v. Sierra Leone,* CCPR, Communications Nos. 839/98, 840/98 and 841/98, Views of 16 July 2001, para. 5.1; *Ashby v. Trinidad and Tobago,* CCPR, Communication No. 580/1994, Views of 19 April 2002, para. 4.11.

the Committee against Torture.[1364] Given the uniformity of the jurisprudence on this issue, other bodies such as the CESCR, CERD and CEDAW, which have the power to issue interim measures, are also likely to uphold their binding nature.

The European Court has stated that, "[w]hilst the formulation of the interim measure is one of the elements to be taken into account in the Court's analysis of whether a State has complied with its obligations [to follow interim measures], the Court must have regard not only to the letter but also to the spirit of the interim measure indicated [...] and, indeed, to its very purpose".[1365] In particular, the Court "cannot conceive [...] of allowing the authorities to circumvent an interim measure such as the one indicated in the present case by using another domestic procedure for the applicant's removal to the country of destination or, even more alarmingly, by allowing him to be arbitrarily removed to that country in a manifestly unlawful manner."[1366]

Interim measures can be issued by the human rights body invested by the case from the moment of the communication of the case until the reaching of a final decision.[1367] The Inter-American system allows for the Commission to issue precautionary measures and to ask the Inter-American Court for provisional measures even in cases of which the Court is not yet seized.[1368]

4. The effective exercise of the right to petition

When a State hinders or prohibits the applicant from applying to a competent international body in order to seek protection for his or her

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1364 *Brada v. France,* CAT, *op. cit.*, fn. 1355; *Pelit v. Azerbaijan,* CAT, *op. cit.*, fn. 339; *Dar v. Norway,* CAT, *op. cit.*, fn. 1309; *Nuñez Chipana v. Venezuela,* CAT, Communication no.110/1998, Views of 16 December 1998, para. 8; *T.P.S. v. Canada,* CAT, Communication No. 999/1997, Views of 4 September 2000, para. 15.6.

1365 *Savriddin Dzhurayev v. Russia,* ECtHR, *op. cit.*, fn. 1359, para. 216.

1366 *Ibid*., para. 217

1367 See, Rule 92, *CCPR Rules of Procedure;* Article 5.1 OP-ICESCR; Rule 114, *CAT Rules of Procedure;* Rule 94.3, *CERD Rules of Procedure;* Article 5.1 OP-CEDAW; Rule 63, *CEDAW Rules of Procedure;* Article 6 OP-CRC-CP; Article 4 OP-CRPD; Article 31.4 CED; Rule 39, *ECtHR Rules of Procedure* (the obligation to comply with interim measures arises under Article 34 ECHR and also related to obligations under Articles 1 and 46 ECHR); Article 25, *IACHR Rules of Procedure;* Article 63.2 ACHR; Article 27, *IACtHR Rules of Procedure;* Article 111, *Rules of Procedures of the African Commission on Human and Peoples' Rights,* adopted on the 6 October 1995 (ACHPR Rules of Procedure); Article 27.2, *P-ACHPR on African Court;* Article 51, *ACtHPR Rules of Procedure.* Similar provisions are included in Article 35, *ACJHR Statute.*

1368 See, Article 76, *IACHR Rules of Procedure.*

rights, that State may be in violation of the provision of the treaty which grants the applicant the right to petition.[1369]

In treaty law, the European Convention on Human Rights establishes that the "High Contracting Parties undertake not to hinder in any way the effective exercise" of the right to submit individual applications.[1370] Furthermore, many States Parties to the ECHR are also parties to the *European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights,* which provides for certain protections and immunities.[1371]

The OP-ICESCR also requires the State Party to "take all appropriate measures to ensure that individuals under its jurisdiction are not subject to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol".[1372] These measures include positive obligations to protect against a wide range of "ill-treatment and intimidation", such as undue interference and pressure against physical, moral and psychological integrity of the person who communicated the case or of all persons that can suffer adverse consequences as a result of the presentation of the communication.[1373] States Parties to the OP-CEDAW undertake to "take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee".[1374] Where the Committee, receives reliable information that a State Party has breached these obligations it may request written explanations or clarification.[1375]

The European Court of Human Rights has found violations of this obligation when a prison administration refused to post the applicant's letter to the Court itself or interfered with it,[1376] or when the applicant was

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[1369] Articles 1 and 2 OP-ICCPR; Articles 1 and 2 OP-CEDAW; Article 14 ICERD; Articles 1 and 2 OP-ICESCR; Article 76 ICRMW; Article 34 ECHR; Article 44 ACHR. See, *Alzery v. Sweden,* CCPR, *op. cit.*, fn. 364, para. 11.11; *Agiza v. Sweden,* CAT, *op. cit.*, fn. 332, para. 13.9; *Poleshchuk v. Russia,* ECtHR, Application No. 60776/00, Judgment of 7 October 2004; *Cotlet v. Romania,* ECtHR, Application No. 38565/97, Judgment of 3 June 2003; *Akdivar and Others v. Turkey,* ECtHR, *op. cit.*, fn. 937; *Kurt v. Turkey,* ECtHR, *op. cit.*, fn. 724; and *Ilascu and Others v. Russia and Moldova,* ECtHR, *op. cit.*, fn. 406.

[1370] Article 34 ECHR.

[1371] See, *European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights,* Strasbourg, 5 March 1996.

[1372] Article 13 OP-ICESCR. See also, Rule 4, *CRC Rules of Procedure.*

[1373] Inter-American Institute of Human Rights and International Commission of Jurists, *Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* English edition, 2010, p. 100.

[1374] Article 11 OP-CEDAW.

[1375] Rule 91.2, *CEDAW Rules of Procedures.*

[1376] *Poleshchuk v. Russia,* ECtHR, *op. cit.*, fn. 1369; *Cotlet v. Romania,* ECtHR, *op. cit.*, fn. 1369.

directly asked by the national authorities about the petition,[1377] or when the applicant was pressured or intimidated by the national authorities not to file or to withdraw the application.[1378]

The Committee against Torture determined that a State had violated the applicant's right to petition where it did not grant a reasonable period of time before the execution of the final decision to remove him from the national territory, so as to not allow him to consider whether to petition the Committee itself.[1379]

5. Third party interventions

The **universal treaty bodies**—HRC, CESCR, CAT, CERD and CEDAW—do not provide expressly for the presentation of formal third party interventions in individual cases.[1380] It may however be possible to intervene in the case by asking the applicant to include the third party interventions in his or her application, or to petition the treaty body on an *ad hoc* basis.

As for the **European Court of Human Rights,** according to Article 36 ECHR, in all cases before Chambers or the Grand Chamber, the "President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings."[1381] NGOs may also make submissions. The same Article gives standing as third party interveners to other Contracting States and the Council of Europe Commissioner for Human Rights. The request for leave to be invited to send written third party observations must be duly reasoned and submitted in writing in one of the Court's official languages no later then twelve weeks after notice of the application has been given to the State Party concerned. In cases before the Grand Chamber the time runs from the date of relinquishment of jurisdiction by the Chamber or of acceptance of the case by the Grand Chamber's Panel.[1382]

The requirements are more restrictive for the **European Committee on Social Rights,** due to the collective nature of the complaint mechanism. According to the rules of procedure, States Parties to the

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1377 *Akdivar v. Turkey,* ECtHR, *op. cit.*, fn. 937.

1378 See, *Kurt v. Turkey,* ECtHR, *op. cit.*, fn. 724; and *Ilascu and Others v. Russia and Moldova,* ECtHR, *op. cit.*, fn. 406.

1379 *Agiza v. Sweden,* CAT, *op. cit.*, fn. 332, para. 13.9.

1380 The rules of procedure of the Human Rights Committee or the OP-ICCPR do not mention third party interventions. See also, Article 8.1 OP-ICESCR; Rule 118.2, *CAT Rules of Procedure;* Rule 95.2, *CERD Rules of Procedure;* Rule 72.2, *CEDAW Rules of Procedures.*

1381 Article 36.1 ECHR.

1382 Rule 44.3-4, *ECtHR Rules of Procedure.*

collective complaint mechanisms are automatically invited to submit their views on the complaint, as are the international organisations of employers and trade unions, but the international organisations may only make submissions on complaints lodged by national organisations of employers and trade unions or by NGOs.[1383] However, the recently adopted Rule 32A gives to the President the possibility to "invite any organisation, institution or person to submit observations".[1384]

In the Inter-American system, neither the ACHR nor the Rules of Procedure provide for the consideration of third-party briefs by the **Inter-American Commission on Human Rights.** However, in practice, the Commission will accept the submission of *amicus curiae* briefs without any particular formal requirements. The **Inter-American Court of Human Rights** has institutionalised the submission of third party interventions in its rules of procedures, according to which any person or institution seeking to act as *amicus curiae* may submit a brief, signed in order to ensure authenticity, to the Court in person, by courier, facsimile, post or electronic mail, in a working language of the Court, and bearing the names and signatures of its authors. If the brief is transmitted by electronic means and not subscribed, or is not accompanied by its annexes, the original document or missing annexes must be received by the Court within seven days from its transmission, otherwise it will be archived, without having been taken into consideration. The interventions may be submitted at any time during the contentious proceedings for up to 15 days following the public hearing. If the hearing is not held, they must be submitted within 15 days following the Order setting the deadlines for the submission of final arguments. The interventions are transmitted to the parties. They may also be submitted during proceedings to monitor the compliance of judgments and on provisional measures.[1385]

In the **African system,** the rules of procedure of the African Commission on Human and Peoples' Rights do not mention the submission of third party intervention. Conversely, Article 49(3) of the new *Statute of the African Court of Justice and Human Rights* seems to give space for third party interventions.[1386] However, the Statute has not yet entered into force and that the rules of the Court might still provide otherwise.

1383 Rule 32, *Rules of the European Committee of Social Rights,* adopted during the 201st session on 29 March 2004 and revised during the 207th session on 12 May 2005 and during the 234th session on 20 February 2009 (ECSR Rules of Procedure).

1384 Rule 32A, *ECSR Rules of Procedure.*

1385 See, Article 44, *IACtHR Rules of Procedure.*

1386 Article 49.3 *ACJHR Statute.*

II. Procedures of international mechanisms

1. Universal Treaty Bodies[1387]

The procedures of the UN treaty bodies, while rather similar, have not been harmonised.[1388] Differences arise in the most recently established bodies. Procedures are set out both in their constituting treaties and in their rules of procedures. The communications must be presented in one of the official languages of the United Nations, which are Arabic, Chinese, English, French, Russian and Spanish.

a) Preparatory Stage

The rules related to the preparatory phase of the procedure are similar for all the four human rights treaty bodies that receive individual communications and have established rules of procedure. The UN Secretariat receives the communication and verifies that all formal requirements have been satisfied. The Secretariat may ask for clarifications on these requirements and on the intention of the complainant effectively to seize the Committee of the communication. Once these preliminary steps are satisfied, the communication is registered with and transmitted to the Committee.[1389]

b) Admissibility stage

Who decides? While it is generally the Committee as a whole which determines whether the communication satisfies the formal requirements for admissibility, it is possible for it to establish an internal Working Group (WG) for decisions on admissibility.[1390] For CERD and CEDAW, the WG can only make recommendations on admissibility.[1391]

How? The Committee always takes the decision on admissibility by a simple majority vote. When a Working Group is established, the systems

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1387 Further practical information on how to submit a petition to the UN treaty bodies may be found at http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

1388 A process of harmonisation of the procedures of UN treaty bodies under the initiative of the United Nations is undergoing. For more information see, http://www2.ohchr.org/english/bodies/treaty/reform.htm.

1389 See, Rules 84–87, *CCPR Rules of Procedure;* Rules 103–105, *CAT Rules of Procedure;* Rules 83–84, *CERD Rules of Procedure;* Rules 56–58, *CEDAW Rules of Procedure.* In this section we address the procedures of universal human rights mechanisms which have been tested in individual communications. For procedures of the most recently established treaty bodies see their rules of, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/62/3&Lang=en (CRC); http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI/GEN/3/Rev.1/Add.1&Lang=en (CMW); http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx (CRPD); and http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/1&Lang=en (CED).

1390 See, Rules 111–112, *CAT Rules of Procedure;* Rules 93–98, *CCPR Rules of Procedure.*

1391 Rule 87, *CERD Rules of Procedure;* Rule 62, *CEDAW Rules of Procedure.*

vary. For the Human Rights Committee, the WG may take a decision on admissibility only by unanimous vote, although an inadmissibility decision will have to be ratified by the Committee as a whole; while for the Committee against Torture the Working Group can declare a communication admissibile by majority vote or inadmissible by unanimity.[1392]

Communications and Replies: The Committee requests information of both the complainant and the State Party, fixing the appropriate time-limits.[1393] The HRC requests the concerned State to provide a written reply to the communication within six months on the admissibility and merits, unless the Committee specifies that only observations on admissibility are needed. Then, the Committee may request the applicant or the State to submit further observations. Each party must be afforded an opportunity to comment on the observations of the other.[1394]

Revision of admissibility decision: A decision of inadmissibility may be reviewed by the Committee at a later date where it is established that the reasons for inadmissibility no longer apply.[1395]

Decisions on admissibility and merits: In practice, the Committees may decide together the admissibility and the merits of the communication when the information given to them is already sufficient for reaching a final decision.

c) Merits

Closed Meetings: The Committees will examine the communication, both at the admissibility and merit stage, in closed meetings.[1396] CERD and CAT may invite the parties to participate in a closed oral hearing in order to answer to questions and provide additional information.[1397]

Communications: The general rule is that a Committee will transmit the information to the State Party and inform the complainant,[1398] and may request additional information on the merits.[1399] The Human Rights

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1392 Rules 93–98, *CCPR Rules of Procedure;* Rules 111–112, *CAT Rules of Procedure.*

1393 See, Rule 115, *CAT Rules of Procedure;* Rule 92, *CERD Rules of Procedure.*

1394 Rules 93–98, *CCPR Rules of Procedure.*

1395 Rule 116, *CAT Rules of Procedure;* Rule 93.2, *CERD Rules of Procedure;* Rule 70, *CEDAW Rules of Procedure.*

1396 Rules 88 and 102, *CCPR Rules of Procedure;* Article 8 OP-ICESCR; Article 22.4–6 CAT; Rule 88, *CERD Rules of Procedure;* Article 7 OP-CEDAW, and Rule 72, *CEDAW Rules of Procedure;* Article 77.6–7 ICRMW.

1397 Rule 94.5, *CERD Rules of Procedure;* Rule 117, *CAT Rules of Procedure.*

1398 Rule 117, *CAT Rules of Procedure;* Article 8 OP-ICESCR; Rules 99–100, *CCPR Rules of Procedure;* Rule 94.1, *CERD Rules of Procedure;* Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure.*

1399 *Ibid*.

Committee provides that the State Party has six months to submit to the Committee written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by the State. Any explanations or statements submitted by the State Party will be communicated to the author of the communication, who may submit any additional written information or observations within fixed time-limits.[1400] For CERD, the State has three months from then to submit its reasons. These will be transmitted to the complainant who may oppose further observations.[1401]

Material: The Committee will take into consideration all the information made available to it by the parties.[1402] The CESCR also explicitly includes all relevant documentation from other UN bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including from regional human rights systems.[1403]

Decision: The Committees will adopt their decision (Views) on the case and forward them to the parties.[1404] The Human Rights Committee's rules of procedure explicitly say that this body's decisions are public.[1405]

d) Friendly Settlement

The CESCR is the only Committee which expressly provides for the possibility of reaching a friendly settlement. The settlement must be on the basis of the respect for the obligations set forth in the Covenant and closes the communication procedure.[1406] While other UN human rights treaties and corresponding rules of procedure do not expressly provide for a procedure of friendly settlement, in practice the Committees may provide their good offices for reaching this kind of agreement if the parties so desire.[1407]

1400 Rules 99–100, *CCPR Rules of Procedure.*

1401 Rule 94.2–4, *CERD Rules of Procedure.*

1402 Rules 99–100, *CCPR Rules of Procedure;* Article 8 OP-ICESCR; Article 22.4–6 CAT; Rule 118.1, *CAT Rules of Procedure;* Article 14.7(a) ICERD; Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure;* Article 77.5 ICRMW.

1403 Article 8 OP-ICESCR.

1404 Rules 99–100, *CCPR Rules of Procedure;* Article 22.7 CAT; Article 14.7(b) ICERD; Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure;* Article 77.6–7 ICRMW.

1405 Rule 102(5), *CCPR Rules of Procedure.*

1406 Article 7 OP-ICESCR.

1407 See, Catarina de Albuquerque, *Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur,* Open-ended working group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2006/WG.23/2, 30 November 2005, para. 14; and CESCR, *Report to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/CN.4/1997/105, 18 December 1996, para. 38.

e) Interim Measures

Interim measures can be issued by the human rights body to which the case has been submitted, when they are desirable to avoid irreparable damage to the victim of the alleged violation from the moment of the communication of the case until the reaching of a final decision.[1408] The Human Rights Committee[1409] and the Committee against Torture[1410] have confirmed in their jurisprudence the binding nature of interim measures. Given the uniformity of the jurisprudence on this issue, other bodies such as the CESCR, CERD and CEDAW, which have the power to issue interim measures, are also likely to uphold their binding nature.

2. European Court of Human Rights

Application: An application to the European Court of Human Rights should normally be made by completing and sending the application form that can be found on the Court's website, to be filled out in one of the official languages of the Court (English or French), together with copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.[1411] It is also possible to first introduce the complaint through a letter containing the subject matter of the application, including the Convention articles claimed to be breached.[1412] This letter will stop the running of the six months time limit (see, supra). In this case, or in the case of an incomplete application form, the Court will request the provision of additional information within eight weeks from the date of the information's request.[1413] On receipt of the first communication setting out the subject-matter of the case, the Registry will open a file, whose number must be mentioned in all subsequent correspondence. Applicants will be informed of this by letter. They may also be asked for further information or documents.[1414]

Preparatory Stage: The President of the Court will assign the case to a designated Chamber of the Court, which is composed of seven judges.[1415]

[1408] See, Rule 92, *CCPR Rules of Procedure;* Article 5.1 OP-ICESCR; Rule 114, *CAT Rules of Procedure;* Rule 94.3, *CERD Rules of Procedure;* Article 5.1 OP-CEDAW; Rule 63, *CEDAW Rules of Procedure.*

[1409] See, fn. 1363.

[1410] See, fn. 1364.

[1411] Application form may be found at http://www.echr.coe.int/Documents/Application_Form_2014_1_ENG.pdf. See, Article 47.1, *ECtHR Rules of Procedure.*

[1412] *Institution of Proceedings,* Practice Direction, Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003 and amended on 22 September 2008 and on 24 June 2009, para. 3.

[1413] *Ibid*., para. 4.

[1414] *Ibid*., para. 7.

[1415] Rule 52.1, *ECtHR Rules of Procedure.*

Admissibility stage: When the application is on its own sufficient to determine its inadmissibility or to be struck out of the list, it will be considered by a single judge, whose decision is final. Otherwise, the single judge will forward the case to a Chamber or a Committee from among whose members the President of the Chamber of the Court will appoint a Judge Rapporteur to deal with the case. The Judge Rapporteur may request additional information from the parties, decide whether the case may be considered by a single judge, a Committee or a Chamber and may submit reports, drafts or documents to the Chamber or Committee or the President.[1416] At this stage, the case will pass to the Committee, which is composed of three judges of the Chamber and whose decision is final. The Committee will give notice of the application to the State concerned and request additional information from both the parties. The Committee may by unanimous vote declare the case inadmissible or strike it out of the list, or declare it admissible and immediately reach a decision on the merits when the underlying question in the case is already the subject of well-established case-law of the Court. Otherwise, the Committee will forward the case to the Chamber.[1417] The Chamber will also be able to notify the decision to the State and request information from the parties. It may also decide to declare the application inadmissible or strike it out of the list at once. Before taking a decision, it may consider holding a hearing at the request of a party or of its own motion, and, if considered appropriate, to decide the admissibility and merits of the application at the same time.[1418]

Friendly Settlement: At any stage of the proceedings, the Court may be at the disposal of the parties with a view of securing a friendly settlement of the dispute. In this case, proceedings are confidential and are conducted by the Registry under instruction of the Chamber or its President. If the settlement is reached, the case will be struck off the list and the decision of the Court will be limited to a brief statement of the facts and solution reached, which will be transmitted to the Committee of Ministers for supervision of its execution.[1419]

Striking Out of the List: At any stage of the proceedings, the Court may decide to strike the application out of its list of cases when the applicant does not intend to pursue his application; the matter has been resolved; or when, for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, "the Court shall continue the examination of the

[1416] Articles 27 ECHR; Rules 49 and 52A, *ECtHR Rules of Procedure.*

[1417] Article 28 ECHR; Rule 53, *ECtHR Rules of Procedure.*

[1418] Article 29 ECHR; Rules 54 and 54A, *ECtHR Rules of Procedure.*

[1419] Article 39 ECHR; Rule 62, *ECtHR Rules of Procedure.*

application if respect for human rights as defined in the Convention and the Protocols thereto so requires",[1420] and it can also decide to restore an application previously struck out.[1421] The case will also be struck out when a friendly settlement between the parties has been reached[1422] or when a unilateral declaration by the respondent State is accepted by the Court. In this last case, the Court may strike the case out of the list even if the applicant wishes the case to continue.[1423] It will depend, however, on whether respect for human rights as defined in the Convention and the Protocols requires otherwise. The Court held that in order to establish this it will consider "the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue".[1424]

Examination of merits: Once an application has been declared admissible, the Chamber may invite the parties to submit further evidence and observations and hold a hearing. The Court in the form of a Chamber will examine the case.[1425] Hearings are public, as are the documents deposited with the Registrar of the Court, although access may be restricted where the Court finds particular reasons in the interest of morals, public order or national security in a democratic society, or where the interests of the juveniles or the protection of private life of the parties so require, or in special circumstances where publicity would prejudice the interests of justice.[1426] Judgments of the Chamber are

[1420] Article 37.1 ECHR.

[1421] See, Article 37 ECHR; Rule 43, *ECtHR Rules of Procedure.*

[1422] See, Rule 43.3, *ECtHR Rules of Procedure.*

[1423] See, *Akman v. Turkey,* ECtHR, Application No. 37453/97, Admissibility Decision, 26 June 2001, paras. 28–32; and, *Tahsin Acar v. Turkey,* ECtHR, Application No. 26307/95, Judgment of 8 April 2004, paras. 75–76.

[1424] *Tahsin Acar v. Turkey,* ECtHR, *op. cit.*, fn. 1423, para. 76. The Court also added that "[i]t may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what prima facie evidentiary value is to be attributed to the parties' submissions on the facts. In that connection it will be of significance whether the Court itself has already taken evidence in the case for the purposes of establishing disputed facts. Other relevant factors may include the question of whether in their unilateral declaration the respondent Government have made any admission(s) in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which they intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation (as, for example, in some property cases) and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application". The list is not exhaustive. This practice is now reflected in Rule 62A, *ECtHR Rules of Procedure.*

[1425] Article 38 ECHR.

[1426] Article 40 ECHR. See, Rules 33 and 63, *ECtHR Rules of Procedure.*

final, when the parties declare that they will not request referral to the Grand Chamber, or when three months have passed from the date of the judgment, without this referral being asked, or the Grand Chamber rejected the request of referral.[1427]

Just satisfaction: If the Court finds a violation, it will afford just satisfaction to the injured party.[1428] To make the award, the Court will need to receive from the applicant a specific claim of just satisfaction, and the submission of items particular to the claim, together with any relevant supporting document, within the time-limits set by the President for submission of the applicant's observations on the merits.[1429] Additionally, "[i]n certain particular situations, [...] the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the—often systemic—situation that gave rise to the finding of a violation [...]. Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required [...]".[1430] In the case of *Hirsi Jamaa and Others v. Italy,* since "the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea",[1431] the European Court ordered the Italian Government to "take all possible steps to obtains assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated."[1432]

Referral or relinquishment to the Grand Chamber: A Chamber may relinquish its jurisdiction to the Grand Chamber, composed of seventeen judges, when the case before it "raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where a resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court",[1433] unless one of the parties to the case objects within one month from the relinquishment decision.[1434] Furthermore, any party may request the case to be referred to the Grand Chamber within three months from the Chamber's judgment. The request will be examined by a five judge Panel appointed by the Grand Chamber, which will accept the case only if it raises a serious question affecting the interpretation of

1427 Article 44 ECHR.

1428 Article 41 ECHR.

1429 Rule 60, *ECtHR Rules of Procedure.*

1430 *Hirsi Jamaa and Others v. Italy,* ECtHR, GC, *op. cit.*, fn. 46, para. 209. The measures are ordered under Article 46 ECHR.

1431 *Ibid*. para. 211.

1432 *Ibid*., para. 211.

1433 Articles 30–31 ECHR.

1434 See also, Rule 72, *ECtHR Rules of Procedure.*

the Convention or the Protocols, or a serious issue of general importance.[1435] The rules of procedure before the Chambers apply also to the Grand Chamber proceedings, including the designation of a Judge Rapporteur.[1436]

i) Legal Representation and legal aid

Applications may be initially presented directly by the victim or through a representative.[1437] However, the European Court system requires mandatory representation after the application has been notified to the Contracting State.[1438] The applicant may require leave to present his or her own case, which can be granted by the President of the Chamber only "exceptionally". The representative must be an advocate "authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber".[1439] He or she must have an adequate understanding of one of the Court's languages, unless leave to use a different language is given by the President of the Chamber, who can also remove an advocate if he or she considers that, because of the circumstances or the conduct, the advocate can no longer represent his or her client.

Conscious of its own jurisprudence and of the costs of legal representation, the European Court of Human Rights provides for a legal aid system. The decision to grant legal aid is made by the President of the Chamber only when it is deemed necessary for the proper conduct of the case and the applicant has insufficient means to meet all or part of the costs entailed. The decision to grant legal aid is made either following the applicant's request or *proprio motu,* from the moment when the State concerned has submitted its observations in writing on the admissibility of the case, or when that deadline has passed. Legal aid, once granted, will cover all stages of the proceedings before the Court, unless the President finds that the conditions for it are no longer present. Applicants who request legal aid must complete a form of declaration, certified by national authorities, stating their income, capital assets, and any financial commitments in respect of dependants, or any other financial obligations.[1440]

1435 Article 43 ECHR. See also, Rule 73, *ECtHR Rules of Procedure.*

1436 Rules 50 and 71, *ECtHR Rules of Procedure.*

1437 Rules on representation are enshrined in Rule 36, *ECtHR Rules of Procedure.*

1438 A constant failure, through a long period of time, of the applicant to contact his representative might lead the Court to rule that s/he has lost interest in the proceedings and to strike the case off the list. See, *Ramzy v. the Netherlands,* ECtHR, Application No. 25424/05, Admissibility Decision, 20 July 2010.

1439 Rule 36.4(a), *ECtHR Rules of Procedure.*

1440 See, Rules 100 to 105, *ECtHR Rules of Procedure.*

3. European Committee on Social Rights

Preparatory phase: The complaint must be addressed to the Executive Secretary acting on behalf of the Council of Europe Secretary General who will acknowledge receipt, notify it to the State Party concerned and transmit it to the European Committee of Social Rights (ECSR).[1441] The complaints must be submitted in one of the Committee's working language, English or French.

Admissibility phase: For each case, the President of the Committee will appoint one of its members as Rapporteur. The Rapporteur will prepare a draft decision on admissibility, followed by, where appropriate, a draft decision on the merits.[1442] The Committee may request additional information from the parties on the admissibility of the complaint. If it finds it admissible, the Committee notifies the Contracting Parties to the Charter through the Secretary General.[1443] The Committee may declare the complaint admissible or inadmissible without having invited the government concerned to submit observations when it considers that the admissibility conditions are either manifestly fulfilled or manifestly unfulfilled.[1444]

Examination of the merits: The Committee may request additional information from the parties and may organise a hearing, at the request of one of the parties or at the Committee's initiative.[1445] The Committee will draft a report containing its conclusions on the State's violation of the Charter, if it existed, and will transmit it confidentially to the Committee of Ministers and the parties, under prohibition of publication.[1446] Thereafter, the members of the Committee of Ministers which are States Parties to the Charter adopt the report with a resolution by a majority vote. If the ESCR found a violation of the Charter, the Committee, in the same composition, can adopt a recommendation to the State concerned with a two-thirds majority vote.[1447] The ESCR report will be published immediately after the Committee of Minister's adoption of a resolution, or, in any case, not later than four months after its transmission to the Committee.[1448]

1441 Article 5, AP-ESC. See, Rule 23, *ECSR Rules of Procedure.*

1442 Rule 27, *ECSR Rules of Procedure.*

1443 Articles 6 and 7.1, AP-ESC. See also, Rules 29 and 30, *ECSR Rules of Procedure.*

1444 Rule 29.4, *ECSR Rules of Procedure.*

1445 Article 7, AP-ESC. See also, Rules 31 and 33, *ECSR Rules of Procedure.*

1446 Article 8, *ibid.*

1447 Article 9, *ibid.*

1448 Article 8.2, *ibid.*

4. Inter-American Commission on Human Rights

The exact nature of the procedure for consideration of the petition/communication depends on whether the petition/communication is based upon an alleged violation of the American Convention on Human Rights or the American Declaration on the Rights and Duties of Man.

a) Petitions referring to the American Convention on Human Rights

Preparatory Stage: The Executive Secretariat of the Commission undertakes an initial processing of petitions lodged before the Commission. If a petition or communication does not meet the requirements set out in Article 28 Rules of Procedure (formal requirements of the application), the Executive Secretariat may request that the petitioner or his or her representative satisfy those requirements that have not been fulfilled. In particular cases, the Commission has also the power to expedite the examination of the petition or communication.[1449]

Admissibility Procedure: The Executive Secretariat of the Commission forwards the relevant parts of the petition to the State in question with a request for information within three months. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing. Once the observations have been received or the period set has elapsed with no observations received, the Commission verifies whether the grounds for the petition exist or subsist.[1450] The Commission establishes a working group of three or more of its members to study, between sessions, the admissibility of the complaint and make recommendations to the plenary.[1451] Once the Commission has considered the positions of the parties, it makes a decision as to admissibility. The Commission's reports on admissibility are public and are included in its Annual Report to the General Assembly of the OAS. When an admissibility report is adopted, the petition is registered as a case and proceedings on the merits are initiated.[1452]

Procedure on the merits: Upon opening the case, the Commission sets a period of four months for the petitioner(s) to submit additional observations on the merits. The pertinent parts of those observations are transmitted to the State in question so that it may submit its observations within a further four months.[1453] The Commission

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[1449] See, Articles 26, 27, 29, *IACHR Rules of Procedure.*

[1450] See, Article 30, *IACHR Rules of Procedure.*

[1451] See, Article 35, *ibid.*

[1452] See, Article 36, *ibid.*

[1453] See, Article 37, *ibid.* Procedure for the hearings is in Articles 61–69, *ibid.*

asks whether the parties are interested in a friendly settlement. The Commission may carry out on-site investigations and may call for a hearing.[1454] The Commission then deliberates on the merits of the case. If the Commission establishes that there has been no violation in a given case, it indicates this in its report on the merits. The report will be transmitted to the parties, and published in the Commission's Annual Report to the OAS General Assembly. If the Commission establishes one or more violations, it prepares a preliminary report with the proposals and recommendations it deems pertinent and transmits it to the State in question. In so doing, the Commission sets a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State is not authorised to publish the report until the Commission has adopted a decision in this respect. The Commission notifies the petitioner of the adoption of the report and its transmission to the State. In the case of States Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission gives him or her one month to present his or her position as to whether the case should be submitted to the Court.[1455]

Friendly settlement: The American Convention provides that "the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention".[1456] However, in the period after the initial submissions on the merits, the Commission gives a time for the parties to express their interest in using the friendly settlement procedure.[1457] All friendly settlements must be based on respect for the human rights recognised in the ACHR, the ADRDM, and other relevant instruments.[1458] If a settlement is reached, the Commission adopts a report with a brief statement of the facts and the solution reached, which it shall transmit to the parties and publish.[1459]

Referral of the case to the Court: If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it refers the case to the Court, unless there is a reasoned

1454 See, Articles 39 and 43, *ibid.*

1455 Article 50–51 ACHR. See, Articles 43 and 44, *IACHR Rules of Procedure.*

1456 Article 48.1(f) ACHR. See also, Article 40, *IACHR Rules of Procedure.*

1457 See, Article 37.4, *IACHR Rules of Procedure.*

1458 See, Article 40.5, *IACHR Rules of Procedure.*

1459 Article 49 ACHR. See, Article 40.5, *IACHR Rules of Procedure.*

decision by an absolute majority of the members of the Commission to the contrary.[1460]

Publication of the Report: If within three months from the transmission of the preliminary report to the State in question the matter has not been resolved or, for those States that have accepted the jurisdiction of the Inter-American Court, has not been referred by the Commission or by the State to the Court for a decision, the Commission, by an absolute majority of votes, may issue a final report that contains its opinion and final conclusions and recommendations. The final report will be transmitted to the parties, who, within the time period set by the Commission, are required to present information on compliance with the recommendations. The Commission will evaluate compliance with its recommendations based on the information available, and will decide on the publication of the final report by the vote of an absolute majority of its members.[1461]

b) Petitions concerning States that are not parties to the American Convention on Human Rights

The Commission may receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the *American Declaration of the Rights and Duties of Man* in relation to the Member States of the OAS that are not parties to the American Convention on Human Rights.[1462] The procedure applicable to these petitions is substantially the same as the one explained above with the exception of the referral to the Inter-American Court of Human Rights.[1463]

5. Inter-American Court of Human Rights

Preparatory Stage: As noted above, the Inter-American Commission and States Parties are the only entities that can file a case with the Court. Once the case is received in an official language of the Court, its President conducts a preliminary review of the application, asking the parties to correct any deficiency within 20 days, if the President finds that the basic requirements have not been met.[1464] If the applicant is acting without duly accredited representation, the Court may appoint an Inter-American Defender as representative during the proceedings.[1465]

[1460] See, Article 45, *IACHR Rules of Procedure.*

[1461] See, Article 47, *ibid.*

[1462] These States are Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, and United States of America. See, Article 51, *IACHR Rules of Procedure.*

[1463] See, Article 52, *IACHR Rules of Procedure.*

[1464] See, Articles 34–36 and 38, *IACtHR Rules of Procedure.*

[1465] See, Article 37, *ibid.*

The Secretary of the Court notifes the application to the President and the judges of the Court, the respondent State, the Commission, when it is not the applicant, the alleged victim, his or her representatives or the Inter-American defender, if applicable.[1466] When the application has been notified to the alleged victim, or his or her representatives, they have a non-renewable period of two months to present their pleadings, motions and evidence to the Court.[1467] The State will also have a non-renewable term of two months to answer.[1468]

Preliminary Objections Stage: The State's preliminary objections may only be filed in the response to the first application. The document setting out the preliminary objections must set out the facts on which the objection is based, the legal arguments, and the conclusions and supporting documents, as well as any evidence which the party filing the objection may wish to produce. Any parties to the case wishing to submit written briefs on the preliminary objections may do so within 30 days of receipt of the communication. When the Court considers it indispensable, it may convene a special hearing on the preliminary objections, after which it shall rule on the objections. The Court may decide on the preliminary objections and the merits of the case in a single judgment, under the principle of procedural economy.[1469]

Additional written pleadings: Once the application has been answered, and before the opening of the oral proceedings, the parties may seek the permission of the President to enter additional written pleadings. In such a case, the President, if he sees fit, shall establish the time limits for presentation of the relevant documents.[1470]

Hearing and Merits Phase: The hearings of the IACtHR are public, although when exceptional circumstances warrant it, the Court may decide to hold a hearing in private.[1471] The date of the hearings will be announced by the Presidency of the Court and follow the procedure indicated by Articles 45 to 55 of the Rules of Procedure.[1472] After the hearings, the victims or their representatives, the State and the Commission may submit their final written arguments.[1473]

Friendly Settlement: If the victims, their representatives, the State or the Commission inform the Court that a friendly settlement has been

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[1466] See, Article 39, *ibid.*

[1467] See, Article 40, *ibid.*

[1468] See, Article 41, *ibid.*

[1469] See, Article 42, *ibid.*

[1470] See, Article 43, *ibid.*

[1471] See, Article 15, *ibid.*

[1472] See, Articles 45–55, *ibid.* See also, Articles 57–60 on admission of evidence.

[1473] See, Article 56, *ibid.*

reached, the Court will rule on its admissibility and juridical effects. It may also decide to continue the case, nonetheless.[1474]

Judgement: If the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of the right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[1475] The judgments of the Court are final and the States Parties to the Convention are bound to comply with them. Compensatory damages provided with by the Court are executive in the State Party.[1476]

Interpretative Rulings: The Court may accept request of interpretation of its previous judgments by any of the parties within 90 days from the notification of the judgment.[1477]

6. African Commission on Human and Peoples' Rights

Preparatory Stage: The Secretary of the Commission transmits to the Commission for its consideration any communication submitted to him. The Commission, through the Secretary, may request the author of a communication to furnish clarifications on the communication.[1478]

Admissibility Stage: Communications are examined by the Commission in private.[1479] The Commission may set up one or more working groups of maximum three members to submit recommendations on admissibility.[1480] The Commission determines questions of admissibility pursuant to Article 56 of the Charter.[1481] The Commission or a working group may request the State Party concerned or the author of the communication to submit in writing additional information or observations relating to the issue of admissibility of the communication. If the Commission decides that a communication is inadmissible under the Charter, it must make its decision known as early as possible, through the Secretary to the author of the communication and, if the communication has been transmitted to a State Party concerned, to that State. If the Commission decides that a communication is admissible under the Charter, its decision and text of the relevant documents shall, as soon as possible, be

1474 See, Article 63 and 64, *ibid.*

1475 Article 63.1 ACHR. See, Articles 65–67, *IACtHR Rules of Procedure.*

1476 Articles 67–68 ACHR.

1477 Article 67 ACHR. See, Article 68, *IACtHR Rules of Procedure.*

1478 See, Articles 102–105, *ACHPR Rules of Procedure.*

1479 See, Article 106, *ibid.* See also, Article 59.1 ACHPR.

1480 See, Article 115, *ibid.*

1481 See, Article 116, *ibid.*

submitted to the State Party concerned, through the Secretary. The author of the communication shall also be informed of the Commission's decision through the Secretary.[1482]

Merits: The State Party to the Charter concerned, within the three following months, must submit in writing to the Commission, explanations or statements elucidating the issue under consideration and indicating, if possible, measures it has taken to remedy the situation. All explanations or statements submitted by a State Party must be communicated, through the Secretary, to the author of the communication who may submit in writing additional information and observations within a time limit fixed by the Commission.[1483]

Final decision: If the communication is admissible, the Commission must consider it in the light of all the information that the individual and the State Party concerned has submitted in writing; it shall make known its observations on this issue. To this end, the Commission may refer the communication to a working group, which submits recommendations to it. The observations of the Commission must be communicated to the Assembly through the Secretary General and to the State Party concerned. The Assembly or its Chairman may request the Commission to conduct an in-depth study on these cases and to submit a factual report accompanied by its findings and recommendations, in accordance with the provisions of the Charter. The Commission may entrust this function to a Special Rapporteur or a working group.[1484]

7. African Court on Human and Peoples' Rights

The 1998 Protocol to the *African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,* which came into force on 25 January 2004, established the Court. On 1 July 2008, the Assembly of the African Union adopted a *Protocol on the Statute of the African Court of Justice and Human Rights,* which will merge the African Court of Justice and the African Court on Human and Peoples' Rights. The Protocol has at the time of writing been ratified by only three States and will enter into force after the fifteenth ratification.

Preparatory Stage: The applicant must file with the Court Registry one signed copy of the application containing a summary of facts and of the evidence he or she intends to adduce. It must specify the alleged violation, the evidence of exhaustion of domestic remedies, and the orders or injunctions sought, plus the request for reparations, if

[1482] See, Articles 117–119, *ibid.*

[1483] See, Article 119, *ibid.*

[1484] See, Article 120, *ibid.*

sought.[1485] The Registrar transmits a copy to the President and the members of the Court and, unless the Court decides otherwise, to the other parties which might be potential applicants or respondents.[1486] The State Party must respond within 60 days, unless extension is granted by the Court.[1487] The Court may dismiss the application because there is no merit in it at the preparatory stage, and will give reasons for it.[1488]

Admissibility Stage: The Court conducts preliminary examinations on its jurisdiction and admissibility of the complaint, and may request further information to the parties.[1489] The admissibility conditions are the same as for the Commission. The Court may also request an opinion of the Commission on admissibility or consider transferring the case to the Commission itself.[1490]

Friendly Settlement: The parties may bring to the attention of the Court that a settlement has been reached. The Court will render a judgment stating the facts and the solution adopted. It may also decide to proceed with the case. The Court will also put itself at the disposal of the parties with a view to reaching a friendly settlement.[1491]

Merits Stage: The President of the Court will fix the date of the hearing if applicable, which shall be public as a rule, unless it is in the interest of public morality, safety or public order to conduct in camera hearings. In the hearing evidence can be presented.[1492]

Judgement: If the Court finds that there has been violation of a human or peoples' right, it must make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. The Court must issue a judgment within 90 days from the date of completion of the deliberations.[1493] Judgments are binding on the parties. States are bound by the treaty establishing the Court to execute the judgment.[1494] Any party may apply to the Court within twelve months from the date of the judgment to request an interpretation of it for the purpose of execution.[1495] The Court can review its own judgments in

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1485 Article 34, *ACtHPR Rules of Procedure.*

1486 Article 35, *ibid.*

1487 Article 37, *ibid.* See also, Article 52, *ibid.*, on preliminary objections.

1488 Article 38, *ibid.*

1489 Article 39, *ibid.*

1490 Article 6, *P-ACHPR on African Court.* See also, Article 40, *ACtHPR Rules of Procedure.*

1491 Article 9, *ibid.* See also, Articles 56–57, *ACtHPR Rules of Procedure.*

1492 Articles 10 and 26, *ibid.* See also, Articles 42–50, *ACtHPR Rules of Procedure.*

1493 Articles 27 and 28.1, *ibid.* See also, Articles 59–61, *ACtHPR Rules of Procedure.*

1494 Articles 28 and 30, *ibid.* See also, Article 61, *ACtHPR Rules of Procedure.*

1495 Article 28.4, *ibid.* See also, Article 66, *ACtHPR Rules of Procedure.*

light of new evidence, which was not within the knowledge of the party at the time of the judgment, when so requested by a party.[1496]

III. What next? Enforcement system and follow-up

After having obtained a judgment or opinion by an international body establishing a violation, the applicant should be entitled to reparation. Judicial remedies provide for enforceable reparation: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights may order compensation or other measures of reparation, with which States are obliged to comply.

Quasi-judicial international bodies may recommend, but cannot enforce, reparations. A good-faith application of the treaty by State Parties entails that States should carry out the recommendations of the competent body.

Once it has reached a final judgment, the **European Court of Human Rights** transmits it to the Council of Europe Committee of Ministers which supervises its execution. Article 46(1) ECHR states that "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".[1497] The Court's judgments are therefore binding. The Committee of Ministers will examine whether the State Party has paid the awarded just satisfaction and the potential default interests,[1498] whether "individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention[, and/or] general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations".[1499] If the Committee of Ministers considers that a State Party has refused to abide by the final judgment, it may, after formal notice and with a two-thirds absolute majority decision, refer the case to the Court for lack of implementation of the judgment. The Court can then rule on the violation of Article 46 ECHR and refer the case to the Committee for measures to be taken.[1500]

1496 Article 28.3, *ibid.* See also, Article 67, *ACtHPR Rules of Procedure.*

1497 Article 46.1 ECHR.

1498 Rule 6.2(a), *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements,* adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies (CMCE Rules for execution of judgments).

1499 Rule 6.2(b), *CMCE Rules for execution of judgments.*

1500 See, Article 46 ECHR.

Exceptionally, where new facts come to light within a year of a judgment, a party may request revision of the judgment.[1501]

The American Convention on Human Rights does not establish any institutional role for the political organs of the Organisation of American States to supervise enforcement of the **Inter-American Court of Human Rights'** rulings. According to Article 65 ACHR, the Court is obliged to submit an Annual Report to each regular session of the General Assembly of the OAS for its consideration. In this report, the Court will specify the cases in which a State has not complied with its judgments, making any pertinent recommendations. However, the Rules of Procedure provide that the Court may follow up on its judgments and monitor its execution through reports of the State Party and observations of the victims or their representatives. The Court may request additional information from other sources and, if it deems it appropriate, convoke a hearing with the State and the victims' representatives in order to monitor the compliance with its decisions. At the hearing, the Court will hear also the opinion of the Commission. After the hearing, the Court may determine the state of compliance and issue appropriate orders.[1502]

In the African system, the Committee of Ministers of the African Union is mandated by the treaty establishing the Court to monitor the execution of the judgments of the **African Court on Human and Peoples' Rights,** once the Court is operational.[1503]

The other bodies, whether universal or regional, apart from the Human Rights Committee and the CERD, have procedures to assure follow-up on the implementation of their recommendations.

The **Committee against Torture** and the **CERD** invite the State, when communicating their decision, to provide information on their implementation and may appoint one or more Special Rapporteur(s) to follow up and report on it.[1504] **CESCR** and **CEDAW** establish an obligation of the State to report within six months, in writing, any action taken in light of the views and recommendations, and specifically provide that the State Party may be invited to include further information in its periodic report to the Committee.[1505]

[1501] Rules 79–80, *ECtHR Rules of Procedure.*

[1502] See, Article 69, *IACtHR Rules of Procedure.*

[1503] Article 29, *P-ACHPR on African Court.*

[1504] Rules 118.5 and 120, *CAT Rules of Procedure;* new Rule 95, paras. 6 and 7, *CERD Rules of Procedure,* adopted on 15 August 2005, available at http://www2.ohchr.org/english/bodies/cerd/docs/newruleprocedure-august05.pdf.

[1505] See, Article 7.4–5 OP-CEDAW. See also, Rule 73, *CEDAW Rules of Procedure;* Article 9 OP-ICESCR.

The **Inter-American Commission on Human Rights,** once it has published a report on a friendly settlement or on the merits in which it has made recommendations, may adopt any follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations. The Commission will report on progress in complying with any such agreements and recommendations as it deems appropriate.[1506]

The **European Committee on Social Rights** will require the concerned State to provide information about the implementation of the Committee of Ministers' recommendation in the periodic report it submits on the implementation of the Charter.[1507]

IV. Reporting procedures

International reporting mechanisms do not bar the applicants from bringing cases to quasi-judicial or judicial mechanisms. Although they do not have the capacity to address an individual situation, their use might be important in light of a case brought under them. This may be because reports by these bodies might inform a judicial or quasi-judicial mechanism on the country situation, or because it will be possible to signal the case to these bodies both to exercise political pressure on the national authorities and contribute to their analysis of the country situation. This last outcome is particularly significant given that individual cases might take some years to be resolved in an international venue, and that reports on country situations or diplomatic interventions on the individual case might be quicker, therefore providing useful material for the contentious case.

1. United Nations Treaty Bodies

The UN Treaty Bodies are those mechanism established by international human rights treaties, most of which we have considered in the previous paragraphs, because they also have a quasi-judicial procedure to consider individual cases. Each of them also has a procedure under which States periodically report on their human rights situation and are examined by the relevant Committee. These are:

- The Human Rights Committee (ICCPR);
- The Committee for the Elimination of Racial Discrimination (ICERD);

[1506] See, Article 48, *IACHR Rules of Procedure.*

[1507] Article 10 AP-ESC.

- The Committee for the Elimination of Discrimination against Women (CEDAW);
- The Committee on Economic, Social and Cultural Rights (ICESCR);
- The Committee against Torture (CAT);
- The Committee on the Rights of the Child (CRC);
- The Committee on the Rights of Migrant Workers and Their Families (ICMW);
- The Committee on the Rights of Persons with Disabilities (CRPD);
- The Committee on Enforced Disappearance (CED).

All these Committees accept submissions from NGOs. These submissions might also include some cases as example of human rights violations occurring in the country. Contacting a national or international NGO in order to take into consideration the case in their report, might increase the chances that the relevant Committee will address the general human rights situation concerning it. An appropriate finding of the Committee might be of help in the individual case.

2. Non-judicial mechanisms taking individual petitions

Many of the Special Procedures established by the UN Human Right Council to address particular issues ("thematic mandates"), to which independent experts are appointed as "mandate-holders", will receive and address individual "communications". Once a communication is received, they will take it into consideration, and then, at their discretion, they will decide whether to contact the concerned State requesting an answer to the allegations. The communications will generally be published in the Annual Report of the relevant Special Procedure. These communications do not depend on whether the State concerned is a party to a particular human rights treaty, and domestic remedies do not need to be exhausted. Furthermore, Special Procedures are not bound by the prohibition of duplication of complaints, so that it is possible to present the same communication to more Special Procedures or to Special Procedures and one judicial or quasi-judicial human rights body. In addition to these Special Procedures, there also exists the Human Rights Council Complaint Procedure established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.[1508]

[1508] See http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx.

a) Basic Procedural Standards of Special Procedures

The UN Special Procedures follow in the consideration of communications some basic procedural standards that are enshrined in the *Manual of Operations of the Special Procedures of the Human Rights Council*[1509] and in the *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council.*[1510] These standards are not mandatory but inform a harmonised procedure for mandate-holders and are generally enforced by them.

Who can submit a communication: Communication may be submitted by a person or group of persons claiming to be victim of violations or by any person or group of persons, including, non-governmental organisations, acting in good faith in accordance with the principles of human rights, and free from politically motivated stands or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of these violations substantiated by clear information.[1511]

How the communication must be submitted: The communication must be in written, printed or electronic form and include full details of the sender's identity and address, and full details of the relevant incident or situation. Anonymous communications are not considered.[1512] Most Special Procedures provide *questionnaires* in different language to be completed in order to present a communication.[1513] While the presentation of a communication through these forms is not mandatory, it is highly recommended.

Which violations can be submitted for consideration: The kind of violation that can be submitted to a Special Procedure depends on the subject-matter which the mandate-holder is charged to consider.[1514]

Conformity criteria: The communications (1) should not be manifestly unfounded or politically motivated; (2) should contain a factual description of the alleged violations of human rights; (3) the language of the communication should not be abusive; (4) and the communication should not be exclusively based on reports dissem-

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1509 *Manual of Operations of the Special Procedures of the Human Rights Council,* adopted at the 15th Annual Meeting of Special Procedures, June 2008, available at http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc (Manual of Operations).

1510 *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council,* in Resolution 5/2 of the UN Human Rights Council, Annex (Code of Conduct).

1511 Article 9.d, *ibid.*; *Manual of Operations, op. cit.*, fn. 1509, para. 38.

1512 *Manual of Operations, op. cit.*, fn. 1509, para. 38. Other formal requirements which may ideally be included are listed in para. 39.

1513 See, http://www2.ohchr.org/english/bodies/chr/special/questionnaires.htm.

1514 *Ibid*., para. 28.

inated by mass media.[1515] There is no need to exhaust domestic remedies.[1516]

Channels of communication: Mandate-holders address all their communication to the concerned government through diplomatic channels, unless otherwise agreed between the individual government and the Office of the High Commissioner for Human Rights.[1517] Mandate-holders are not required to inform those who provide information about any subsequent measure they have taken. They may, however, acknowledge receipt of the information and provide an indication of outcomes and follow-up, and may choose to provide some information, although normally not involving disclosure of the specific contents of communication with governments, unless an issue has been definitively dealt with by the government in question.[1518]

Confidentiality: Mandate-holders take all feasible precautions to ensure that sources are not subject to retaliation.[1519] In communications sent to governments, the source is normally kept confidential. An information source may, however, request that its identity be revealed.[1520] The text of all communications sent and the responses to them are confidential until they are published in the relevant reports of the mandate-holders or the mandate-holders determine that the specific circumstances require action to be taken before the time of publication.[1521] The names of alleged victims are normally reflected in the reports, although exceptions may be made in relation to children and other victims of violence in relation to whom publication of names would be problematic.[1522]

Action: The response to communication by mandate-holders may take the form of letters of allegation or of urgent appeals. The decision to take action is at the discretion of the mandate-holder.[1523]

- **Letters of allegations:** Letters of allegations are used to communicate violations that are alleged to have already occurred and in situations where urgent appeals are not needed.[1524] In this case, governments have two months to provide a substantive

[1515] Article 9(a), (b), (c) and (e), *Code of Conduct, op. cit.*, fn. 1510.

[1516] *Manual of Operations, op. cit.*, fn. 1509, para. 42.

[1517] Article 14, *Code of Conduct, op. cit.*, fn. 1510; *Manual of Operations, op. cit.,* fn. 1509, para. 28.

[1518] *Manual of Operations, op. cit.*, fn. 1509, para. 25.

[1519] *Ibid*., para. 27.

[1520] *Ibid*., para. 35.

[1521] *Ibid*., para. 37.

[1522] *Ibid*., para. 37.

[1523] *Ibid*., para. 40.

[1524] *Ibid*., para. 6.

response. Some mandate-holders forward the substance of the replies received to the sources of information.[1525]

- **Urgent appeal:** mandate-holders may resort to urgent appeals in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of letters of allegation.[1526] In the case of urgent appeals, governments are generally requested to provide a substantive response within thirty days. In appropriate cases, mandate-holders may decide to make public an urgent appeal.[1527]

Follow-up: The summaries of communications and of the government's replies are published in reports submitted to the Human Rights Council. The general practice is for the mandate-holder to provide some response to, or evaluation of, the exchange of information, although this practice varies from one Special Procedure to the other.[1528]

Box 18. Special Procedures most relevant to migrants and refugees

Special Procedure	Communications information
Special Rapporteur on the human rights of migrants	http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx
Working Group on Arbitrary Detention	http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx
Special Rapporteur on the sale of children, child prostitution and child pornography	http://www.ohchr.org/EN/Issues/Children/Pages/IndividualComplaints.aspx
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context	http://www.ohchr.org/EN/Issues/Housing/Pages/IndividualComplaints.aspx

[1525] *Ibid*., para. 48.

[1526] Article 10, *Code of Conduct, op. cit.*, fn. 1510; *Manual of Operations, op. cit.*, fn. 1509, para. 43.

[1527] *Manual of Operations, op. cit.*, fn. 1509, para. 45.

[1528] *Manual of Operations, op. cit.*, fn. 1509, para. 91.

Working Group on Enforced or Involuntary Disappearances	http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx
Special Rapporteur on the right to education	http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx
Working Group on the issue of discrimination against women in law and in practice	http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx
Special Rapporteur on extrajudicial, summary or arbitrary executions	http://www2.ohchr.org/english/issues/executions/complaints.htm
Special Rapporteur on the right to food	http://www.ohchr.org/EN/Issues/Food/Pages/Complaints.aspx
Special Rapporteur on freedom of religion or belief	http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Complaints.aspx
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Complaints.aspx
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	http://www.ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx
Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance	http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndividualComplaints.aspx
Special Rapporteur on Contemporary forms of slavery	http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SubmittingInformation.aspx

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	Letters of allegations: http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Allegation.aspx Urgent appeals: http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Appeals.aspx
Special Rapporteur on trafficking in persons, especially in women and children	http://www.ohchr.org/EN/Issues/Trafficking/Pages/complaints.aspx
Special Rapporteur on violence against women, its causes and consequences	http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx
Special Rapporteur on the independence of judges and lawyers	http://www.ohchr.org/EN/Issues/Judiciary/Pages/Complaints.aspx
Special Rapporteur on extreme poverty and human rights	http://www.ohchr.org/EN/Issues/Poverty/Pages/Individualcomplaints.aspx

b) The Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention (WGAD) is the only UN Special Procedure whose mandate expressly provides for consideration of individual 'complaints' rather than merely 'communications', thereby recognising a right of petition of individuals anywhere in the world.[1529] The WGAD may also take up cases on its own initiative.[1530]

The Law: The WGAD bases its decisions on individual complaints on the *Universal Declaration of Human Rights,* the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* the *International Covenant on Civil and Political Rights* for States Parties to it, the *Standard Minimum Rules for the Treatment of Prisoners;* the *UN Rules for the Protection of Juveniles Deprived of Their Liberty,* and the *UN Standard Minimum Rules for the Administration of Juvenile Justice,* as well as any other relevant standard.[1531]

[1529] See, Resolutions 1991/42 and 1997/50 of the UN Commission on Human Rights; Decision 2006/102 of the UN Human Rights Council; and Resolution 6/4 of the UN Human Rights Council.

[1530] *Revised Methods of Work,* WGAD, in Fact Sheet No. 26, The Working Group on Arbitrary Detention, OHCHR, Annex IV, para. 13.

[1531] *Ibid*., para. 7.

Who may submit a complaint: Complaints may be sent by the individuals directly concerned, their families, their representatives or non-governmental organisations for the protection of human rights, although the Group may also receive complaints by governments and inter-governmental organisations.[1532]

How the complaint must be submitted: The complaint must be submitted in writing and addressed to the Secretariat, including at least the family name and address of the sender. As far as possible, each case should include a presentation indicating names and any other information making it possible to indentify the person detained. A *questionnaire* is provided for by the WGAD website.[1533]

Procedure. The consideration of individual complaints involves a four-stage procedure.

- **Stage 1:** The WGAD receives the complaint, which should contain the minimum information highlighted above.[1534]
- **Stage 2:** The WGAD forwards the complaints to the government through diplomatic channels, inviting it to reply with comments and observations within 90 days. If the government communicates that it desires an extension, this may be granted for a further period of a maximum of two months.[1535]
- **Stage 3:** The replies by the government are brought to the attention of the complainant, which can further comment on them.[1536]
- **Stage 4:** The WGAD may adopt one of the following decisions on the complaint:

  (a) If the person has been released, for whatever reason, following the reference of the case to the WGAD, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned;

  (b) If the WGAD considers that the case is not one of arbitrary deprivation of liberty, it shall render an opinion to this effect;

  (c) If the WGAD considers that further information is required from the government or the source, it may keep the case pending until that information is received;

1532 *Ibid*., para. 12.

1533 *Ibid*., paras. 9–11. See questionnaire at http://www2.ohchr.org/english/issues/detention/docs/WGADQuestionnaire_en.doc.

1534 *Ibid*., paras. 9–14.

1535 *Ibid*., paras. 15–16.

1536 *Ibid*., para. 15.

(d) If the WGAD considers that it is unable to obtain sufficient information on the case, it may file the case provisionally or definitively;

(e) If the WGAD decides that the arbitrary nature of the deprivation of liberty is established, it shall render an opinion to that affect and make recommendations to the government.

The opinion adopted by the WGAD is sent to the government concerned together with the recommendations of the WGAD. Three weeks later, the opinion is sent to the complainant.

Follow-up: The WGAD inserts the opinion in its annual report to the UN Human Rights Council.[1537] The WGAD must also take all the appropriate measures to ensure that governments inform it of follow-up actions taken on the recommendations made.[1538]

Review: In exceptional circumstances, the WGAD may reconsider an already adopted opinion: (a) if the facts on which the request is based are considered by the Group to be entirely new and such as to have caused the Group to alter its decision had it been aware of them; (b) if the facts had not been known or had not been accessible to the party originating the request; or (c) when the request comes from a government which has respected the delays for replies.[1539]

Urgent Action Procedure: This procedure may be resorted to by the WGAD (a) in cases in which there are sufficiently reliable allegations that a person is being arbitrarily deprived of his liberty and that the continuation of such deprivation constitutes a serious threat to that person's health or even to his life; or (b) in cases in which, even when no such threat is alleged to exist, there are particular circumstances that warrant an urgent action. The urgent action procedure does not prejudge any opinion that the WGAD may later adopt on the arbitrariness of the deprivation of liberty.[1540]

[1537] *Ibid*., para. 19.

[1538] *Ibid*., para. 20.

[1539] *Ibid*., para. 21.

[1540] *Ibid*., paras. 22–23.

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