

# Access to Justice for Economic, Social and Cultural Rights

## Training Materials on Access to Justice for Migrants



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This project is funded by the European Union's Justice Programme (2014-2020). The content of this publication represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



# **Access to Justice for Economic, Social and Cultural Rights**

Training Materials on Access to Justice  
for Migrants

International Commission of Jurists (ICJ)  
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September 2021



# Access to Justice for Economic, Social and Cultural Rights

FAIR PLUS project - September 2021

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This training module is the third of a five-part series of training materials<sup>1</sup> relevant to protecting the rights of migrants in Europe. This part provides judges and lawyers, working at national level in the EU in cases involving economic, social and cultural rights of migrants (ESC rights), with the international legal framework on ESC rights of migrants.

A more detailed elaboration is available in the **ICJ, A Practitioners Guide: Adjudicating Economic, Social and Cultural Rights at National Level, Guide no. 8 (2014)** (hereafter ICJ Guide no. 8).

## I. Introduction

All migrants, including migrants in irregular situation, are holders of rights and have the right to economic, social and cultural rights (ESC rights) under international and EU law.

### 1. Economic, Social and Cultural rights (ESC rights)

Although heard less frequently nowadays, a distinction has sometimes been made between the nature of economic, social, and cultural rights (ESC rights) on one hand, and civil and political rights (CP) on the other. Under contemporary human rights law, the distinction between different categories of rights is not sustainable. The *UN Charter*<sup>2</sup> (1945) does not differentiate between the two sets of rights in its Articles 55 and 56. Similarly, the *Universal Declaration of Human Rights*<sup>3</sup> (UDHR) of 1948 does not make a distinction. When the rights were enshrined in international treaties (*International Covenant on Civil and Political Rights*<sup>3</sup> (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR))<sup>4</sup>, the two sets of rights were placed in separate instruments for reasons that reflected political dynamics of the times. As rights entrenched in international treaties, both sets of rights have equal normative force as legal rights and States therefore have legal obligations to realize those rights. Moreover, the Vienna Declaration on Human Rights, adopted by consensus of all UN Member States at the World Conference on Human Rights of 25 June 1993, affirmed that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." (*Vienna Declaration and Programme of Action on Human Rights*, para. 5).

Indeed, in part as a result of their interdependent nature and equal status the contemporary trend is to do away entirely with conceiving CP and ESC rights as different sets of rights. This is exemplified in the view of the UN Office of the High Commissioner on Human Rights:

**OHCHR, 'Fact Sheet Number 33: Frequently asked Questions on Economic, Social and Cultural Rights' (December 2008)**

"In the past, there has been a tendency to speak of economic, social and cultural rights as if they were fundamentally different from civil and political rights. However, this categorization is artificial and even self-defeating [...] when closely scrutinized, categories of rights such as 'civil and political rights' or 'economic, social and cultural rights' make little sense. For this reason, it is increasingly common to refer to civil, cultural, economic, political and social rights."

Substantively there is a close connection between the two sets of rights. Their origin being the UN Charter and the UDHR, all human rights are designed to protect people from acts and conditions that are contrary to human dignity.

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<sup>1</sup> These training materials on access to justice for migrants were developed as part of the FAIR PLUS (Fostering Access to Immigrant's Rights PLUS) project and include the following training modules:

0. Access to justice
- I. Fair asylum procedures and effective remedy
- II. Access to justice in detention
- III. Access to justice for economic, social and cultural rights
- IV. Access to justice in the protection of migrant's right to family life
- V. Access to justice for migrant children

<sup>2</sup> United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (hereafter UN Charter)

<sup>3</sup> Adopted by UN General Assembly Resolution 217A(III) of 10 December 1948

<sup>4</sup> Adopted by UNGA Resolution 2200(XXI) of 16 December 1966

**CESCR, General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990**

8. [...] In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question.

## 2. Sources of ESC Rights

The principal universal instrument governing ESC rights is the ICESCR. However, in respect of the rights of children, the [Convention on the Rights of the Child](#) (20 November 1989, UNTS 1577, p. 3; hereafter CRC), the content of which contains both CP and ESC rights, many of the rights are elaborated in greater detail. The [Convention on the Elimination of Discrimination against Women](#) (18 December 1979, UNTS 1249, p. 13; hereafter CEDAW), the [Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (18 December 1990, A/RES/45/158; hereafter CRMW) and the [Convention on the Rights of Persons with Disabilities](#) (CRPD) also contain important ESC rights and obligations.

Essential to clarifying the nature and scope of ESC rights under the ICESCR are the General Comments of the UN Committee on Economic, Social and Cultural Rights (CESCR), the body charged with providing the authoritative interpretation of the Covenant. To date the Committee has issued 25 General Comments, covering most of the rights and obligations (the Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and the CEDAW Committee have also issued General Comments and General Recommendations relating to ESC). Also important is the body of expert-elaborated standards related to ESC rights, which have been informed by and also informed the work of the CESCR, UN Special Procedures and other international authorities. These include the [1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights](#) (adopted 8 January 1987, reproduced in UN DOC. E/CN.4/1987/17); the [1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights](#) (reproduced in 20 Human Rights Quarterly 459, 691-704 (1998)); the [2011 Maastricht principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights](#) (reproduced, with Commentary, in 34 Human Rights Quarterly 1084). In addition, the work of [United Nations Special Rapporteurs](#) (SR) provides relevant thematic overview of international standards regarding specific rights. Several SR are relevant in the context of migration and ESC rights such as, SR on the human rights of migrants, SR on cultural rights, SR on education, SR on the right to food, SR on right to health, SR on right to safe drinking water and sanitation, SR on housing).

Regional human rights instruments also establish obligations on states to protect ESC rights. In Europe, the most comprehensive guarantees of ESC rights are set out in the [Revised European Social Charter](#) (ETS No. 163 of 3 March 1966; hereafter ESC); some ESC rights protections are also included in the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (4 November 1950, ETS 5; (hereafter ECHR). For other key sources, see [ICJ Guide no. 8](#).

## 3. The obligation to respect, protect, fulfil

International law concerning ESC rights imposes legally binding obligations on States to **respect, protect and fulfil** these rights. The CESCR has adopted and developed this three-tier classification of State obligations to guarantee the Covenant rights.

- (1) The obligation to **respect** entails the duty to organize governmental apparatus and discharge public authority in a way that does not interfere with the enjoyment of ESC rights. Thus, for example, a forced eviction by the State in violation of the right to adequate housing typically constitutes a violation of the duty to respect that right.
- (2) The obligation to **protect** involves the State taking all practicable measures to safeguard against the risk of interference on the enjoyment of ESC rights by third parties (e.g. private actors and other States and organizations). Thus, for example, failing to appropriately prevent a corporation from undertaking a forced eviction, or regulate private actors involvement in the provision of housing, would constitute a violation of the duty to protect.
- (3) The obligation to **fulfil** requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of ESC rights. This obligation may need to be discharged through international assistance and cooperation

While not all methods of achieving the full enjoyment of a human right and not all State acts or omissions neatly fit within these categories, they continue to shape the development of the global, regional and domestic jurisprudence on ESC rights (ICJ's Practitioners Guide, p. 53).

The following case example illustrates how the European Committee of Social Rights (ECSR) assesses compliance with State obligations under the European Social Charter and, particularly, the trilogy of the specific duties to respect (para. 52), protect (para. 71) and fulfil (para. 40).

**European Roma Rights Centre v. Portugal, European Committee of Social Rights, Complaint No. 61/2010, Decision of 30 June 2011**

40. Therefore, given the continuing precarious housing conditions for a large part of the Roma community, coupled with the fact that the Government has not demonstrated that it has taken sufficient measures to ensure that Roma live in housing conditions that meet minimum standards, the situation is in breach of Article E taken in conjunction with Article 31§1.

[...]

52. [T]he Committee [...] it holds that the specific differences of Roma have not been sufficiently taken into account when implementing housing programmes, and that some of such programmes have led to the segregation of Roma or have been tainted by discrimination.

[...]

71. Hence, the Committee holds that the inability and unwillingness of central authorities to correctly oversee/coordinate the implementation of housing programmes at the local level taking into consideration the specific situation of Roma, for instance by taking action against those municipalities where housing projects have led to the isolation or segregation of Roma, demonstrates the lack of an "overall and coordinated approach" in this area, amounting to a violation of Article E taken in conjunction with Article 30.

The UN CESCR frequently sets out what is required for the three levels of obligations in its General Comments. For instance, in regard to the right to food:

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.

All obligations in terms of all ESCR have both "progressive" and "immediate" components. While progressive obligations may be fulfilled over time immediate obligations must be fulfilled *immediately*. These "immediate obligations" include, broadly the obligations of:

- 1. Taking Steps:** Take steps towards realizing all ESCR in full;
- 2. Non-retrogression:** Avoid any retrogressive steps decreasing existing access to ESCR
- 3. Non-discrimination:** Ensure that ESCR-related services, facilities and goods are available to all without discrimination; and
- 4. Minimum Core Obligations:** Ensure immediate access to at very least the "minimum essential level" of ESCR-related services, facilities and goods.

**International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966.**

**Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures [...]

The obligation to protect has a horizontal effect (*ICJ Guide no. 8*, p. 59). States are required to prevent third parties from undermining the enjoyment of a right (*ICJ Guide no. 8*, p. 59-60).<sup>5</sup> This obligation places emphasis on State action that is necessary to prevent, stop or obtain redress or punishment for third party interference. In order to achieve this, States should adequately regulate private parties conduct, adopt monitoring and compliance mechanisms, and enforce sanctions in case of non-compliance, and provision of remedies.<sup>6</sup>

In its General Comment 24 on business and human rights, the CESCR Committee indicates that "In discharging their duty to protect, States parties should both create appropriate regulatory and policy frameworks and enforce such frameworks." In the specific context of healthcare, for example, it requires States to ensure that private actors "should be subject to strict regulations that impose on them so-called "public service obligations". Private healthcare providers must therefore "prohibited from denying access to affordable and adequate services, treatments or information". The obligation to protect the right to health therefore requires States to proactively take measures – including commonly legal, policy and other regulatory measures – to prevent third parties (whether multi-national corporations, local companies, private persons, armed groups or any other non-state actors) from impairing the enjoyment of ESCR. This position is affirmed in the jurisprudence of the CESCR, as well in other international law sources, including, with respect to business enterprises, the UN Guiding Principles on Business and Human Rights.

#### 4. Progressive realisation and non-retrogression

##### **CESCR, General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990**

9. [...] The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

The CESCR Committee therefore recognizes that full realization of ESC rights in their entire scope may take time to achieve for certain States. There are, however, several important caveats. First, any standstill in progress towards the protection of ESC rights contravenes States' obligations – steps towards full realization must be targeted and not of indefinite duration. Second, retrogression (going backwards in the realization of the right) is in principle not permitted. Once an ESC right is established in national law it cannot be withdrawn, the state cannot lower the level of protection that has been granted. Finally, and critically, not all rights of the Covenant are subject to the notion of progressive realization. The Committee indicates that: the prohibition on discrimination; the principle of non-retrogression; the obligation of "taking of steps"; and compliance with minimum core obligations are immediate obligations or obligations of immediate effect.

##### **CESCR, General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990**

1. [...] In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

<sup>5</sup> See also OHCHR, *Key concepts on ESCRs – What are the obligations of States on economic, social and cultural rights*; In the context of businesses see *Report of the Special Representative of the Secretary General on the issue of human rights and trans-national corporations and other business enterprises*, A/HRC/17/31, 21 March 2011, para. 1.

<sup>6</sup> In the context of businesses see. *ibid.*

2. The other is the undertaking in article 2 (1) “to take steps”, which in itself, is not qualified or limited by other considerations. [...] Thus while the full realization of the relevant rights may be achieved progressively, 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 recognized in the Covenant. [...]
10. [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of 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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. [...]

## 5. Minimum core obligations

When assessing the ESC rights of migrants, it is important to look at the minimum core obligations, including the “minimum essential levels” of rights. These are the obligations under the Covenant that States are bound to with immediate effect, irrespective of the status of implementation of the rights of the Covenant in a particular State or its own political and economic circumstances. The underlying idea is that these core obligations must be prioritized in the apportionment of resources and in the adoption and implementation of legislative, policy and other measures by States. The lack of resources cannot excuse the failure to fulfil these basic core obligations.

### **CESCR, General Comment No. 3, The nature of States parties’ obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990**

1. [...] In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”.

Each of the rights protected in the Covenant has elements that are considered as part of the minimum core. Core obligations can be found in the CESCR General comments on each of the specific rights. The full realization of the remainder of obligations in terms of each right “progressively” would then be much more elaborate.

## 6. Justiciability

People who are victims of violations of ESC rights often face barriers in accessing legal protection and remedies for such violations. In addition, lawyers, or other human rights defenders often face difficulties when trying to ensure the legal protection of ESC rights for their clients. This is due to the fact that in many national and international jurisdictions, ESC rights are considered not suited for direct application by courts in the same manner as civil and political rights. This may arise from a number of factors, including the unwillingness of courts to protect ESC rights because they may perceive this to result in the encroachment of the judiciary on government prerogatives on how to allocate limited resources. There is also often an unfamiliarity with the nature of the rights paradigm as a means of ensuring social and economic needs. In their iterations in international treaties, such as the ICESCR, human rights obligations are formulated in general terms, which are sometimes also perceived as leading to difficulties in their (direct) applications by the courts. This has led to perceived issues with justiciability of ESCR, and to courts granting considerable discretion to State officials in the application and normative interpretation of these (internationally guaranteed) obligations. However, the once common notion that ESC rights are inherently unsuited to justiciability, has now been largely dispelled. (See [ICJ Guide no. 8](#)).

<sup>7</sup> See for instance: CESCR, [General Comment No. 15 \(2002\)](#), The Right to water, E/C.12/2002/11, 20 January 2003; CESCR, [General Comment No. 14](#) (2000) The right to the highest attainable standard of health (article 12), E/C.12.2000/4, 11 August 2000; CESCR, [General Comment No. 13](#) (1999) The right to education (article 13), E/C.12/1999/10, 8 December 1999; CESCR, [General Comment No. 12](#) (1999) The right to adequate food (art. 11), E/C.12/1999/5, 12 May 1999; CESCR, [General Comment No.4](#): The right to Adequate Housing (art. 11(1)), 13 December 1991.

Contentions surrounding the issue of justiciability may lead to a limitation of access to justice for the victims of violations of ESCR. Courts may conclude that they do not have the authority, expertise or include to adjudicate cases on ESC rights at all. Alternatively, courts may decide – after hearing the arguments – that ESC rights do not give rise to create individually based claims but are rather generalized duties of the State. Although the difference in wording of the obligations may have led to a perceived difference in justiciability, it should have no bearing on the substantive assessment of the rights concerned.

As with civil and political rights, the scope and precise content of ESC rights obligations cannot be determined by the words in treaties. There are however a large number of interpretative tools available in the form of General Comments of treaty bodies, case law of courts and quasi-judicial authorities, expert-elaborated standards, such as the *Limburg* and *Maastricht Principles*, and other commentaries from authoritative sources. Often these sources are the treaty monitoring body or a (international) court that has been tasked with interpretation of the treaty. Frequently the outcomes of the treaty monitoring bodies reflect the common understanding of the scope of the rights among domestic authorities and other stakeholders. These sources, although most times not directly legally binding on the States, can and will be used by courts to give authoritative interpretation as to what is binding, namely the treaty provisions themselves.

**CESCR, General Comment No. 9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24, 3 December 1998**

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that “[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. [...]
15. It is generally accepted that domestic law should be interpreted as far as possible in a way, which conforms to a State’s international legal obligations. [...]

Certain aspects of ESC rights by their very nature, have to be considered undoubtedly justiciable. These include obligations of the respect and protect levels, as well as non-discrimination, minimum essential levels and non-retrogression, among others.

**CESCR, General Comment No.9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24, 3 December 1998**

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3, 7 (a) (i), 8, 10.3, 13.2 (a), 13.3, 13.4 and 15.3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While 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. [...] The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.
11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered “non-self-executing” were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. [...] It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

## 7. The right to effective remedy

The right to an effective remedy for violations of any human rights violation is a general principle of international law, one recognized by all States as reflected, for example, in the unanimous adoption by the UN General Assembly in 2005 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 (resolution 60/147). Principle 3, which is addressed not only to gross violations but to all violations of human rights including ESC rights violations, makes clear that: “the obligation to respect, ensure respect for and implement international human rights law [...] includes [...] the duty to [...] “[p]rovide those who claim to be victims of a [...] violation with equal and effective access to justice” [...] “and [p]rovide effective remedies to victims, including reparation[...].” Both the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, in their general comments, affirm that if there is a violation of ESC rights, an effective remedy, including in many cases a judicial remedy, must be available to the victim, as well as reparation for any violation.

For States that are party to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/RES/63/117, 10 December 2008), which gives individuals access to an international complaint procedure, some of these requirements are spelled out in greater detail. Similarly, the third Optional Protocol to the Convention on the Rights of the Child on a communications procedure (A/RES/66/138, 19 December 2011) addresses remedies for the violation of the ESC rights of children.

### **CESCR, General Comment No. 3, The nature of States parties’ obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990**

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. [...] In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non self executing would seem to be difficult to sustain [...].

And:

### **CRC, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, 27 November 2003**

24. For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.
25. As noted in paragraph 6 above, the Committee emphasizes that economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.

The remedies available do not always have to be judicial remedies in order to be effective, although there should be always recourse to a judicial body at the very least to review the proportionality and lawfulness of any non-judicial remedy. On the other hand, there are certain obligations and violations in respect of which an independent adjudicator may be indispensable.

**CESCR, General Comment No. 9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24, 3 December 1998**

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

## 8. Non-discrimination

Non-discrimination is a general principle of law, which applies across human rights law.

Many migrants are confronted with discrimination on the basis of their refugee/asylum seeker/irregular status, and/or nationality. Such discrimination may result in exploitation and disproportionate difficulties accessing ESC rights.

The prohibition of discrimination applies to discrimination based on race, colour, gender, disability, sexual orientation, gender identity, religion, language, political or other opinion, national social or ethnic origin, property, birth or other status. In many situations involving migrants, there may be multiple and/or compounding bases of discrimination that compound the violations.

The principle of non-discrimination applies to all non-citizens (including non-nationals and migrants) enjoyment of all ESC rights. There are however regional treaties that apply an exclusionary clause to migrants in irregular situations. One such example can be found in the European Social Charter.

**European Social Charter (Revised) - Annex, 1996**

**Scope of the Revised European Social Charter in terms of persons protected**

1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned [...]

This exclusion, although intended as such by the treaty drafters, is not as absolute as it might seem. In a number of cases the monitoring body has expanded the scope of the Charter in order to protect non-nationals from situations that would impair human dignity.

**CEC v. The Netherlands, European Committee of Social Rights, Complaint No. 90/2013, Decision of 1 July 2014**

65. The Committee recalls that pursuant to paragraph 1 of the Appendix the persons covered by Articles 1 to 17 and 20 to 31 of the Charter include foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.
66. When human dignity is at stake the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter nor to impair their fundamental rights such as the right to life or to physical integrity or human dignity (Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §28).

The prohibition of discrimination is itself featured in every human rights treaty at international and regional level, irrespective of whether it enshrines civil and political rights or ESC rights. The CESCR Committee has explicitly confirmed that everyone, including non-citizens, have the right to non-discriminatory access to the full range of ESC rights. States' obligations to secure non-discrimination is an obligation of immediate effect.

**CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009**

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. [...]
26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. [...]
30. The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. 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. [...]

In addition to formal discrimination, which can be combatted by amending laws and policy, the Committee provides guidelines as to how to combat substantive discrimination through proactive measures designed to combat de facto discrimination.

**CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009**

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively: [...]
- (b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.
9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

In relation to the right to social security, the European Court of Human Rights (ECtHR) has determined that because of the socio-economic implications, States have a wide margin of appreciation in the choice of a social security system. Note, however, that under the ICESCR, the concept of "margin of appreciation" does not apply, and has in fact been rejected by the CESCR Committee and States in their elaboration of the Optional Protocol (ICJ Guide no. 8, p. 210).

**Stec and others v. The United Kingdom, ECtHR, Applications no. 65731/01 and 65900/01, Judgment of 12 April 2006**

51. Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article

[...]. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment [...].

52. The scope of this margin will vary according to the circumstances, the subject matter and the background [...]. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention [...]. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy [...]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (ibid.).
53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention. [...]

**Oulajin and Kaiss v. The Netherlands, Human Rights Committee, Communications Nos. 406/1990 and 426/1990, Views of 23 October 1992, UN Doc. CCPR/C/46/D/406/1990 and 426/1990 (1992).**

- 7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of nondiscrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. [...]

Children may face particular forms of discrimination, for instance because of the status of their parents. This type of indirect discrimination, may be caused, for instance, by the lack of residence status of the parent. An example where a child was considered not to be eligible for orphans benefits because of the marital status of the parents was considered to be discriminatory by the UN Human Rights Committee:

**Derksen and Bakker v. The Netherlands, Human Rights Committee, Communication No. 976/2001, UN Doc. CCPR/C/80/D/976/2001 (2004)**

- 9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. [...] The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria.

Conversely, the ECtHR has concluded that unfavourable treatment of a parent on the basis of disability of the child constituted a prohibited form of discrimination:

**Guberina v. Croatia, ECtHR, Application no. 23682/13, Judgment of 22 March 2016**

77. The case at hand concerns a situation in which the applicant did not allege discriminatory treatment related to his own disability but rather his alleged unfavourable treatment on the basis of the disability of his child, with whom he lives and for whom he provides care. In other words, in the present case the question arises to what extent the applicant, who does not himself belong to a disadvantaged group, nevertheless suffers less favourable treatment on the grounds related to the disability of his child (compare paragraphs 41-42 above). [...]

79. The Court therefore finds that the alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability based discrimination covered by Article 14 of the Convention. [...]

## 9. Extra-territorial obligations

Human rights law recognizes that human rights obligations apply extraterritorially as well on the territory of the responsible State, although the scope of extraterritorial obligations (ETOs) may be narrower than those related to the rights of people within a State's territory. Extraterritorial obligations have been recognized by the International Court of Justice, human rights courts and UN treaty bodies and have been developed in the [Maastricht Principles on Extraterritorial Obligations of States in the area of ESCR](#).

There are two types of extraterritorial obligations in relation to ESC rights. First is the obligation that States, when conducting themselves in a way that has real and foreseeable effects on human rights beyond borders, must ensure that they respect and protect rights. Second is the obligation that States take measure to fulfil rights through international assistance and cooperation, as required in the CESCR. The latter is not only related to aid, it also means that in bilateral and multilateral arrangements, such as in the areas of international trade, investment, finance, the environment, and immigration among others, States must act together to fulfil rights. This obligation recognizes that the realization of ESC rights in some aspects cannot be achieved by one State alone.

## II. The right to an adequate standard of living

### 1. Introduction

The right to an adequate standard of living as described in Article 11 ICESCR is composed of distinctive rights (including the rights to water, to clothing, to food and to housing) and a more general right to "the continuous improvement of living conditions". The particular rights enumerated in article 11 are non-exhaustive, and the scope of what constitutes an adequate standard may change with circumstances over time.

#### **International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966**

##### **Article 11**

1. The 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. [...]

These rights are easily associated with what the CESCR refers to as minimum core obligations. The core elements of these rights are so fundamental that it will result in a *prima facie* violation of such rights if the minimum essential conditions are not fulfilled, including for migrants. Every element of the right to an adequate standard of living closely relates to the basic notion of human dignity that underpins human rights. It also relates to other human rights such as the right to private and family life, the prohibition of inhuman and degrading treatment and, potentially, the right to life.

#### **CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

4. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. [...]

#### **CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

49. States should ensure that children in the context of international migration have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in article 27 (3) of the Convention on the Rights of the Child. States, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

## 2. The right to water

The right to water is linked to both the right to highest attainable standard of health, as well as the right to an adequate standard of living. Next to the physical need for water for survival of the human body, water serves many different purposes.

**CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

6. Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

The core obligations on the right to water are quite extensive, which in turn shows how important the right to water is for human survival.

**CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

37. In General Comment No. 3 (1990), the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household; [...]
- (e) To ensure equitable distribution of all available water facilities and services; [...]
- (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

Because water is so important for survival and other aspects of human life, the Committee emphasizes that water should be available, accessible and of sufficient quality. In other words, for each different use, the water (facility) needs to be adequate.

**CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

- (a) *Availability*. The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines. Some individuals and groups may also require additional water due to health, climate, and work conditions;
- (b) *Quality*. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.
- (c) *Accessibility*. Water and water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
  - (i) *Physical accessibility*: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace. All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;
  - (ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;
  - (iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and
  - (iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning water issues.

The Committee prescribes that when violations of the right to water occur, there should always be a remedy available. What is more, the Committee stipulates that at all times an essential amount of water should be available to all. This brings the need for a remedy where the right to water is concerned back to the heart of what the right to water entails: survival.

**CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. [...] All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. [...]

56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

Water needs to be available to all without discrimination. The Committee emphasizes that the right to water may be more difficult to obtain for certain disadvantaged groups, such as women, children, and migrants. This needs to be addressed by States.

**CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003**

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. [...] The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.
14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. [...]
15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.
16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:
  - (a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;
  - (b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency; [...]
  - (f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals; [...]

### 3. The right to food

The CESCR Committee has identified the minimum core obligations of the right to food:

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. [...]
21. [...] Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. [...]

Food needs to be available and accessible to rights holders. This means food is available in sufficient quantity, affordable and accessible.

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

8. The Committee considers that the core content of the right to adequate food implies:  
The **availability** of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;  
The **accessibility** of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

[...]

12. Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

13. Accessibility encompasses both economic and physical accessibility:

Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. [...] Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. [...]

The food available needs to meet certain quality standards of food safety. There is also an element of cultural identity that is attached to the right to food:

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

9. Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.

10. Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

Food needs to be available to everyone without discrimination, irrespective of the nationality or citizenship status.

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

When the right to food is violated a remedy and reparation should be available to the victim.

**CESCR, General Comment No. 12, The right to adequate food (art. 11), UN Doc. E/C.12/1999/5, 12 May 1999**

32. Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.

#### **4. Adequate standard of living v. destitute conditions of living: the relationship with the right to life**

In relation to migrants living in or facing destitution, a number of cases have been dealt with by international courts and tribunals under the right to life in light of the principle of human dignity. In *M.S.S. v. Belgium and Greece* (Application no. 30696/09, 21 January 2011), the ECtHR assessed whether article 3 ECHR permitted the Belgian authorities to return migrants to Greece even though they were aware of the manifest deficiencies in the Greek reception system for asylum seekers.

**M.S.S. v. Belgium and Greece, ECtHR, Application no. 30696/09, Judgment of 21 January 2011**

252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.

253. The Court reiterates that it has not excluded the possibility “that State responsibility [under Article 3] could arise for ‘treatment’ where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity” (see *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece. [...]

358. In the light of the foregoing, the Court considers that at the time of the applicant’s expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. [...] The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum-seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, *mutatis mutandis*, *Saadi*, cited above, § 132). [...]

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

Other cases have dealt with the question of whether failed asylum seekers could be excluded from (government funded) social care, including the right to food and shelter. Although the [annex to the Revised European Social Charter](#) (ESC) explicitly excludes the protection of unlawfully residing migrants, the European Committee on Social Rights (ECSR) reached a different conclusion:

**CEC v. The Netherlands, European Committee of Social Rights, Complaint No. 90/2013, Decision of 1 July 2014**

121. [The Committee] ... is nevertheless unable to consider that the denial of emergency shelter to those individuals who continue to find themselves in the territory of the Netherlands is an absolutely necessary measure for achieving the aims of the immigration policy. No indications on the concrete effects of this measure have been referred to by the Government.
122. The Committee observes, similarly, that the persons concerned by the current complaint undeniably find themselves at risk of serious irreparable harm to their life and human dignity when being excluded from access to shelter, food and clothing. It refers to its established case-law under the reporting procedure (see paragraphs 73, 106) and holds that access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival in the prevailing weather conditions are necessary for the basic subsistence of any human being. [...]

Similarly, the Court of Justice of the European Union (CJEU) reached the conclusion that despite the fact that a migrant may have lost lawful residency, this should not lead to a loss of means of subsistence:

**H.T. v. Land Baden-Württemberg, CJEU, Case C 373/13, Judgment of 24 June 2015**

95. Nevertheless, it should be stated in that regard that the refugee whose residence permit is revoked pursuant to Article 24(1) of Directive 2004/83 retains his refugee status, at least until that status is actually ended. Therefore, even without his residence permit, the person concerned remains a refugee and as such remains entitled to the benefits guaranteed by Chapter VII of that directive to every refugee, including protection from refoulement, maintenance of family unity, the right to travel documents, access to employment, education, social welfare, healthcare and accommodation, freedom of movement within the Member State and access to integration facilities. In other words, a Member State has no discretion as to whether to continue to grant or to refuse to that refugee the substantive benefits guaranteed by the directive. [...]
97. As those rights conferred on refugees result from the granting of refugee status and not from the issue of the residence permit, the refugee, as long as he holds that status, must benefit from the rights guaranteed to him by Directive 2004/83 and they may be limited only in accordance with the conditions set by Chapter VII of that directive, since Member States are not entitled to add restrictions not already listed there. [...]

**Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida, CJEU, Case C 562/13, Judgment of 18 December 2014**

55. Article 14 of Directive 2008/115 provides for certain safeguards pending return, including during periods for which removal has been postponed in accordance with Article 9 of the directive.
58. It follows from the foregoing that Member States are required to provide to a third country national suffering from a serious illness who has appealed against a return decision whose enforcement may expose him to a serious risk of grave and irreversible deterioration in his state of health the safeguards, pending return, established in Article 14 of Directive 2008/115.
59. In particular, in a situation such as that in the main proceedings, the Member State concerned is required, pursuant to Article 14(1)(b) of Directive 2008/115, to make provision, in so far as possible, for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself.
60. The requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) of Directive 2008/115 may, in such a situation, be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. [...]

In the latter case, the Advocate General made a principled argument of the inherent right of every human being to live a humane and dignified life:

**Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida, CJEU, Case C 562/13, Judgment of 18 December 2014**

155. In my view, the respect for human dignity and the right to life, integrity and health enshrined in Articles 1, 2, 3 and 35 of the Charter respectively, as well as the prohibition of inhuman or degrading treatment contained in Article 4 of that Charter, mean that, in a situation such as that in the main proceedings, an illegally staying third-country national whose removal has been de facto suspended must not be deprived of the means necessary to meet his basic needs pending the examination of his appeal.
156. To have one's most basic needs catered for is, in my opinion, an essential right which cannot depend on the legal status of the person concerned.
157. Although the extent of the provision for basic needs must be determined by each of the Member States, given the discretion conferred on them by Directive 2008/115, it seems to me that such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have.

## 5. The right to adequate housing

The right to adequate housing is a right that encompasses a broad spectrum of protections. It includes the core obligation of protection from the (harsh) environment through basic shelter, as well as extensive standards regarding the quality of housing, affordability of housing, and security of tenure including protection from forced evictions.

The right to adequate housing is protected as part of the right to an adequate standard of living in Article 11 of ICESCR. A more elaborate description of what the right to housing entails can be found in the [European Social Charter](#).

**European Social Charter (Revised), article 31 (The right to housing)**

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

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

The right to housing means the right to be accommodated.

**EU Reception Directive, 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), article 18 (Modalities for material reception conditions)**

1. Where housing is provided in kind, it should take one or a combination of the following forms:
  - (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
  - (b) accommodation centres which guarantee an adequate standard of living;
  - (c) private houses, flats, hotels or other premises adapted for housing applicants. [...]
3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b). [...]

Next to these examples of specific housing rights, article 8 ECHR (private and family life), article 1 of [Protocol 1 ECHR](#) of 20 March 1952 (right to property), and article 3 ECHR (prohibition of inhuman and degrading treatment) are also relevant to the right to adequate housing.

### a) Minimum Core Obligation: Shelter

The CESCR in its General Comment No. 4 on the Right to Adequate Housing (E/1992/23, 13 December 1992) does not describe the content of the minimum core obligation of the right to housing. The reason given by CESCR is that the States in their reports had not at the date of drafting of the General Comment 4 provided sufficient description for CESCR to draw generally applicable conclusions. At the same time, the Committee recognized homelessness as a problem that needs to be solved.

#### **CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. [...]

In the Revised European Social Charter, the right to housing is protected in a separate article and includes the obligation on the State to prevent homelessness. In its case law, the ECSR has first determined that especially children, irrespective of their residence status, are entitled to shelter on the basis of Article 31 ESC.

The ECSR has also established that shelters must meet certain standards such as being equipped by basic amenities (water, heating, lighting) in order to comply with health, hygiene and security requirements. The surroundings must also be secure ([DCI v. The Netherlands](#), §62 and [CEC v. Netherlands](#), §138 below).

#### **DCI v. The Netherlands, European Committee of Social Rights, Complaint No. 47/2008, Decision of 20 October 2009**

46. The Committee recalls that Article 31§2 (prevention and reduction of homelessness) is specifically aimed at categories of vulnerable people. It obliges Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of emergency and longer-term measures, such as the provision of immediate shelter and care for the homeless as well as measures to help such people overcome their difficulties and to prevent them from returning to a situation of homelessness (Conclusions 2003, Italy, Article 31 and [FEANTSA v. France](#), Complaint 39/2006, decision on the merits, 5 December 2007, § 103).

47. The Committee considers that the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. The Committee observes that if all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. It therefore considers that children would adversely be affected by a denial of the right to shelter.

48. The Committee thus holds that children, whatever their residence status, come within the personal scope of Article 31§2. [...]

62. As to living conditions in a shelter, under Article 31§2 the Committee holds that they should be such as to enable living in keeping with human dignity ([FEANTSA v. France](#), Complaint No 39/2006, decision on the merits of 5 December 2007, §§ 108-109). In this regard the Committee refers to the Recommendation of the Commissioner for Human Rights of the Council of Europe on the implementation of the right to housing (June 2009) where he claims that "the starting point to reduce homelessness should be (...) to guarantee that all people, regardless of circumstance, are able to benefit from housing that corresponds with human dignity, the minimum being temporary shelter. The requirement of dignity in housing means that even temporary shelters must fulfil the demands for safety, health and hygiene, including basic amenities, i.e. clean water, sufficient lighting and heating. The basic requirements of temporary housing include also security of the immediate surroundings. Nevertheless, temporary housing need not be subject to the same requirements of privacy, family life and suitability as are required from more permanent forms of standard housing, once the minimum requirements are met. The housing of people in reception camps and temporary shelters which do not satisfy the standards of human dignity is in violation of the aforementioned requirements."

63. Finally, the Committee recalls that under Article 31§2 States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available [...]. Accordingly, the Com-

mittee holds that, since in the case of unlawfully present persons no alternative 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 for their human dignity.

64. On the basis of the above, the Committee concludes that States Parties are required, under Article 31§2 of the Revised Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children. [...]

**CEC v. The Netherlands, European Committee of Social Rights, Complaint No. 90/2013, 1 July 2014**

138. According to Article 31§2 of the Charter, shelters are required to meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting in order to ensure that the dignity of the persons sheltered is respected. Another basic requirement is the security of the immediate surroundings (DCI v. the Netherlands, § 62).

In a later case, the ECSR came to the same conclusion on the basis of article 17 ESC, which provides children with economic, social, and legal protection. Reference to this article was necessary, as Belgium had not accepted the obligations under article 31 ESC.

**DCI v. Belgium, European Committee of Social Rights, Complaint No. 69/2011, Decision of 23 October 2012**

36. [...] [T]his category of foreigners (which includes accompanied or unaccompanied minors not lawfully present in a country) is not covered by all the provisions of the Charter, but solely by those provisions whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons concerned by the provision in question from serious threats to the enjoyment of those rights.

37. Moreover, the risk of impairing fundamental rights is all the more likely where children – a fortiori migrant children unlawfully present in a country – are at stake. This is due to their condition as “children” and to their specific situation as “unlawful” migrants, combining vulnerability and limited autonomy. As a result, in particular, of their lack of autonomy children cannot be held genuinely responsible for their place of residence. Children are not able to decide themselves whether to stay or to leave. Furthermore, if they are unaccompanied, their situation becomes even more vulnerable and the State should be managed entirely by the State, which has a duty to care for children living within its territory and not to deprive them of the most basic protection on account of their “unlawful” migration status.

38. In the light of the above general observations, the Committee, referring specifically to Article 17 of the Charter and recalling its decisions [...], considers that this provision is applicable to the persons concerned by this complaint. Article 17, in particular paragraph 1 thereof, requires States Parties to fulfil positive obligations relating to the accommodation, basic care and protection of children and young persons. Not considering that States Parties are bound to comply with these obligations in the case of foreign minors who are in a country unlawfully would therefore mean not guaranteeing their fundamental rights and exposing the children and young persons in question to serious threats to their rights to life, health and psychological and physical integrity and to the preservation of their human dignity. [...]

81. The Committee considers that immediate assistance is essential and allows assessing material needs of young people, the need for medical or psychological care in order to set up a child support plan. [...] “§34. Poverty renders children, in particular girls, vulnerable to exploitation, neglect and abuse. States must respect and promote the rights of children living in poverty, including by strengthening and allocating the necessary resources to child protection strategies and programmes, with a particular focus on marginalized children, such as street children, child soldiers, children with disabilities, victims of trafficking, child heads of households and children living in care institutions, all of whom are at a heightened risk of exploitation and abuse.”

82. In the light of the above, the Committee considers that the fact that the Government has, since 2009, no longer guaranteed accompanied foreign minors unlawfully present in the coun-

try any form of accommodation in reception centres (through either through the FEDASIL network or other alternative solutions) breaches Article 17§1 of the Charter. The persistent failure to accommodate these 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. [...]

Two years later, the ECSR decided that the same norm applies to adult undocumented migrants.

**CEC v. The Netherlands, European Committee of Social Rights, Complaint No. 90/2013, 1 July 2014**

142. With regard to the Netherlands, the Committee recalls that the domestic situation has been found not to be in conformity with Article 31§2 of the Charter due to the lack of a legal requirement to provide shelter to irregular migrant children for as long as they were in the jurisdiction of the Netherlands (Conclusions 2011, the Netherlands).
143. With regard to the instant complaint, the Committee has held under Article 13§4 that the large majority of adult migrants in an irregular situation are provided shelter neither in law, nor in practice.
144. In light of the Committee's established case-law, shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them. The Committee again refers to its findings above under Article 13§4 and reiterates that the right to shelter is closely connected to the human dignity of every person regardless of their residence status. It considers that the situation, on the basis of which a violation has been found under Article 13§4, also amounts to a violation of Article 31§2. [...]

Overpopulation of reception centers is not an excuse for not providing shelter. In 2018 the ESCR found a violation of the obligation to provide social, legal, and economic protection when children were left to themselves in the street due to the lack of places in reception facilities.

**ESCR, EUROCEF v. France, Complaint No. 114/2015, Decision of 24 January 2018**

137. Due to overcrowded reception facilities and to the lack of reception homes, a certain number of minors live on the street where their physical and moral integrity is threatened. It exposes young persons in question to very serious physical and moral hazards, resulting from life on the street which may even lead to trafficking, exploitation of begging and sexual exploitation (Conclusions 2006, Article 7§10, Moldova).
138. The failure to care for unaccompanied foreign minors present in the country therefore shows that the Government has not taken 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.
139. Therefore, the Committee holds that there is a violation of Article 7§10 of the Charter due to the inappropriate accommodation of minors or their exposure to life on the street.

**Khan v. France, ECtHR, Application no. 12267/16, Decision of 28 February 2019**

93. The applicant thus spent several months in the shantytown of the Calais heath, in an environment totally unsuited to his status as a child, whether in terms of safety, housing, hygiene or access to food and care, and in unacceptably precarious conditions in view of his young age.
94. The Court is of the view that these particularly serious circumstances and the failure to enforce the decision of the Youth Judge ordering measures for the applicant's protection, when taken together, constitute a breach of the obligations imposed on the respondent State, thus attaining the threshold of severity required for Article 3 of the Convention to be engaged. It thus concludes that the applicant found himself, as a result of the failings of the French authorities, in a situation which contravened that provision and which it considers to have constituted degrading treatment.
95. Accordingly, there has been a violation of Article 3 of the Convention.

## b) Adequacy of Housing

The quality of housing forms part of the substance of what can be considered adequate housing. In general the right to housing must, according to the CESCR Committee, be understood as a right to "live somewhere in security, peace and dignity".

### **CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. [...] "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost".
8. [...] "[A]dequate housing" for the purposes of the Covenant. [...] include[s] the following:
- (a) Legal security of tenure. [...]
  - (b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;
  - (c) Affordability. [...]
  - (d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. [...]
9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. [...] Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing. [...]

## c) Access and Security of Tenure, Forced Evictions

The right to housing requires that people should be able to enjoy secure access to that housing, including through having sufficient "security of tenure". In practice, access to housing usually requires a system through which tenure is secured, which may trigger questions in relation to equality and non-discrimination.

### **CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

- 8(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as [...] children [...] should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. [...]

Once housing is arranged the obligation on the State is to prevent homelessness. This means there should be sufficient protection against forced evictions, while at the same time property rights of the owners need to be recognized. From the treaty perspective however, protection is key.

### **CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

18. In this regard, the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

**CESCR, General Comment No. 7, The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions, UN Doc. E/1998/22, 20 May 1997**

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of 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. [...]
11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected. [...]
14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. [...] [I]nterference with a person's home can only take place "in cases envisaged by the law". [...]
15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.
16. Evictions 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. [...]

#### **d) Non-Discrimination**

The right to housing, similar to all rights in the convention, needs to be applied without discrimination. Housing may impact women and disadvantaged groups in society more negatively.

**CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

This same approach is taken by the European Committee on Social Rights where undocumented migrants are concerned. Even though the European Social Charter itself excludes undocumented migrants from its scope, the Committee is giving preference to the protection of human dignity.

Treaty provisions require States to treat migrants no less favorable than nationals, or other aliens, in respect of housing. In essence, the non-discrimination clause in these cases has been connected to the substantive rights as protected by the treaty.

The 1951 Convention relating to the Status of Refugees (A/RES/429, 14 December 1950), for instance, requires treatment no less favorable than other aliens. This requirement is of course only effective once a person is recognized as a refugee.

**1951 Convention relating to the Status of Refugees, UNGA Resolution A/RES/429, 14 December 1950, Article 21 (housing)**

As regards housing, the Contracting 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.

When the ECtHR had to determine whether there had been an Article 14 violation in relation to access to housing, the Court considered that, despite the lack of assistance, there never was a situation of homelessness, and hence no violation:

**Bah v. The United Kingdom, ECtHR, Application no. 56328/07, Judgment of 27 September 2011**

40. Having thus defined the scope of its examination, the Court begins by observing that there is no right under Article 8 of the Convention to be provided with housing [...], where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14. The impugned legislation in this case obviously affected the home and family life of the applicant and her son, as it impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The Court therefore finds that the facts of this case fall within the ambit of Article 8. [...] The Court must therefore go on to consider whether the applicant was impermissibly discriminated against within the meaning of Article 14. [...]

51. As regards the proportionality of the means employed to realise this legitimate aim, the Court has had regard to the specific circumstances of the applicant's case. Without underestimating the anxiety which the applicant must have suffered as a result of being threatened with homelessness, the Court observes that she was never actually homeless and that, as pointed out by the Government (see paragraph 24 above), there were duties imposed by legislation other than section 193 of the Housing Act 1996 which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. [...] In the applicant's case, she moved back to Southwark when she was offered a social housing tenancy seventeen months later, which was within a similar timescale as that in the case of a person accorded priority need.

52. In these circumstances, the Court finds that the differential treatment to which the applicant was subjected was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the United Kingdom and the legitimacy, in so allocating, of having regard to the immigration status of those who are in need of housing. On the facts of the applicant's case, the effect of the differential treatment was not disproportionate to the legitimate aim pursued. [...]

**Directive 2011/95/EU of the European Parliament and of the Council 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 or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive).**

**Article 32 Access to accommodation**

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.

Other treaties deal with equal rights to housing for economic migrants.

**International Labour Convention No. 97 – Migration for Employment Convention (Revised), 1949, Article 6**

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
  - (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities--
    - (i) 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;
    - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
    - (iii) accommodation; [...]

As previously mentioned in section I.3 'The obligation to respect, protect, fulfil', *States are required to take measures* to prevent third parties, including private parties from undermining the enjoyment of all ESC rights. This includes taking measures to prohibit and prevent discrimination in contracts for the provision of basic services such as housing (ICJ Guide no. 8, p. 60).

**e) Remedies**

As with other rights, the CESCR Committee has affirmed that violations can only be effectively resolved when a legal or administrative remedies are available. In relation to the right to housing, the Committee provides a non-exhaustive list of examples of possible remedies that underpin the importance of housing in relation to other human rights.

**CESCR, General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant), UN Doc. E/1992/23, 13 December 1992**

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

**Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, A/HRC/40/61, 15 January 2019.**

54. Access to justice for migrants must ensure effective remedies for widespread systemic discrimination in access to shelters and public and private housing. Migrants must be empowered to challenge laws that exclude them from accessing social housing or that forbid private landlords from renting to them. Where migrants themselves are not in a position to advance claims on their own behalf, claims should be heard from representative organizations. Migrants must have access to legal assistance without requiring disclosure of their immigration status to public authorities and, where necessary, access to complaints procedures that preserve anonymity. Violations of the right to housing of migrants cannot be justified as measures to discourage irregular migration.

### III. The right to social security

The right to social security is protected in a number of different treaties. The right to social security is also explicitly protected in Article 9 ICESCR.

#### **International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966**

##### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

#### **CESCR, General Comment No. 19, The right to social security (art. 9), UN Doc. E/C.12/GC/19, 4 February 2008**

2. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from [...]
  - (b) unaffordable access to health care;
  - (c) insufficient family support, particularly for children and adult dependents. [...]
12. The social security system should provide for the coverage of the following nine principal branches of social security.
  - (a) Health care [...]
  - (f) Family and child support
  - (g) Maternity [...]
  - (h) Disability
  - (i) Survivors and orphans [...]
18. Benefits for families are crucial for realizing the rights of children and adult dependents to protection under articles 9 and 10 of the Covenant. In providing the benefits, the State party should take into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child or adult dependent, as well as any other consideration relevant to an application for benefits made by or on behalf of the child or adult dependent. Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate. [...]

#### **Revised European Social Charter, 1996**

##### **Article 12 – The right to social security**

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
  - a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
  - b. the granting, maintenance and resumption of social security rights by such means as the

accumulation of insurance or employment periods completed under the legislation of each of the Parties.

#### **Article 13 – The right to social and medical assistance**

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

#### **Convention on the Rights of the Child, 1989**

##### **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

#### **CESCR, General Comment No. 19, The right to social security (art. 9), UN Doc. E/C.12/GC/19, 4 February 2008**

37. 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. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.
38. 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.
39. Internally displaced persons should not suffer from any discrimination in the enjoyment of their right to social security and States parties should take proactive measures to ensure equal access to schemes, for example by waiving, where applicable, residence requirements and making allowance for provision of benefits or other related services at the place of displacement. Internal migrants should be able to access social security from their place of residence, and residence registration systems should not restrict access to social security for individuals who move to another district where they are not registered. [...]

The European Social Charter extends the right to social security to refugees and stateless persons, but excludes third country nationals or States Parties nationals irregularly staying in the territory of the States Parties.<sup>8</sup> However, the Council of Europe Parliamentary Assembly (PACE) provides that 'social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity'.<sup>9</sup> The ESC also enshrines the principle of non-discrimination regarding access to social security scheme. The non-discrimination principle is also emphasized in the [joint general comment No. 4](#) (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

#### **ECSR, Conclusions XIX-2 (2009) (DENMARK), January 2010 (p. 23)**

The Committee points out that, where non-contributory benefits are concerned, the section of the Appendix relating to Article 12§4 allows a residence requirement to be imposed on foreign nationals, but it reserves the right to assess the proportionality of the length of residence to the objective pursued. All of the aforementioned benefits are non-contributory. However, in view of the fact that both types of pension are basic benefits, the Committee considers the ten-year residence requirement to be excessive.

<sup>8</sup> [Digest of the case law of the European committee of social rights](#), December 2018, p. 141.

<sup>9</sup> CoE Parliamentary Assembly, '[Human rights of irregular migrants](#)', [Doc. 10924](#), 4 May 2006, para. 13.3.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

47. With respect to social security, migrant children and their families shall have the right to the same treatment granted to nationals, insofar as they fulfil the requirements provided for by the applicable legislation of the State and the applicable bilateral and multilateral treaties. The Committees consider that in cases of necessity, States should provide emergency social assistance to migrant children and their families regardless of their migration status, without any discrimination.

As mentioned before, migrants in any form of residency procedure may not be eligible for “regular” social benefits. This however does not mean that they can be left to fend for themselves:

**CESCR, General Comment No. 19, The right to social security (art. 9), UN Doc. E/C.12/GC/19, 4 February 2008**

Core obligations

59. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. This requires the State party:

- (a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families 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. [...]

*EU law*

**EU Charter of Fundamental Rights, 2012/C 326/02, 6 October 2012**

**Article 34 Social security and social assistance**

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

## 1. Protection of the right to social security through the right to property

Cases in which courts have had to deal with the issue of social benefits for migrants tend to focus on the issue of discrimination on the basis of residency or nationality. This stems from the fact, as discussed earlier in relation to non-discrimination, that States may choose whether or not to have a social benefit scheme. Once it is in place, it however needs to be applied in a non-discriminatory fashion. In the case *Gaygusuz v Austria* (17371/90, 16 September 1996), the ECtHR decided on a case concerning emergency assistance:

**Gaygusuz v. Austria, ECtHR, Application no. 17371/90, Judgment of 16 September 1996**

40. In the instant case it has not been argued that the applicant did not satisfy that condition; the refusal to grant him emergency assistance was based exclusively on the finding that he did not have Austrian nationality and did not fall into any of the categories exempted from that condition (see paragraphs 11 and 13 above).

41. The Court considers that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (P1-1). That provision (P1-1) is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions". Accordingly, as the applicant was denied emergency assistance on a ground of distinction covered by Article 14 (art. 14), namely his nationality, that provision (art. 14) is also applicable [...]
46. The Court notes in the first place that Mr Gaygusuz was legally resident in Austria and worked there at certain times (see paragraph 10 above), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.
47. It observes that the authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33 (2) (a) of the 1977 Unemployment Insurance Act (see paragraph 20 above).
48. In addition, it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.
49. Admittedly, sections 33 and 34 of the 1977 Unemployment Insurance Act (see paragraph 20 above) lay down certain exceptions to the nationality condition, but the applicant did not fall into any of the relevant categories.
50. The Court therefore finds the arguments put forward by the Austrian Government unpersuasive. It considers, like the Commission, that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification". [...]

In the case *Koua Poirrez v. France* (40892/98, 30 September 2003), the ECtHR decided on a case where benefits were denied on the basis of nationality. The benefit was considered a property right, which in turn made it possible for the court to assess whether the denial on the basis of nationality was a prohibited ground of discrimination.

#### **Koua Poirrez v. France, ECtHR, Application no. 40892/98, Judgment of 30 September 2003**

37. The Court also points out that it has already held that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions" (see *Gaygusuz*, cited above, p. 1142, § 41). In that connection, the Court considers that the fact that, in that case, the applicant had paid contributions and was thus entitled to emergency assistance (*ibid.*, pp. 1141-42, § 39) does not mean, by converse implication, that a non-contributory social benefit such as the AAH does not also give rise to a pecuniary right for the purposes of Article 1 of Protocol No. 1.
47. In the instant case, the Court notes in the first place that the applicant was legally resident in France, where he received the minimum welfare benefit, which is not subject to the nationality condition. It reiterates that the domestic authorities' refusal to award him the allowance in issue was based exclusively on the fact that he did not have the requisite nationality, which was a precondition for obtaining the allowance under Article L. 821-1 of the Social Security Code as applicable at the material time.
48. In addition, it has not been established, or even alleged, that the applicant did not satisfy the other statutory conditions entitling him to the social benefit in question. In that connection, the Court can only note that the applicant did receive the AAH after the 11 May 1998 Act had abolished the nationality condition. He was therefore in a like situation to that of French nationals or nationals of a country that had signed a reciprocity agreement as regards his right to receive the benefit. The Court notes that the Court of Cassation also considered that the refusal - solely on grounds of foreign nationality - to award the supplementary allowance payable by the National Solidarity Fund to a claimant resident in France who received an invalidity pension under the French scheme breached Article 14 of the Convention and Article 1 of Protocol No. 1 (see paragraph 26 above).
49. The Court therefore finds the arguments advanced by the Government unpersuasive. The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was

not based on any “objective and reasonable justification” (see, conversely, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 20, § 49). Even though, at the material time, France was not bound by reciprocity agreements with the Ivory Coast, it undertook, when ratifying the Convention, to secure “to everyone within [its] jurisdiction”, which the applicant indisputably was, the rights and freedoms defined in Section I of the Convention (see *Gaygusuz*, cited above, p. 1143, § 51).

50. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. [...]

## 2. Protecting the right to social security through the right to family life

In a case regarding child benefits, the ECtHR deemed different treatment of different categories of non-nationals, in violation of the principle of non-discrimination.

### **Niedzwiecki v. Germany, ECtHR, Application no. 58453/00, Judgment of 25 October 2005**

31. By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision [...]. It follows that Article 14 – taken together with Article 8 – is applicable.
32. According to the Court’s case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Willis*, cited above, § 39).
33. [...] Like the Federal Constitutional Court, the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention. [...]

In regard to maternity benefits, the ECtHR has decided that no distinction should be made based on the nationality of the parent.

### **Weller v. Hungary, ECtHR, Application no. 44399/05, Judgment of 31 March 2009**

37. The Court observes that, flowing from the relevant provisions of the Act, a family with children of a Hungarian mother and a foreign father are entitled to maternity benefits. However, this was not the situation of the second and the third applicants as their father is Hungarian and their mother a foreigner. They were therefore prevented from benefitting from such an allowance on the basis of this difference.
38. The Court finds no reasonable justification for this practice. It considers that the entitlement to an allowance due to a family under sections 1 and 2 of the Act cannot be dependent on which of the two biological parents of the children is a Hungarian national. The Court would add that it is irrelevant that, as of 1 January 2008, the applicants’ mother became entitled to the allowance under the same conditions as Hungarian nationals, because by then she was barred from claiming it as the request had to be made within 180 days of the children’s birth and could not be made retroactively.
39. In sum, since the Government have failed to put forward any convincing argument to justify the second and third applicants’ exclusion from the benefit of the allowance in question, the Court concludes that this difference in treatment amounted to discrimination. [...]

The ECtHR has in a number of cases found that the right to respect for family life may require granting the parents access to social benefits, even if they would ordinarily not be eligible. This was considered also in *N.P. vs The Republic of Moldova* (58455/13, 6 October 2015) where the applicant was a Moldovan single mother who received no social benefits.

**N.P. v. The Republic of Moldova, ECtHR, Application no. 58455/13, Judgment of 6 October 2015**

79. Furthermore, there is no indication that the judicial authorities analysed in any depth the extent to which the inadequacies of the child's upbringing were attributable to the applicant's incapacity or unwillingness to provide requisite care, as opposed to her financial difficulties, to which she referred in the domestic proceedings and which could have been overcome by appropriate financial and social assistance and effective counselling. [...]
80. It is not the Court's role to determine whether the promotion of family unity in this case entitled the applicant to an adequate standard of living at public expense. It is, however, a matter which falls to be discussed by the relevant public authorities and, subsequently, in the course of court proceedings. There is no evidence in the case-file that such matters were ever considered by the authorities or the courts.
81. [...] The Court finds that obtaining information in this regard was required by domestic law (see paragraphs 37 and 40 above) and would have been pertinent in evaluating whether the authorities had discharged their Convention obligation to promote family unity and had explored sufficiently the effectiveness of less far-reaching alternatives before seeking to separate the child from the applicant by withdrawing the applicant's parental authority. [...]

## IV. The right to work

The right to work is linked with other human rights and is fundamental in order to achieve a dignified life. Migrants are particularly vulnerable when it comes to the protection of their right to work. Irregular migrants are often not legally permitted to work in the host State in terms of domestic law and will frequently engage in informal economy and be subject to abuse and exploitation.

**Universal Declaration on Human Rights, (UDHR) 1948**

**Article 23**

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

**International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966**

**Article 6**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

**International Convention on the Elimination of All Forms of Racial Discrimination, (CERD) 1969**

**Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(e) Economic, social and cultural rights, in particular:

- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

**Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW) 1979**

**Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;

**Revised European Social Charter, 1996**

**Article 1 The right to work**

Everyone shall have the opportunity to earn his living in an occupation freely entered upon.

The right to work is not an obligation of result but of means. States should not provide every individual with a job but should provide the adequate labour market allowing providing sufficient employment opportunities. As all the ESCR right, the right to work should be progressively realised but still imposes, core obligations on States.

**CESCR, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005.**

25. Obligations to protect the right to work include, inter alia, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers' rights

26. States parties are obliged to fulfil (provide) the right to work when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. This obligation includes, inter alia, the obligation to recognize the right to work in national legal systems and to adopt a national policy on the right to work as well as a detailed plan for its realization

31. (...) In the context of article 6, this "core obligation" encompasses the obligation to ensure non discrimination and equal protection of employment (...)

Accordingly, these core obligations include at least the following requirements:

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
- (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.

The Committee on the Elimination of Racial Discrimination recognised that States have the right to decide who is entitled to work on their territories. However, the ESCR declared that, even if the Charter confers rights to regular migrants, irregular migrants should never be deprived of their right to live in dignity.

**CERD, General Recommendation XXX on discrimination against non-citizens, UN doc. A/59/18, 2005.**

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

**ECSR, Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, 25 June 2010**

33. In the light of the information provided in the written submissions and during the public hearing, the Committee understands that it is extremely complex to distinguish to whom the protection guaranteed by the Charter and its Appendix applies without restrictions. The Committee considers that the lack of identification possibilities should not lead to depriving persons fully protected by the Charter of their rights under it. In addition, that part of the population at stake which does not fulfil the definition of the Appendix cannot be deprived of their rights linked to life and dignity under the Charter.

The fact that the right to work may be subject of limitations does not exclude the application of the principle of non-discrimination.

**CESCR, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005.**

*Migrant workers and the right to work*

18. The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.

*Specific legal obligations*

23. States parties are under the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers. In particular, States parties are bound by the obligation to respect the right of women and young persons to have access to decent work and thus to take measures to combat discrimination and to promote equal access and opportunities.

**CESCR, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005.**

23. (...) refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers. In particular, States parties are bound by the obligation to respect the right of women and young persons to have access to decent work and thus to take measures to combat discrimination and to promote equal access and opportunities.

*Prohibition of slavery, servitude, forced and compulsory labour.*

The right to work includes free choice of occupation which, consequently, prohibits slavery, servitude and forced labour.

The prohibition of slavery, servitude and forced labour is recognised in international law as jus cogens norm but also in numerous conventions. Slavery can constitute a crime against humanity under international criminal law.

**Convention to Suppress the Slave Trade and Slavery (Slavery Convention), 60 LNTS 253, Registered No. 1414, 19 September 1926.**

**Article 1**

For the purpose of the present Convention, the following definitions are agreed upon:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

### **International Covenant on Civil and Political Rights, (ICCPR) 1966**

#### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
  - (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
  - (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
    - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
    - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
    - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
    - (iv) Any work or service which forms part of normal civil obligations.

### **European Convention on Human Rights, (ECHR) 1950**

#### **Article 4 Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

### **International Convention on the Protection of Migrant Workers and Their Families, (CRMW) 1990**

#### **Article 11**

1. No migrant worker or member of his or her family shall be held in slavery or servitude.
2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.
3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.
4. For the purpose of the present article the term "forced or compulsory labour" shall not include:
  - (a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
  - (b) Any service exacted in cases of emergency or calamity threatening the life or wellbeing of the community;

(c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

The European Court of Human Rights held in *Rantsev v. Cyprus and Russia* (25965/04, 7 January 2010) that slavery and servitude are characterised by an ownership relationship, the individual considered as an object and seriously deprived of freedom. The CMW includes bondage, passport retention and illegal confinement in the notion of forced labour.

**ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010.**

276. In *Siliadin*, considering the scope of “slavery” under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object” (...). With regard to the concept of “servitude”, the Court has held that what is prohibited is a “particularly serious form of denial of freedom” (...). The concept of “servitude” entails an obligation, under coercion, to provide one’s services, and is linked with the concept of “slavery” (...). For “forced or compulsory labour” to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person’s will (...).

**CMW, General Comment No.2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013**

60. Article 11 of the Convention requires States parties to take effective measures against all forms of forced or compulsory labour by migrant workers. This includes debt bondage, passport retention, and illegal confinement, for example. Article 21 obliges States parties to ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to migrant workers. States parties should provide training to law enforcement officers, and ensure that occupations dominated by migrant workers, especially women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws and subject to inspections.

In *Chowdury and Others v. Greece* (21884/15, 30 March 2017), the ECtHR found that irregular migrants working without a salary in physical conditions under supervision of armed guards constituted forced labour.

**ECtHR, *Chowdury and Others v. Greece*, Application no. 21884/15, 30 March 2017**

94. In the present case, the Court notes that the applicants were recruited on various dates between October 2012 and February 2013 and that they worked at least until the date of the incident, 17 April 2013, without having received the agreed wage which remained due. While their employers offered board and lodging for a low price (EUR 3 per day), their living and working conditions were particularly harsh: they worked in greenhouses from 7 am to 7 pm every day, picking strawberries under the supervision of armed overseers employed by T.A.; they lived in makeshift shacks made of cardboard, nylon and bamboo and without toilets or running water; their employers did not pay them and warned them that they would only receive their wages if they continued to work.

95. The Court also observes that the applicants did not have a residence permit or a work permit. The applicants were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part. Furthermore, the applicants, who had not received any salary, could neither live elsewhere in Greece nor leave the country.

96. The Court further considers that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour. The question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances of a case.

101. The Court therefore concludes that the applicants’ situation fell within the scope of Article 4 § 2 of the Convention as human trafficking and forced labour.

In terms of the duty to respect and protect the right to work, States have the obligation to prohibit forced or compulsory labour.

**CESCR, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005.**

23. States parties are under the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour
25. The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.

The obligation of States to prohibit slavery, servitude, forced and compulsory labour includes material (adequate administrative and legal framework) and procedural requirements (investigation, prosecution and protection of victims).

In *Rantsev v. Cyprus and Russia*, the Court held that States are under the obligation to prevent and investigate slavery, servitude, forced and compulsory labour.

**ECtHR, Rantsev v. Cyprus and Russia, Application no. 25965/04, 7 January 2010**

285. In its *Siliadin* judgment, the Court confirmed that Article 4 entailed a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour (cited above, §§ 89 and 112). In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking.
288. 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.

**CEDAW, Concluding observations on Portugal, CEDAW/C/PRT/CO/8-9, 24 November 2015**

29. The Committee urges the State party:  
[...]
  - (c) To strengthen the protection and rehabilitation of women who are victims of trafficking by providing them with access to alternative income opportunities and providing undocumented women with temporary resident permits, irrespective of their ability or willingness to cooperate with the prosecutorial authorities.

**CEDAW, Concluding observations on Italy, CEDAW/C/ITA/CO/7, 24 July 2017**

30. The Committee recommends that the State party:  
[...]
  - (c) Adopt adequate mechanisms for the early identification and referral of victims of trafficking in order for them to receive coordinated protection and assistance following arrival by sea and throughout the asylum procedure;
  - (d) Allocate adequate resources for the effective and sustainable implementation of the existing protection system for victims of trafficking, in particular women migrants, refugees and asylum seekers who are victims or at risk of becoming victims of trafficking;

In 2019, the ECtHR found a violation of article 4 procedural requirements by Croatia for not investigating seriously allegations of forced labour and exploitation.

**ECtHR, S.M. v. Croatia, Application no. 60561/14, 19 July 2019**

78. These elements, together with those listed below show that the national authorities did not make a serious attempt to investigate in depth all relevant circumstances and to gather all available evidence. They did not make further attempts to identify the applicant's clients and interview them, and in particular the individual to whom T.M. had taken the applicant to give sexual services for the first time. They also did not hear evidence from the applicant's moth-

er, the landlord and neighbours of the applicant and T.M., all of whom could have had some relevant knowledge of the true relationship between the applicant and T.M., alleged beatings and locking her up in the apartment. (...)

81. In conclusion, the Court considers that the above elements demonstrate that, in the particular circumstances of this case, the relevant State authorities did not fulfil their procedural obligations under Article 4 of the Convention. There has accordingly been a violation of Article 4 of the Convention.

In another case, Greece was condemned by the European Court of Human Rights for failing to prosecute perpetrators of human trafficking and forced labour in a reasonable time, despite the diligence applied by the national court.

#### **ECtHR, *T.I. and others v. Greece*, Application No. 40311/10, 18 July 2019**

156. The Court however notes that the proceedings in question ended on 6 June 2011 with Judgments Nos. 209-212/2011 of the Court of Appeal, approximately seven years and nine months after the concerned party's complaint. In particular, the hearing of the case before the Criminal Court was initially set for January 19, 2005, two years and four months after the facts in question. Furthermore, the proceedings before the Court of Appeal were concluded five years and eight months after the defendants initiated the appeal.

157. The Court recalls that the passage of time inevitably erodes the quantity and quality of the evidence available and that the apparent lack of diligence casts doubt on the good faith with which the investigations were carried out (see, *mutatis mutandis*, Paul and Audrey Edwards, cited above, § 86). It is true that the circumstances of this case involved a certain complexity. However, the length of the preliminary phase as well as that of the proceedings before the Court of Appeal may have been such as to compromise the effectiveness of the proceedings despite the apparent diligence carried out by the Criminal Court.

#### *Child labour*

Child labour is prohibited under International Labour Organisation (ILO) Conventions [No. 138](#) (Minimum Age Convention, 6 June 1973) and [No. 182](#) (Worst Forms of Child Labour Convention, 1 June 1999). The minimum age requirement to employ children is 15 years (with some exceptions such as artistic performances). The European Social Charter sets the same age standard and allows "light work". The ICESCR requires States to set a minimum age for labour and the CESCR obliges states to prohibit labour under the age of 16. The CRC prohibits economic exploitation of children.

#### **ILO, C138- Minimum Age Convention (No. 138), 1973**

##### **Article 1**

Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

##### **Article 2**

3. The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.

#### **International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966**

##### **Article 10**

3. (...) Children 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. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

**CESCR, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005**

24. With regard to the obligations of States parties relating to child labour as set out in article 10 of the Covenant, States parties must take effective measures, in particular legislative measures, to prohibit labour of children under the age of 16. Further, they have to prohibit all forms of economic exploitation and forced labour of children. States parties must adopt effective measures to ensure that the prohibition of child labour will be fully respected.

**Revised European Social Charter, 1996**

**Article 7 – The right of children and young persons to protection**

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;

**Convention on the Rights of the Child, 1989**

**Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment;
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

**ECSR, International Commission of Jurists v. Portugal, Decision on the merits, 9 September 1999.**

30. The nature of the work is a determining factor. Work which is unsuitable because of the physical effort involved, working conditions (noise, heat, etc.) or possible psychological repercussions may have harmful consequences not only on the child's health and development, but also on its ability to obtain maximum advantage from schooling and, more generally, its potential for satisfactory integration in society. In order to comply with Article 7 para. 1, states are therefore required, under the supervision of the Committee, to define the types of work which may be considered light, or at the very least to draw up a list of those which are not.
31. Work considered to be "light" in nature ceases to be so if it is performed for an excessive duration. States are therefore required to set out the conditions for the performance of "light work", especially the maximum permitted duration and the prescribed rest periods so as to allow supervision by the competent services. Even though it has not set a general limit on the duration of permitted light work, the Committee has considered that a situation in which a child under the age of fifteen years works for between twenty and twenty-five hours per week during school term (Conclusions II, p. 32), or three hours per school day and six to eight hours on week days when there is no school is contrary to the Charter (Conclusions IV, p. 54).

The ILO Convention No. 182 sets out the list of worst forms of child labour.

### **ILO, C182- Worst Forms of Child Labour Convention (No. 182), 1999**

#### **Article 3**

For the purposes of this Convention, the term **the worst forms of child labour** comprises:

- (a) 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;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) 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;
- (d) 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.

In addition to the obligation to enact an adequate legislative framework prohibiting child labour, States are also required to ensure that such legislation is respected in practice.

### **ECSR, International Commission of Jurist v. Portugal, Decision on the merits, 9 September 1999**

32. Finally, the Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this regard, it considers that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (see for example Conclusions XIII-3, pp. 283 and 286). It considers that the Labour Inspectorate has a decisive role to play in effectively implementing Article 7 of the Charter.

### **Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

45. With due respect to international labour standards related to the minimum age for admission to employment and the prohibition and elimination of the worst forms of child labour, not all work carried out by migrant children who are above legal working age is exploitative or undertaken in hazardous conditions. The Committees remind States that migrant children above working age, irrespective of their status, should enjoy equal treatment to that of national children in respect of remuneration, other conditions of work and terms of employment.
46. States should take all appropriate legislative and administrative measures, including a gender dimension, to regulate and protect the employment of migrant children with respect to the minimum age of employment and hazardous work. Given the specific risk to which migrant children are exposed, States shall also ensure that, in both law and practice, all necessary measures, including the provision of appropriate penalties, be taken by the competent authority to guarantee the effective enforcement of the provisions of the Convention on the Rights of the Child and relevant international standards and that migrant children:
  - Enjoy fair terms of employment as well as decent working conditions, in line with internationally accepted standards
  - Enjoy specific protective measures regulating the hours and conditions under which children can work
  - Are subject to periodic medical examinations attesting to their fitness for work
  - Have access to justice in case of violation of their rights by public or private actors, including by ensuring effective complaints mechanisms and a firewall between labour rights and immigration enforcement

## V. The right to the highest attainable standard of health

Migrants face many challenges in relation to equal and non-discriminatory to healthcare services. Migrants may, for a variety of reasons, be excluded from regular health care systems. In some instances, States provide migrants access to some healthcare services and not others. Migrants may, therefore, for instance, have access to emergency medical care, but not to preventive and other healthcare services.

### **International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966**

#### **Article 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

### **International Convention on the Rights of Migrants Workers and Their Families, (CRMW) 1990**

#### **Article 28**

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

#### **Article 43**

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:
  - ...(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met; ...

### **Convention on the Rights of the Child, 1989**

#### **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
  4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

55. Every migrant child should have access to health care equal to that of nationals, regardless of their migration status. This includes all health services, whether preventive or curative, and mental, physical or psychosocial care, provided in the community or in health-care institutions. States have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability; the implications of multiple forms of discrimination should also be addressed. Attention should be paid to addressing the gender-specific impacts of reduced access to services. In addition, migrant children should be provided full access to age- appropriate sexual and reproductive health information and services.
56. States are encouraged to emphasize a holistic approach to the right to health. Their national plans, policies, and strategies should address the health needs of migrant children and the vulnerable situations in which they may find themselves. Migrant children should have access to health services without being required to present a residence permit or asylum registration. Administrative and financial barriers to accessing services should be removed, including through the acceptance of alternative means of proving identity and residence, such as testimonial evidence. In addition, the Committees urge States to prohibit the sharing of patients' data between health institutions and immigration authorities as well as immigration enforcement operations on or near public health premises, as these effectively limit or deprive migrant children or children born to migrant parents in an irregular situation of their right to health. Effective firewalls should be put in place in order to ensure their right to health.
58. Restrictions on adult migrants' right to health on the basis of their nationality or migration status could also affect their children's right to health, life and development. Therefore, a comprehensive approach to children's rights should include measures directed at ensuring the right to health to all migrant workers and their families, regardless of their migration status, as well as measures aimed at ensuring an intercultural approach to health policies, programmes and practices.

**Revised European Social Charter, 1996**

**Article 11 – The right to protection of health**

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

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

Even though there is no right to be healthy, the right to health is fundamental for survival of the human being. The CESCR describes the right to health in General Comment No. 14:

**CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, 11 August 2000**

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.
4. [...] [T]he reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that 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. [...]
8. The right to health is not to be understood as a right to be healthy. [...]

Also, in relation to the right to health, CESCR describes the minimum core obligations:

**CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, 11 August 2000**

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. [...] these core obligations include at least the following obligations:
  - (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
  - (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
  - (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
  - (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
  - (e) To ensure equitable distribution of all health facilities, goods and services;
44. The Committee also confirms that the following are obligations of comparable priority:
  - (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
  - (b) To provide immunization against the major infectious diseases occurring in the community;
  - (c) [...]

**ESCR, Conclusions 2005, Interpretative Statement on Article 11 of the Charter, 2005**

In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in such a way as to impede the effective exercise by these groups of the right to protection of health. This interpretation imposes itself because of the non discrimination requirement (Articles E of the Revised Charter and Preamble of the 1961 Charter) in conjunction with the substantive rights of the Charter.

**ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision on the merits, 23 October 2012.**

28. The Committee notes that, according to an argument put forward by States Parties in response to other complaints concerning the rights of foreign minors unlawfully present in the country (...) the implication of paragraph 1 of the Appendix to the Charter is that the persons concerned by this complaint (accompanied and unaccompanied foreign minors unlawfully present in a country) would not come within the personal scope of Article 17, as they are not nationals of other Parties "lawfully resident or working regularly" within the territory of the Party concerned. The Committee nonetheless points out that, the restriction of the personal scope included in the Appendix should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.

**ESCR, *International Federation of Human Rights League (FIDH) v. France*, Complaint No. 14/2003, decision on the merits, 8 September 2004.**

31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.

In addition to providing adequate legislation regarding access to the highest attainable standard of health, legislation should be effectively applied.

**ECSR, *EUROCEF v. France*, Complaint No. 114/2015, 24 January 2018**

154. However, the Committee, referring to its findings under Article 17, reiterates that due to overcrowded reception facilities a certain number of minors live on the street where their physical and moral integrity is threatened with no access to health services. The Committee is concerned by the fact that a certain number of unaccompanied foreign minors, declared to be "adult" by the authorities and not complying with the condition of three months' residence on the territory, do not have access neither to universal healthcare coverage (PUMa), nor to the State medical assistance (AME). Therefore, it finds that the specific needs in terms of health protection of unaccompanied foreign minors are not taken into account and the legislation currently in force is not effectively implemented.

155. For these reasons, the Committee holds that there is a violation of Article 11§1 of the Charter.

The right to health is also linked to the right to life (art. 2) and the prohibition of degrading and inhuman treatment (art. 3) of the European Convention of Human Rights. In *Khan v. France*, the European Court of Human Rights held that the unhealthy living conditions in the camp of Calais amounted to degrading and inhuman treatment.

***Khan v. France*, ECtHR, Application no. 12267/16, 28 February 2019**

85. Accordingly, in the absence of protection by the authorities and in spite of the support he was able to find from non-governmental organisations on the heath, the applicant spent six months in an environment that was manifestly unsuited to his status as a child, characterised in particular by unhealthy, precarious and unsafe conditions. It was precisely on the grounds of the danger in which he found himself, and the fact that the danger had been exacerbated by the clearance of the southern zone of the heath, that the Youth Judge of the Boulogne-sur-Mer tribunal de grande instance ordered on 22 February 2016 that he be placed in the care of the child welfare services (see paragraph 31 above).

93. The applicant thus spent several months in the shantytown of the Calais heath, in an environment totally unsuited to his status as a child, whether in terms of safety, housing, hygiene or access to food and care, and in unacceptably precarious conditions in view of his young age.

94. The Court is of the view that these particularly serious circumstances and the failure to enforce the decision of the Youth Judge ordering measures for the applicant's protection, when taken together, constitute a breach of the obligations imposed on the respondent State, thus attaining the threshold of severity required for Article 3 of the Convention to be engaged. It thus concludes that the applicant found himself, as a result of the failings of the French authorities, in a situation which contravened that provision and which it considers to have constituted degrading treatment.

95. Accordingly, there has been a violation of Article 3 of the Convention.

*The right to health: non-discrimination*

From this description, it is clear that the right to health is not a stand alone right. The right to health is closely linked to other human rights, and should be applied without discrimination:

**CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, 11 August 2000**

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. [...]
18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. [...]
19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. [...]
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; abstaining from enforcing discriminatory practices as a State policy. [...]

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

55. Every migrant child should have access to health care equal to that of nationals, regardless of their migration status. This includes all health services, whether preventive or curative, and mental, physical or psychosocial care, provided in the community or in health-care institutions. States have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability; the implications of multiple forms of discrimination should also be addressed. Attention should be paid to addressing the gender-specific impacts of reduced access to services. In addition, migrant children should be provided full access to age- appropriate sexual and reproductive health information and services.
58. Restrictions on adult migrants' right to health on the basis of their nationality or migration status could also affect their children's right to health, life and development. Therefore, a comprehensive approach to children's rights should include measures directed at ensuring the right to health to all migrant workers and their families, regardless of their migration status, as well as measures aimed at ensuring an intercultural approach to health policies, programmes and practices.

The ECSR in its early case law decided that it was in violation of the ESC to distinguish in the access to health care between two types of migrant status for children. This case is also the first case in which the ECSR expanded the scope of protection of the [Annex to the ESC](#) to include undocumented migrant children. Later on this was confirmed in the case of [DCI v. The Netherlands](#) and, in relation to adults in [CEC v. The Netherlands](#) (cases cited above).

**ECSR, FIDH v. France, Complaint No. 14/2003, Decision of 8 September 2004**

29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i. e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.
30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment. [...]
32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter. [...]
35. With respect to Article 17 the Committee recalls that several provisions of the Revised Charter guarantee the Rights of Children and young persons. [...]
36. Article 17 of the Revised Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance. Yet, the Committee notes that
- a) medical assistance to the above target group in France is limited to situations that involve an immediate threat to life;
  - b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time.
37. For these reasons, the Committee considers that the situation is not in conformity with Article 17. [...]

As mentioned earlier, the ESC rights of migrants are often interlinked with residence rights issues. This was also the case in regard to medical treatment in [Paposhvili v. Belgium](#) (No. 41738/10, 12 December 2016). The ECtHR was faced with the question of whether an absence of access to medical treatment (for a life-threatening condition) in the country of origin should prevent the return of an individual to their country of origin. The court held that the information available to the Belgian authorities was insufficient for it to have concluded that there was a real risk of a breach of Article 3 if the individual was returned.

**Paposhvili v. Belgium, ECtHR, Application No. 41738/10, Judgment 12 December 2016**

175. The Court further observes that it has held that the suffering which flows from naturally occurring illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *Pretty*, cited above, § 52). However, it is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country (see *D. v. the United Kingdom*, cited above, § 49).
181. The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. [...]
205. In conclusion, the Court considers that in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention (see paragraph 183 above).
206. It follows that, if the applicant had been returned to Georgia without these factors being assessed, there would have been a violation of Article 3.

For more information on the right to health in detention cfr. Module II, section D.2(a) Access to healthcare.

## VI. The right to education

This right to education is entrenched in a wide range of international and regional treaties, as well as in treaties concerning economic, social, and cultural rights. The right to education is recognized as crucial to all people's development, and to the understanding and protection of all other human rights.

### **International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966**

#### **Article 13**

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. [...]
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; [...]
3. The States Parties to the present Covenant undertake 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.

### **Protocol 1 of the European Convention on Human Rights, (ECHR) 1952**

#### **Article 2**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

### **CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999**

1. Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in [...] safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.[...]
4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). [...] education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. [...] [P]erhaps the most fundamental is that "education shall be directed to the full development of the human personality". [...]

According to CESCR, the right to education requires states to ensure that education at all levels (primary, secondary and tertiary) is: available, accessible, acceptable, and adaptable.

**CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999**

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

(a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (...);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

Although some State obligations in terms of the right to education have to be achieved through progressive realization, there are certain aspects of the right that have immediate effect.

**CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999**

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art.2 (2)) and the obligation "to take steps" (art. 2 (1)) towards the full realization of article 13. Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education.

44. The realization of the right to education over time, that is "progressively", should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13.

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources. [...]

52. In relation to article 13 (2) (b)-(d), a State party has an immediate obligation "to take steps" (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored. [...]

Given the importance of education it is of equal importance that every individual has equal access to education, irrespective of financial possibilities, or the choice of a carer or the government.  
*Non-discrimination and the Right to Education*

The right to education applies to all categories of non-citizens irrespective of their status: refugees, asylum seekers, regular and undocumented migrants (see also *Timishev v. Russia* below).

**CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999**

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. [...]

31. The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. [...]

34. The Committee [...] 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. [...]

57. In its General Comment 3, the Committee confirmed that States parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education". In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a) [...]

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; [...] the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13 (2) (b)-(d) [...]

## 1. Children's right to education

The fundamental right of children to education is enshrined in several international legal instruments. However, in reality, migrant children face enormous challenges in access to education and often face discrimination.

**Convention on the Rights of the Child (CRC), 1989**

**Article 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial

assistance in case of need;

- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- [...]

### **Revised European Social Charter, 1996**

#### **Article 17 – The right of children and young persons to social, legal and economic Protection**

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

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

The Convention on the Rights of the Child does not only recognise a right to education but the right to a specific quality of education.

#### **CRC, General Comment No. 1, Article 29 (1): The Aims of Education, UN Doc. CRC/GC/2001/1, 17 April 2001**

9. Third, while article 28 focuses upon the obligations of State parties in relation to the establishment of educational systems and in ensuring access thereto, article 29 (1) underlines the individual and subjective right to a specific quality of education. Consistent with the Convention's emphasis on the importance of acting in the best interests of the child, this article emphasizes the message of child-centred education: that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs. Thus, the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life. [...]

#### **ESCR, Conclusions 2003 – Bulgaria-Article 17-2, 30 June 2003**

Therefore Article 17 as a whole requires states to establish and maintain an education system that is both accessible and effective. In assessing whether the system is effective the Committee will examine under Article 17:

- whether there is a functioning system of primary and secondary education;
- the number of children enrolled in school as a percentage of the number of children of the relevant age;
- the number of schools;
- class sizes;

- the teacher pupil ratio;
- whether there is a mechanism to monitor the quality of education delivered and to ensure a high quality of teaching in both public and private schools;
- whether education is compulsory in general until the minimum age for admission to employment;
- whether there is a fair geographical distribution of schools in particular between rural and urban areas;
- whether, considering that equal access to education should be guaranteed for all children, particular attention is paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty etc. and whether necessary special measures have been taken to ensure equal access to education for these children;
- the cost of education, whether basic education is free of charge, whether there are hidden costs such as books and uniforms, whether these are reasonable and whether assistance is available to limit their impact;
- the number of children dropping out, not completing compulsory education or failing compulsory education, rate of absenteeism, measures taken to encourage school attendance and to reduce dropping out.

**CESCR, General Comment No. 11, Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/1992/23, 10 May 1999**

6. Compulsory. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. [,,,] It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights.
7. Free of charge. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. [...]

While States are required to ensure the provision of primary education should be free of charge immediately, they are also required to ensure that secondary education is made available free of charge progressively.

**CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999**

9. The Committee obtains guidance on the proper interpretation of the term "primary education" from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied [...]"
12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. [...]
13. According to article 13 (2) (b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction

of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. [...]

In the case *Ponomaryovi v. Bulgaria* (No. 5335/05, 21 June 2011), the ECtHR links the right of access to secondary education – free of charge – to the increased importance of secondary education in a modern society.

**Ponomaryovi v. Bulgaria, ECtHR, Application no. 5335/05, Judgment of 21 June 2011**

57. Secondary education, which is in issue in the present case, falls between those two extremes. The distinction is confirmed by the difference of wording between sub-paragraphs (a), (b) and (c) of Article 28 § 1 of the United Nations Convention on the Rights of the Child, the first of which enjoins States to "[m]ake primary education compulsory and available free to all", whereas the second and the third merely call upon them to "[e]ncourage the development of different forms of secondary education ... and take appropriate measures such as the introduction of free education and offering financial assistance in case of need" and to "[m]ake higher education accessible to all on the basis of capacity by every appropriate means" (see paragraph 33 above).[...] However, the Court is mindful of the fact that with more and more countries now moving towards what has been described as a "knowledge-based" society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.

The progressive obligation to make secondary education available free of charge is also subject to the prohibition on States taking deliberately retrogressive measures, which is an immediate obligation. This means that, once secondary education has been made free of charge in a particular State, such access can only be reversed or withdrawn in very dire (economic or other) situations.

**CRC, General Comment No. 1, Article 29 (1): The Aims of Education, UN Doc. CRC/GC/2001/1, 17 April 2001**

10. Discrimination 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 is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. [...]

The CRC and the CMW highlight that States should take measure to recognize the child's previous education, including education received in other countries.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

61. States should put in place adequate measures to recognize the child's former education by acknowledging previously obtained school certificates and/or issuing new certification based on the child's capacities and capabilities, to avoid creating stigmatization or penalization. This is equally applicable to countries of origin or third countries in the case of return.

The right to education should be realised without discrimination.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

59. All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children

are living. This obligation implies that States should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status. Migrant children should have access to alternative learning programmes where necessary and participate fully in examinations and receive certification of their studies.

For example, exclusion of children from education due to lack of registration as regular migrants of the parents violates the right to education.

**Timishev v. Russia, ECtHR, Applications no. 55762/00 and 55974/00, Judgment of 13 December 2005**

64. Article 2 of Protocol No. 1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Articles 2 and 3, Article 4 § 1 and Article 7 of the Convention (“No one shall”), which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 137, ECHR 2005 XI). This right is also to be found in similar terms in other international instruments such as the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (v)), and the Convention on the Rights of the Child (Article 28). There is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child’s development.
65. The Court observes that the applicant’s children were refused admission to the school which they had attended for the previous two years. The Government did not contest the applicant’s submission that the true reason for the refusal had been that the applicant had surrendered his migrant’s card and had thereby forfeited his registration as a resident in the town of Nalchik.
66. As noted above, the Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents’ residence. It follows that the applicant’s children were denied the right to education provided for by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No. 1. [...]

The ECSR has found that the system in France placed a discriminatory barrier to access to education for unaccompanied non-national children over the age of 16, who were deemed not to be a priority for access to education, since education was compulsory in France only until the age of 16.

**ECSR, EUROCEF v. France, Complaint No. 114/2015, 24 January 2018**

122. With regard to the schooling of unaccompanied foreign minors, as it is asserted by the Government, unaccompanied foreign minors aged over 16 are by no means prioritised in terms of access to education. The Government explains that under national law, the obligation to attend school does not extend beyond the age of 16.
123. The Committee points out that Article 17§2 of the Charter requires that equal access to education must be guaranteed for all children, with a particular focus on vulnerable groups, such as children from minorities and children seeking asylum. Where necessary special measures should be taken to ensure equal access to education for these children (Conclusions 2011, Turkey).
124. The Committee notes that the majority of unaccompanied foreign minors arriving in France are between 16 and 18 years. Consequently, unaccompanied foreign minors aged over 16 who ask to be enrolled in a school after taking tests to determine their education level may not be assigned to a school. Their right to schooling, education and training is therefore undermined, eliminating their chances of achieving social and professional integration in France and regularising their status. Access to education is crucial for every child’s life and development, in particular in a situation of vulnerability (see Statement of Interpretation on Article 17§2, 2011).

**ECSR, Conclusions 2011, Statement on Interpretation on Article 17-2, 2011**

As regards the issue as to whether children unlawfully present in the State Party are included in the personal scope of the Charter within the meaning of its Appendix, the Committee refers to the reasoning it has applied in its Decision on the Merits of 20 October 2009 of the Complaint No. 47/2008 Defence for Children International (DCI) v. the Netherlands (see, inter alia, §§ 47 and 48) and holds that access to education is crucial for every child's life and development. The denial of access to education will exacerbate the vulnerability of an unlawfully present child. Therefore, children, whatever their residence status, come within the personal scope of Article 17§2. Furthermore, the Committee considers that a child's life would be adversely affected by the denial of access to education. The Committee therefore holds that States Parties are required, under Article 17§2 of the Charter, to ensure that children unlawfully present in their territory have effective access to education as any other child.

**ECSR, Médecins du Monde International v. France, Complaint No. 67/2011, Decision on the merits, 11 September 2012**

128. The Committee considers access to education as crucial for every child's life and development. The denial of access to education will exacerbate the vulnerability of an unlawfully present child. Therefore, children, whatever their residence status, come within the personal scope of Article 17§2. Furthermore, the Committee considers that a child, from whom access to education has been denied, sustains consequences thereof in his or her life. The Committee, therefore, holds that states parties are required, under Article 17§2 of the Charter, to ensure that children unlawfully present in their territory have effective access to education in keeping with any other child.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/2316, 16 November 2017**

59. All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children are living. This obligation implies that States should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status. Migrant children should have access to alternative learning programmes where necessary and participate fully in examinations and receive certification of their studies.

62. The principle of equality of treatment requires States to eliminate any discrimination against migrant children and to adopt appropriate and gender-sensitive provisions to overcome educational barriers. This means that, where necessary, targeted measures are needed, including additional language education, additional staff and other intercultural support, without discrimination of any kind. States are encouraged to dedicate staff to facilitating access to education for migrant children and to promoting the integration of migrant children into schools. In addition, States should take measures aimed at prohibiting and preventing any kind of educational segregation, to ensure that migrant children learn the new language as a means for effective integration. State efforts should include the provision of early childhood education as well as psychosocial support. States should also provide formal and non-formal learning opportunities, teacher training and life skills classes.

In a case on access to secondary education, the ECtHR found that imposing school fees on the applicants due to their nationality and immigration status amounted to discrimination as it was not objectively and reasonably justified.

**Ponomaryovi v. Bulgaria, ECtHR, Application no. 5335/05, Judgment of 21 June 2011**

59. In assessing that proportionality the Court does not need, in the very specific circumstances of this case, to determine whether the Bulgarian State is entitled to deprive all unlawfully residing aliens of educational benefits – such as free education – which it has agreed to provide to its nationals and certain limited categories of aliens. [...]

60. [T]he Court observes at the outset that the applicants were not in the position of individuals

arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling. Even when the applicants found themselves, somewhat inadvertently, in the situation of aliens lacking permanent residence permits, the authorities had no substantive objection to their remaining in Bulgaria and apparently never had any serious intention of deporting them. Indeed, at the material time the applicants had taken steps to regularise their situation. Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case [...] Nor can it be said that the applicants tried to abuse the Bulgarian educational system. It was not their choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national. The applicants could not realistically choose to go to another country and carry on their secondary studies there. Moreover, there is no indication that the applicants, who were fully integrated in Bulgarian society and spoke fluent Bulgarian, had any special educational needs which would have required additional financing for their schools.

62. However, the authorities did not take any of these matters into account. [...] [I]t does not seem that the authorities could have done so.
63. The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. [...]

In *D.H. and others v. the Czech Republic* (No. 57325/00, 13 November 2007), the Grand Chamber of the ECtHR concluded that Roma children had been systematically excluded from the regular schooling system, which amounted to indirect discrimination. This may analogously be relevant to migrant children, as many States opt to have a less elaborate curriculum where it concerns migrants who are awaiting residency. Although these migrants may not end up residing in the country, the effects of a lesser degree of education can be detrimental to future development and career.

**D.H. and others v. The Czech Republic, ECtHR, Application no. 57325/00, Judgment of 13 November 2007**

183. [...] In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.
184. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. [...] [S]uch a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent. [...]
198. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes. [...]
202. As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent [...].
203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. [...]
204. In view of the fundamental importance of the prohibition of racial discrimination, the Grand

Chamber considers that, even assuming the conditions referred to in paragraph 202 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest. [...]

207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (see paragraph 28 above) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class [...]. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.
208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. [...]
209. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases. [...]

## 2. Education/training for adults, including third-level education

The fundamental right of children to education is enshrined in several international legal instruments. However, in reality, migrant children face enormous challenges in access to education and often face discrimination.

### International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

#### Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:  
[...]
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

### CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999

23. Since everyone has the right to the satisfaction of their "basic learning needs" as understood by the World Declaration, the right to fundamental education is not confined to those "who have not received or completed the whole period of their primary education". The right to fundamental education extends to all those who have not yet satisfied their "basic learning needs".

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

### **Convention relating to the status of refugees (1951)**

#### **Article 22**

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States 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.

### **Protocol 1 of the European Convention on Human Rights, (ECHR) 1952**

#### **Article 2**

No person shall be denied the right to education (...)

Article 2 of the Protocol No.1 guarantees primary (*Sulak v. Turkey*, no. 24515/94, 17 January 1996), secondary (*Cyprus v. Turkey below*) and higher education (*Sahin v. Turkey*, below), as well as specialized education. Right's holders are not children, but also adults (*Velvyo Velvev v. Bulgaria below*).

### **ECtHR, Cyprus v. Turkey, Application no. 25781/94, Judgment of 10 May 2001**

278. (...). Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the "TRNC" authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue.

### **ECtHR, Sahin v. Turkey, Application no. 44774/98, Judgment of 10 November 2005**

41. In the light of all the foregoing considerations, it is clear that any institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the right set out in that provision. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 2 of Protocol No. 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty.

### **ECtHR, Velyo Velvev v. Bulgaria, Application no. 16032/07, Judgment, 27 May 2014**

41. The Court does not, therefore, consider any of the grounds relied on by the Government to be persuasive, particularly as they are unsupported by any evidence relating to the precise modalities of providing access to education at the Stara Zagora Prison school. On the other side of the balance must be set the applicant's undoubted interest in completing his secondary education. The value of providing education in prison, both in respect of the individual prisoner and the prison environment and society as a whole, has been recognised by the Committee of Ministers of the Council of Europe in its Recommendations on education in prison and on the European Prison Rules.
42. In the instant case the Government provided neither practical reasons, for example based on lack of resources at the school, nor a clear explanation as to the legal grounds for the restriction placed on the applicant. In these circumstances, on the evidence before it, the Court does not find that the refusal to enrol the applicant in the Stara Zagora Prison school was sufficiently foreseeable, nor that it pursued a legitimate aim and was proportionate to that aim. It follows that there has been a violation of Article 2 of Protocol No. 1 in this case.

## European Social Charter, 1996

### Article 10 – The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;
3. to provide or promote, as necessary:
  - a. adequate and readily available training facilities for adult workers;
  - b. special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment;

The right to vocational training under the European Social Charter includes secondary education; university and non-university higher education, as well as training organized by private entities.<sup>10</sup>

### Non-discrimination

The right to education must be exercised in a non-discriminatory way. The European Court of Human rights recognizes permissible limitations of human rights only if they are reasonable, proportionate and necessary to achieve the objectives proscribed by law. Admission criteria and entrance examination must be foreseeable (*Kiliç v. Turkey* below). School fees cannot be unreasonable and the margin of appreciation of the state increases with the level of education, in "inverse proportion to the importance of that education for those concerned and for society at large" (*Ponomaryovi v. Bulgaria* below).<sup>11</sup> Nationality requirements are very strictly interpreted (*Ponomaryovi v. Bulgaria*).

### ECtHR, *Kiliç v. Turkey*, Application no. 29601/05, Judgment of 05 March 2019

26. Turning to the facts of the present case, the Court finds that there was a legal basis for the restriction in question in Turkish law, namely the Higher Education Council's circular based on Law no. 2547 that had been adopted in 1999. Consequently, the complained measures were foreseeable to those concerned.
27. The Court moreover observes that two results were taken into account for the national higher education entrance examination at the material time (the 1998 1999 academic year): the average marks scored by students in high school and the marks obtained in the examination taken by all candidates without distinction.
29. The Court further considers that when regulating access to universities or colleges of higher education, the member States enjoy a wide margin of appreciation concerning the qualities required of candidates in order to select those who are liable to succeed in their higher-level studies. It nevertheless considers that the selection system used must not impair the very essence of the right to education if it is not to infringe Article 2 of Protocol No. 1.
30. In the instant case the Court notes that when the Higher Education Council changed the system governing admission to university, it aimed to improve the standard of university education. The Court also notes that in the instant case the Supreme Administrative Court ruled that the new selection system for access to university took account of the requirements arising from the changes in the country's economic and social conditions in connection with university students' qualifications and that the system met the requirement of raising the standard of higher education. In a reasoned judgment, the Supreme Administrative Court decided that the amendment had been necessary and the applicant's rights had not been prejudiced because of the new system.

<sup>10</sup> *Digest of the case law of the European Committee of Social Rights*, December 2018, p. 122.

<sup>11</sup> Council of Europe, *Guide on Article 2 of Protocol No. 1* to the European Convention on Human Rights – Right to education, 31 August 2019, §28.

**ECtHR, Ponomaryovi v. Bulgaria, Application no. 5335/05, Judgment of 21 June 2011**

50. The applicants – secondary school students – were, unlike others in their position, required to pay school fees. This was due exclusively to their nationality and immigration status, because under the 1991 National Education Act only Bulgarian nationals and certain categories of aliens are entitled to primary and secondary education free of charge (see paragraph 32 above). The applicants were thus clearly treated less favourably than others in a relevantly similar situation, on account of a personal characteristic.
54. (...) the Court starts by observing that a State may have legitimate reasons for curtailing the use of resource hungry public services – such as welfare programmes, public benefits and health care – by short term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.
56. In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which to this day remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries (see Konrad, cited above).
61. Nor can it be said that the applicants tried to abuse the Bulgarian educational system (see, *mutatis mutandis*, Weller, cited above, § 36). It was not their choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national.



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