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The Minimum Standards of International Protection Applicable to the European Union

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THE EU'S POLITICAL, CONSTITUTIONAL AND ECONOMIC SYSTEM

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Preface

In 2015, external crises and conflicts around the world drove record numbers of people to leave their homes and try to make the crossing to Europe. Many of them sought, and received, protection under the international, European and national asylum frameworks in the European Union.

Since then, the EU Member States, the European Commission and the European Parliament have been struggling to reform the Common European Asylum System to make it more crisis-resistant and improve responsibility-sharing among the EU Member States while acknowledging the right of individuals to seek protection. As several Member States adopted more restrictive approaches towards people seeking protection, this reform effort became a delicate and difficult task. In the negotiations of the 'New Pact on Migration and Asylum', i.e., the legislative package presented by the Commission in September 2020 to overhaul European migration and asylum law, several Member States attempted to lower the currently applicable minimum levels of international protection. At the same time, they often also engaged in domestic reforms to make themselves less accessible, or less attractive, for people seeking asylum.

This SIEPS report is intended to serve as a handbook for decision-makers, practitioners, scholars and experts involved in proposing, negotiating, implementing and applying current and future European asylum and migration law. Focusing on four fundamental rights elements – access to European territory, access to asylum procedures, reception conditions, and detention – it seeks to identify the minimum level of legal protection that all States Parties to international and European human rights conventions must respect. This is also the level that European migration and asylum law must uphold.

It is our hope that this report will provide useful guidance for a wide range of political and legal actors who shape, within the boundaries of international law, the future of migration and asylum policies in Europe.

Göran von Sydow
Director, SIEPS

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List of Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CED	Convention against Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRRF	Comprehensive Refugee Response Framework
CSR51	1951 Convention relating to the Status of Refugees
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
ExCom	UNHCR Executive Committee
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
LGBTIQA+	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and/or Questioning, and Asexual
NGO	Non-Governmental Organisation
OHCHR	Office for the High Commissioner on Human Rights
RSD	Refugee Status Determination
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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Executive Summary

States have a sovereign entitlement to protect those fleeing foreign countries because of a grave risk that they will suffer persecution, torture, arbitrary disappearance and other cruel, inhuman or degrading treatment or punishment. This right to provide protection is guaranteed in international law and must not be treated as a hostile act by the state of nationality of the protection seeker.[1] For the purpose of this report, 'protection seeker' covers anyone who applies for international protection under international refugee or human rights law instruments, whether this application has been, or is yet to be, determined by a state.

This state sovereign right to provide international protection has been inscribed in law in all European liberal democracies. All countries have laws and rules on how protection seekers must be admitted to the territory and given access to an asylum procedure, how they must be treated while within the jurisdiction and, in limited and justified cases, while subject to detention. This is the consequence of the commitment of European states to the rule of law.

In their exercise of state sovereignty, European states have chosen to sign and ratify international and European human rights conventions. Indeed, European states are among the most consistent in ratifying human rights conventions (after South America).[2] International law does not require states to sign and ratify any convention. The choice to do so is an exercise of state sovereignty. Once a state has signed and ratified a convention, there is a duty of good faith in international law that states will comply with the obligations which they have voluntarily undertaken. It is always open to states to denounce a convention, though this is exceedingly rare.[3]

European states have signed and ratified most UN human rights conventions, all of which are founded on the Universal Declaration of Human Rights (UDHR).[4] Many states have also recognised the competence of the Treaty Bodies established by these conventions to receive and determine individual complaints against them. In the regional context, the European Convention on Human

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1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (CSR51) Preamble: '… States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States'.

2 See OHCHR, 'Dashboard' <https://indicators.ohchr.org/> (accessed 28 September 2023).

3 In the European context, the Russian Federation chose to withdraw from the European Convention on Human Rights (ECHR) and leave the Council of Europe was completed on 31 December 2022. Russia had already had voting rights suspended following the invasion of Ukraine on 24 February 2022.

4 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

Rights (ECHR)[5] and the European Social Charter (ESC)[6] are key conventions setting standards with courts and dispute resolution bodies established to settle complaints. The EU adopted the Charter of Fundamental Rights (EUCFR)[7] in 2000 and established its status as equivalent to the EU Treaties in 2009.

Many human rights conventions address state obligations towards protection seekers either directly or indirectly. The 1951 Convention relating to the Status of Refugees (CSR51)[8] is the primary reference, but also relevant for determining standards are eight others: the International Covenant on Civil and Political Rights (ICCPR);[9] the International Covenant on Economic, Social and Cultural Rights (ICESCR);[10] the International Convention on the Elimination of all Forms of Racial Discrimination (CERD);[11] the Convention against Torture (CAT);[12] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[13] the Convention on the Rights of the Child (CRC);[14] the International Convention for the Protection of All Persons from Enforced Disappearance (CED);[15] and the Convention on the Rights of Persons with Disabilities (CRPD).[16]

The Treaty Bodies monitoring the implementation of these conventions have been very active in setting standards for protection seekers. Many cases in the area of asylum have been brought against European states. At the regional level, the adjudication of protection seekers' human rights by the European Court of Human Rights (ECtHR), the Committee on Social Rights and the Court of Justice of the European Union (CJEU) have similarly established the minimum

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5 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR).

6 European Social Charter (adopted 18 October 1961, entered into force 1 July 1999) CETS No 163 (ESC).

7 Charter of Fundamental Rights of the European Union [2012] OJ C 326 (EUCFR).

8 CSR51 (n 1). There is no agreement in the academic community as to the status of the CSR51 as a human rights convention or a separate category of refugee conventions, see Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) Netherlands Quarterly of Human Rights 389.

9 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

10 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

11 Convention on the Elimination of all Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).

12 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

13 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

14 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

15 Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).

16 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

standards applicable. Between the international and European regional level, there is a high level of convergence regarding these minimum human rights standards for the treatment of protection seekers. When divergence occurs, as it occasionally does, over time it tends to be tempered or to disappear through clarifications by the various Bodies and courts.

Where Member States are parties to international human rights commitments (all are parties to all of the conventions listed above, with the exception of Hungary in respect of the convention on enforced disappearances) they have committed themselves to comply with the standards set out there (consent to be bound). Similarly, as members of the Council of Europe, they are obliged to comply with the ECHR and the judgments of the ECtHR. Under EU law, the Charter is primary law and as such applicable within the scope of EU law in all Member States (and as interpreted by the CJEU).

Where there is divergence among standards, as states are bound by all these fields of law, they must comply with the standard which is most protective of the rights of individuals. They cannot pick and choose among the standards seeking to apply lower levels of rights. To do so would result in the state being in breach of its commitments in international law, ECHR law or EU primary law. This would be in breach of the states' obligations in one or more of the fields of law. The possibility of diverging standards has been covered in EU law by Article 52(3) Charter which specifically recognises the risk of divergence between EU law and the ECHR by providing that the EU must be in conformity with the ECHR standards. This means that the EU may be more expansive in rights than the ECHR, but never less so.[17] As such, we distinguish between European human rights law (specifically under the ECHR) and EU primary law (under the Charter) in this report. Most European states reiterated their commitment to international standards in 2018 voting in favour of the two UN Global Compacts for Refugees and Migrants.

In this report, we set out these international minimum standards regarding protection seekers applicable to the EU in respect of four fundamental elements of protection seekers' rights: access to the territory and protection against expulsion; access to asylum procedures; reception conditions, including family reunification; and limitations on detention. We are careful to distinguish between desirable best practices and mandatory minimum standards established as legally binding by the relevant international Treaty Bodies and European courts. Our focus is on the latter: what does international and European regional law (specifically ECHR and EU primary law) require states to provide to protection seekers? The summary is set out below, the sources and explanations are found in the report.

[17] EUCFR (n 7) Art 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

The Standards

1. Access to the territory and expulsion: non-refoulement

- States must respect the prohibition of *refoulement*, which means that any person either arriving at the borders of a state or within its jurisdiction and who claims to be a refugee or at risk of torture, ill-treatment or enforced disappearance in the country from which he or she has come cannot be arbitrarily refused admission or expelled if the consequence would be a return to such a place. European (Council of Europe) and EU (European Union) human rights law in addition prohibits collective expulsion. The duty of *non-refoulement* is absolute, no national security exception is applicable.
- Where expulsion is to a third country (not the country where the risk is alleged), the procedure must consider the risk of chain-*refoulement* onwards to a country where there is such a risk.
- States' human rights obligations, including the right to *non-refoulement*, apply not only within the states' territory, but wherever they exercise jurisdiction. Jurisdiction is established where a state or its agents exercise authority or effective control over individuals abroad.
- Only under strictly defined circumstances can states rely on diplomatic assurances to effect the return of an individual to a country where, but for said assurances, he or she would be at risk of torture or inhuman or degrading treatment. Diplomatic assurances must be of a specific nature, include follow-up mechanisms guaranteeing their effectiveness, and this effectiveness must be monitored by an objective and impartial body. The sending state must assess the quality of the assurances given and whether they can be relied upon, including in light of the human rights situation in the receiving country and its track record regarding protection from torture.

2. Access to an asylum procedure

- Everyone who indicates a need for international protection to the authorities of a state is entitled to a full and fair consideration of that application.
- To guarantee access to the asylum procedure, states must provide non-discriminatory treatment of all applicants.
- States must guarantee access to rapid registration as the first step in the procedure and to documentation to ensure protection from arrest or removal and access to relevant state services.
- Protection seekers must have access to interpretation, information, and representation in order to allow them to understand and participate in the asylum procedure.
- States must also ensure an efficient determination of asylum claims, which includes a personal interview and a timely decision taken by qualified decision-makers.

- Applicants must be notified of the outcome of the asylum procedure and must have an effective right to appeal that outcome. Appeals must entail an *ex nunc* examination of the law and the facts and must have suspensive effect.
- States must make provisions for applicants with specific needs to ensure that they have access to the asylum procedure and are supported in making their claim.
- States must utilise inadmissibility and accelerated procedures only in appropriate circumstances and while ensuring that necessary safeguards are in place. Accelerating procedures must not be done at the expense of the quality and fairness of the procedure. Decisions on inadmissibility (where a claim will not be treated on the merits on account of lack of responsibility of the state to which the claim has been made or other reasons) must consider whether a 'first country of asylum' will readmit an applicant and treat him or her in accordance with the standards provided by the CSR51, including, but not limited to, the prohibition of *refoulement*; and whether a 'safe third country' will grant the applicant access to a fair and efficient asylum procedure, permit him or her to remain while the application is being assessed, and, where he or she is determined to be a refugee, will recognise him or her as such and grant him or her lawful stay. States must also consider the applicant's living conditions in that receiving country.

3. Reception conditions, including family reunification

- Every protection seeker is dependent on the state where he or she has sought protection and thus that state is responsible for his or her welfare.
- States must provide reception to protection seekers which includes housing, food, sanitation, water, clothing and conditions of subsistence; the general standard is that of general rules of minimum subsistence in the state.
- All protection seekers must be provided access to basic health care, both physical and mental.
- All minor protection seekers must have access to primary education on the basis of equality with nationals of the state, access to secondary education on the basis of non-discrimination and access to further education on the basis of merit.
- Protection seekers must be given access to employment and self-employment, though this can be delayed for a limited period of time.
- Protection seekers are entitled to family reunification, though temporary delays are permissible.[18]

[18] We include family reunification in the chapter on reception conditions because the two cannot be separated: there is no right to family reunification unless a person is on the territory or within the jurisdiction of the state. It is part of the entitlement to treatment on the territory like access to social benefits.

4. Detention

- Protection seekers must not be arbitrarily deprived of their liberty. In order for detention to not be arbitrary, it must be authorised by law, pursue a legitimate aim and be necessary and proportionate.
- In principle, international and EU law allows detention for the purpose of documenting protection seekers' entry, recording their claims, determining their identity, preventing them from absconding, effecting their expulsion, and protecting against crime and threats to national security. However, in all cases, an individual proportionality assessment is required and alternatives to detention must be considered.
- Detention for the purpose of expulsion is only justified as long as deportation proceedings are in progress and there is a reasonable prospect of removal.
- Detained protection seekers must be treated in accordance with human rights law. In particular, they must not be subjected to torture, inhuman or degrading treatment and are entitled to standards of detention which maintain their physical and mental wellbeing.
- Detained protection seekers must have access to information about the reasons for their detention and their rights, to procedures to challenge the lawfulness of their detention, as well as compensation for unlawful detention. This entails access to effective remedies through judicial review or appeal.
- Detention must be time-limited and for the shortest appropriate period. The lawfulness of detention must be re-evaluated at regular intervals and detention facilities must be subject to regular independent monitoring.
- Detention may be wholly inappropriate for certain persons with specific needs. Where such individuals are nevertheless detained, detention conditions must be adapted to their needs.

1 Introduction

1.1 Why this Report now? The Challenges in EU Policy on Migration and Asylum and Minimum Standards of Protection

Through Articles 67(2) and 78(1) TFEU, the EU commits to develop a common asylum policy. Thus, the Common European Asylum System (CEAS) was codified in secondary legislation from 2003 onwards. It underwent major reform in the 2010s and, in 2020, the European Commission proposed a new set of reforms, the so-called New Pact on Migration and Asylum.[19] This New Pact took the form of a political communication, accompanied by five proposals for new legislation and amendments to existing CEAS instruments, as well as non-binding recommendations. The proposed legislation was subsequently hotly debated in the European Parliament and the Council of Ministers, but also by academics and other commentators, who were critical.[20] Much of the criticism levelled at the New Pact concerned the lowering of protection standards for asylum seekers and those refused protection.

At the time of writing, the co-legislators appear to be able to reach agreement on only certain reform proposals. With the current European Parliament and Commission coming to an end in 2024, and with elections and the appointment of a new Commission to follow, this is an important moment for stock-taking on the standards which any (current or future) EU legislation on asylum must comply with, taking into account the international, European regional and EU human rights law. While it is not within the scope of this report to analyse the individual legislative proposals made under the New Pact (or their evolution as a result of negotiations), it is clear that many of the proposed changes raise concerns regarding the proposals' compatibility with human rights law.[21] This report functions as a summary of binding human rights standards against which the outcome of the EU's asylum reform can be assessed, criticised and challenged.

1.2 The Relevant Protection Standards

EU asylum law has been established as a corpus of minimum common standards, which must comply with the Member States' international obligations under the Convention relating to the Status of Refugees (CSR51), adopted by UN

[19] European Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' COM(2020) 609 final (23 September 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0609> (accessed 10 June 2023).

[20] For example: Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022).

[21] ECRE, 'Editorial: Migration Pact Agreement Point by Point' (9 June 2023) <https://ecre.org/editorial-migration-pact-agreement-point-by-point/> (accessed 2 October 2023).

Member States in 1951 (specifically cited in Art 78(1) TFEU and ratified by all EU Member States),[22] and all relevant human rights law. This includes UN and European human rights law. With one exception, EU Member States have ratified all international human rights treaties (only Hungary has yet to sign the Convention on Enforced Disappearances). In this report we will examine the following UN conventions:[23]

- The Convention Against Torture (CAT);[24]
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD);[25]
- The International Covenant on Civil and Political Rights (ICCPR);[26]
- International Covenant on Economic, Social and Cultural Rights (ICESCR);[27]
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[28]
- The Convention on the Rights of the Child (CRC);[29]
- The Convention against Enforced Disappearances (CED);[30]
- The Convention on the Rights of Persons with Disabilities (CRPD),[31] which has been ratified not only by all Member States but also by the EU.

All of the above conventions have Treaty Bodies responsible for determining the correct interpretation of their provisions. The Treaty Bodies all monitor states' implementation of the relevant convention through periodic review by issuing Concluding Observations. They also provide General Comments on the correct interpretation of the conventions, as well as decisions on individual complaints. Similarly, they all have jurisdiction to receive individual complaints, provided that the specific State Party has accepted that jurisdiction. Not all Member States have accepted the jurisdiction of Treaty Bodies to receive complaints against them. In the absence of a dedicated Treaty Body monitoring implementation of the CSR51, documents issued by the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant as discussed below.

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[22] CSR51 (n 1).

[23] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) has not been ratified by any EU Member States and is therefore not discussed in this report.

[24] CAT (n 12) Art 3(1).

[25] CERD (n 11).

[26] ICCPR (n 9).

[27] ICESCR (n 10).

[28] CEDAW (n 13).

[29] CRC (n 14).

[30] CED (n 15).

[31] CRPD (n 16).

1.3 Content and Methodology of this Report

1.3.1 Human Rights Standards and Asylum

The purpose of this report is to set out the international and European regional minimum standards (ECHR and EU primary law) regarding protection seekers applicable to the EU in respect of four fundamental elements of protection seekers' rights: access to the territory and protection against expulsion; access to asylum procedures; reception conditions, including family reunification; and limitations on detention. We are careful to distinguish between desirable best practices and mandatory minimum standards, established as legally binding by the relevant international Treaty Bodies and European courts. Our focus is on the latter: the state obligations towards protection seekers required by international and European law.

We use the term protection seeker to cover anyone who seeks international protection coming within the scope of any of the international refugee law and human rights instruments. The term includes refugees whose application for protection has yet to be determined by a destination state. However, we fully acknowledge the definition by the United Nations High Commissioner for Refugees (UNHCR) of a refugee as someone who fulfils the conditions of Article 1A(2) of the 1951 Convention relating to the Status of Refugees (CSR51),[32] even before a state has considered his or her application.

As the purpose of this study is to establish the standards which are not within the power of state or European Union (EU) authorities to change unilaterally, we are particularly careful to ensure that every standard is fully supported by the international and European instruments. We accept that the foundation of international human rights law is the UDHR. In this non-binding declaration, all member states of the United Nations (UN) set out the basis of the international framework of human rights. However, notwithstanding arguments that the UDHR has become (or is becoming) in itself binding through state practice, we do not rely on it. Instead, we examine the conventions which have been made to give it effect as binding law and which have been ratified by all EU states.[33]

There are three types of conventions: those which apply to everyone within the jurisdiction or under the control of a state, protecting, firstly, civil and political rights and, secondly, economic, social and cultural rights. Thirdly, there are subject-specific conventions which are designed to protect defined groups such as women, children or people with disabilities. At the European regional level the same division between civil and political rights, contained in the ECHR and economic social and cultural rights in the ESC exists. In EU law, standards are consolidated into the EUCFR, which covers civil and political, as well as

[32] CSR51 (n 1).

[33] Only Hungary has yet to ratify the CED (n 15).

economic, social and cultural rights. Because the Charter has the same status as the EU founding treaties themselves and can only be amended by treaty, we consider it to be sufficiently stable to justify its analysis for these purposes.

The UN refugee and human rights conventions are accompanied by a range of explanatory and interpretative documents which have different kinds of legal effects. For the CSR51, we take the Convention and its 1967 Protocol together.[34] The Convention establishes the UNHCR to work with states to effect its correct application. States are obliged to work with UNHCR in good faith for this purpose.[35] Thus, while the Convention is binding on its parties (including all EU Member States), their obligations do not end there. They are required to work with UNHCR to achieve the objectives of the Convention. In this context, UNHCR has produced a Handbook for states regarding the correct interpretation of the convention's elements.[36] This Handbook is not a convention or a protocol to CSR51. However, because of the authority invested in it as an authoritative source of interpretation, many states' courts have relied on it in national judgments determining the exact scope of the obligations. Thus, the Handbook has come to have a particular status through its use in judicial decision making at the national, EU and European level. UNHCR also produces the UNHCR Guidelines on International Protection, which 'supplement the Handbook and … provide interpretive legal guidance'.[37] In addition, UNHCR issues country reports which are widely used by state authorities and courts as reliable sources regarding the human rights situation in countries of origin. Further, UNHCR produces legal opinions regarding specific issues in refugee law, mainly for the purpose of assisting national and European courts in their determination of specific cases. Where such legal opinions are adopted by national courts they may become part of national case law. UNHCR produces legal opinions on national and EU legislation where there appear to the UN agency to be important issues of principle which legislators should be taking into account in their deliberations.[38] Finally, the Executive Committee, composed of representatives of States Parties, produces conclusions on important issues in refugee law. These are compiled into a compendium which expresses the view of

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[34] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol).

[35] CSR51 (n 1) Art 35.

[36] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (April 2019) HCR/1P/4/ENG/REV.4 (UNHCR Handbook).

[37] Cornelis Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 43. All the Guidelines are available online: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&skip=0&query=Guidelines+on+International+Protection&coi=

[38] UNHCR has been particularly active recently in this regard on the application of the UK Rwanda agreement to send asylum seekers from the UK to Rwanda for determination of their claims and protection.

States Parties regarding the correct implementation of the CSR51. These different types of UNHCR documents have been cited in Treaty Body decisions,[39] the ECtHR,[40] as well as the CJEU, which explicitly recognises UNHCR's role under the CSR51 and the relevance of UNHCR documents to interpreting states' obligations towards refugees and asylums seekers.[41]

As regards UN human rights conventions, beyond the provisions of the conventions themselves, we have regard to three kinds of documents produced by their Treaty Bodies. Each human rights convention establishes a Treaty Body which is responsible for clarifying legal issues regarding the convention, supervising review of national implementation of the convention, and where states have notified their agreement (or ratified a protocol), for adjudicating on individual complaints against states regarding the application of the convention rights. As regards the first category, Treaty Bodies issue General Comments regularly to clarify the scope and meaning of the convention for which they are responsible. These General Comments are advisory but state consideration and compliance with these General Comments can be part of the national review process which the Treaty Body undertakes. Secondly, Treaty Bodies are charged with the multiannual review of state implementation of the conventions' provisions. The time periods are usually every five years. The Treaty Bodies receive extensive information from states regarding their implementation of the conventions, as well as information from civil society bodies and others regarding compliance. At the end of a review cycle in which states present their work and have a full opportunity to respond to any criticisms, the Treaty Body issues Concluding Observations usually including recommendations for state action to remedy any shortcomings revealed. These Concluding Observations have substantial legal content as states are expected to respond in the next review cycle regarding their action to correct weaknesses. States are entitled to reject Concluding Observations, but they must do so specifically and transparently.

For the purpose of this report, we will not develop on the UN's Universal Periodic Review process, a peer-to-peer process where states respond regarding their compliance with all UN human rights conventions to which they are

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[39] Examples from the jurisprudence of the Committee against Torture: Committee against Torture, *Elif Pelit v Azerbaijan*, CAT/C/38/D/281/2005 (5 June 2007); Committee against Torture, *ES v Australia*, CAT/C/59/D/652/2015 (24 January 2017); Committee against Torture, *GWJ v Australia*, CAT/C/72/D/856/2017 (9 February 2022). Examples from the jurisprudence of the Human Rights Committee: HRC, *X v Denmark*, CCPR/C/110/D/2007/2010 (12 May 2014); HRC, *RAA and ZM v Denmark*, CCPR/C/118/D/2608/2015 (29 December 2016). Committee on the Elimination of Discrimination against Women: CEDAW Committee, *A v Denmark*, CEDAW/C/62/D/53/2013 (8 December 2015).

[40] For example in: *Salah Sheek v The Netherlands* App No 1948/04 (ECtHR, 11 January 2007); *MSS v Belgium and Greece*, App No 30696/09 (ECtHR, 21 January 2011); *Sufi and Elmi v The United Kingdom* App No 8319/07 and 11449/07 (ECtHR, 28 June 2011); *JK and Others v Sweden* App No 59166/12 (ECtHR, 23 August 2016); *Ilias and Ahmed v Hungary* App No 59793/17 (ECtHR, 11 December 2018).

[41] C-528/11, *Halaf* (CJEU, 30 May 2013) para 44; C-720/17, *Bilali* (CJEU, 23 May 2019) para 57.

parties. Finally, for those states which have accepted the jurisdiction of the Treaty Bodies to receive individual complaints against them regarding their compliance with their obligations, there is one more category of documents: the Opinions or Conclusions after hearing the parties regarding the state's compliance in individual cases. Increasing numbers of states (including in the EU) have accepted this jurisdiction, Sweden being a leader in this regard. The Opinions of the Treaty Bodies sitting in a judicial framework regarding an individual set of facts and the application of the convention are increasingly accepted by states as legally binding. For States Parties to the conventions which have not accepted the jurisdiction of the Treaty Bodies, the decisions are also highly persuasive regarding the correct interpretation of the convention's provision. As Baldinger notes with reference to opinions issued by the Human Rights Committee (HRC) (which monitors implementation of the ICCPR), they 'are of a high authority' since states have agreed to be bound by the provisions of the relevant treaties and to honour the decisions of the bodies created to monitor the treaties' implementation.[42]

Thus, there are a number of bodies responsible for standard setting at the international level. States which have ratified the relevant conventions have consented to be bound by them.[43] We include here also the two Compacts, The Global Compact on Refugees (GCR),[44] and the Global Compact for Safe, Orderly and Regular Migration (GCM),[45] adopted in 2018 by the UN and covering our subject matter. This is our only exception to including only standards which comply with the doctrine of consent to be bound (see above). The reason for this is that as very new instruments in international standard setting, they are expressly based on existing human rights obligations. They do not create new standards, but clarify existing ones as already agreed by states under 'the consent to be bound' principle. What they do, however, is clarify the application of those standards. While they are not legally binding, they do express the commitment of UN states to the upholding of human rights, non-discrimination, rule of law and non-regression in the field of refugee and migrants rights.[46] Most EU

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[42] Dana Baldinger, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Brill 2015) 73.

[43] Alexandru Bolintineanu, 'Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68(4) American Journal of International Law 672.

[44] UNGA, 'Global Compact on Refugees' (2 August 2018) UN Doc A/73/12 (Part II) (GCR).

[45] UNGA, 'Global Compact for Safe, Orderly, and Regular Migration' (11 January 2019) UN Doc A/RES/73/195 GCM).

[46] See Elspeth Guild, Kathryn Allinson, Nicolette Busuttil and Maja Grundler, 'A Practitioners' Handbook on the Common European Asylum System (CEAS) and EU and Member States' Commitments under the UN Global Compact on Refugees and the UN Global Compact for Safe, Orderly and Regular Migration' (PROTECT 2022) <https://zenodo.org/record/7053969#.ZHcOwS337oz> (accessed 31 May 2023). See also, Thomas Gammeltoft-Hansen, Elspeth Guild, Violeta Moreno-Lax, Marion Panizzon and Isobel Roele, 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the of the UN Compact for Safe, Orderly and Regulation Migration' <https://rwi.lu.se/app/uploads/2017/10/RWI_What-is-a-compact-test_101017.pdf> (accessed 30 September 2023).

Member States endorsed the GCR and the GCM,[47] thereby subscribing to the GCM's principle of non-regression. The non-regression principle commits states not to adopt lower protection standards than those which were in force at the time of endorsement of the Compact,[48] a commitment which is highly relevant in the context of the changes proposed by the EU New Pact on Migration and Asylum.[49]

As regards the European regional level, matters are somewhat simpler. The main human rights convention we have regard to is the ECHR and its interpretation by the ECtHR, whose judgments are legally binding on the parties (also with legal consequences for other states not involved in the court proceedings). While there are other Council of Europe instances which produce standards in the field these are generally facultative rather than mandatory. As regards economic social and cultural rights there is the ESC, with the Committee on Social Rights performing the adjudication process. For the EU, the EUCFR has the status of a convention and is interpreted by the CJEU. The judgments of the CJEU, in particular engaging the correct interpretation of Charter rights, are binding on all Member States. The correct interpretation of the EUCFR is tied to the ECHR (and ECtHR's interpretation) by Article 6(3) Treaty on European Union (TEU), EU primary law.[50] This is also confirmed in Article 52(3) EUCFR which specifically provides that for rights found both in the ECHR and the Charter, the ECHR meaning of the right is the floor below which the EU right cannot fall.[51] Nevertheless, it is necessary to distinguish between European human rights law (under the ECHR) and EU primary law.

We are careful in this report to make clear the legal status of the applicable standards. This is critical, as there is a difference between a recommendation regarding treatment of a protection seeker by a Treaty Body, for instance, and a legally binding duty to provide a specific treatment. Because this report is designed with the crafting of further EU and national law in mind, and because we are well aware that there are substantial pressures in various parts of Europe to provide only the bare minimum of mandatory standards for protection seekers, it is fundamental to differentiate between binding and non-binding standards. We seek faithfully to do so here.

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[47] The Czech Republic, Hungary and Poland voted against the GCM, whilst a number of other EU Member States, including Bulgaria, abstained from the vote, see United Nations, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (19 December 2018) <www.un.org/press/en/2018/ga12113.doc.htm> (accessed 19 September 2023).

[48] Guild et al (n 46) 12-13.

[49] COM(2020) 609 final (n 19).

[50] 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[51] EUCFR (n 7) Art 52(3).

1.3.2 Structure of this Report

This report consists of four substantive chapters, covering access to, and expulsion from, the EU territory (Chapter 2); access to asylum procedures (Chapter 3); reception conditions, including family reunification (Chapter 4); and detention (Chapter 5). We include family reunification in the chapter on reception conditions because the two cannot be separated: there is no right to family reunification unless a person is on the territory or within the jurisdiction of the state. It is part of the entitlement to treatment on the territory, like access to social benefits.

Thus, the report follows the protection seeker on their journey through the asylum system and clarifies applicable human rights standards in those areas in which the EU and its Member States have sought to restrict rights through the proposals under the New Pact on Migration and Asylum. While the exact content of this asylum reform (and the question whether the proposals will in fact pass into law) is not yet clear at the time of writing, the purpose of this report is to clarify what the relevant international, European regional (ECHR) and EU primary law human rights standards are in the areas covered by the proposals so that any future EU legislation can be compared to the relevant standards and its compatibility assessed.

Thus, in each chapter, we will follow a common legal methodology. Starting with international law obligations, we will clarify the source and meaning of international law on the issue. We will add clarification from the Global Compacts where these provide detail to existing international obligations under 'the consent to be bound' doctrine. We will then examine and clarify the European regional standards as contained in the ECHR and the case law of the ECtHR. Finally, we will examine and clarify the case law of the CJEU with specific reference to the interpretation of the CEAS with reference to the fulfilment of the EU Charter obligations. In some chapters, this enquiry is subdivided into thematic issues, which makes it easier for the reader to ascertain what the relevant human rights standards are. Our methodology follows classic legal sources; treaties, legal opinions and judgments. We only use legal literature as an addition and doctrine is limited to the minimum necessary. We do not analyse current EU secondary law in the field, since, as discussed above, it is under negotiation for change.

1.3.3 Delimitations

It should be noted that this report seeks to provide an overview of the international and European regional minimum standards regarding protection seekers applicable to the EU only in respect of the four areas analysed (access to the territory and protection against expulsion; access to asylum procedures; reception conditions, including family reunification; and limitations on detention). There are other areas in which states may seek to restrict protection, for example the interpretation and thus the scope of the refugee definition; responses to irregular

migration (such as protection standards for trafficked persons or treatment of those who assist smuggled persons); or (lack of) resettlement of refugees. We have chosen the four thematic areas investigated here not to imply that international and European human rights standards in all other areas are being complied with, but because they lend themselves well to an analysis from the point of view of international, European and EU refugee and human rights law.

Since our analysis follows these four thematic sections, we do not include a separate chapter on remedies. Protection seekers will be entitled to an effective remedy whenever the rights set out in this report are violated. We touch on the issue of remedies in the various thematic areas throughout the report and the case law analysed provided examples of such remedies before the relevant courts and Treaty Bodies.

Just as this report provides a general overview of the relevant protection standards, the case law analysed can only provide an overview of the vast body of jurisprudence on issues pertaining to international protection. Thus, the case law in this report does not cover every factual situation which has already been litigated, but provides samples of the application of international and European human rights standards to the facts of individual cases.

2 Access to EU Territory and Expulsion

2.1 Introduction

This chapter discusses both access to territory and expulsion from the territory – the first and last point of contact between a protection seeker and the state. Although these two topics therefore happen at different stages of the asylum process, states have the same obligations towards protection seekers in both instances. Thus, both during the accessing of the territory and expulsion from it, states must ensure that protection seekers are not subjected to *refoulement* (or collective expulsion). In this context, states must also pay attention to the extraterritorial effects of their actions. To comply with their human rights obligations, states may seek to obtain diplomatic assurances from the state to which the individual in question is to be returned. However, in doing so, returning states must respect a number of important safeguards. This chapter will discuss the prohibition of *refoulement*, the extraterritorial application of human rights, and the use of diplomatic assurances from the perspective of international law, the Global Compacts (where relevant), European human rights law, as well as EU primary law. Procedural safeguards such as the right to information or to an effective remedy are discussed in Chapter 3 on Asylum Procedures and, in the same way, also apply in the context of access to territory and expulsion. Detention at the border or for the purpose of expulsion, is analysed in Chapter 5.

2.2 The Prohibition of *Refoulement*

2.2.1 International Law

It is a well-accepted principle of international law that states have a sovereign right to determine who can enter their territory – bearing in mind the right of their citizens to return,[52] as well as the (qualified) right to leave any country[53] – and who can be refused admission.[54]

The best recognised exception to this claim of national sovereignty over border controls is the duty of all States Parties to the Refugee Convention[55] and relevant international human rights treaties, to uphold the right of *non-refoulement*.[56]

[52] ICCPR (n 9) Art 12(4): 'No one shall be arbitrarily deprived of the right to enter his own country'.

[53] ibid Art 12(2): 'Everyone shall be free to leave any country, including his own'.

[54] Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014). 75-92.

[55] CSR51 (n 1) Art 33(1).

[56] Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) 13(4) International Journal of Refugee Law 533; Rene Bruin and Cornelis Wouters, 'Terrorism and the Non-derogability of Non-refoulement' (2003) 15(1) International Journal of Refugee Law 5.

Further, *non-refoulement* may be considered to be customary international law.[57] This is the state obligation not to send a person to a place where his or her life or freedom would be threatened on the basis of race, religion, nationality, membership of a particular social group or political opinion.[58] In addition to the Refugee Convention, a duty of *non-refoulement* is expressly included in the CAT (Article 3) and CED (Article 16). Furthermore, the Treaty Bodies have recognised in General Comments and Opinions/Communications an implied *non-refoulement* obligation as regards the ICCPR, CEDAW, CRC and the CPRD.

The HRC in General Comment 20/44 confirmed that the prohibition of torture contained in Article 7 ICCPR also prohibits *refoulement*.[59] This brought coherence to the ICCPR and the CAT regarding the *non-refoulement* obligation.[60] Although the CEDAW does not contain an express *non-refoulement* provision, the CEDAW Committee considers that States Parties have *non-refoulement* obligations under the Convention. It has noted that:

> States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence.[61]

The CRC Committee in joint General Comment 22 confirmed that the Convention prohibits *refoulement* of children consistently with the meaning of the *non-refoulement* duty as interpreted by international human rights bodies.[62] The CRPD Committee has recognised an implied *non-refoulement* obligations in its Opinions (discussed below).

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[57] Penelope Mathew, 'Non-refoulement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 904.

[58] CSR51 (n 1) Art 33.

[59] UN Human Rights Committee (HRC), 'CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) para 9.

[60] The outlier in this context is the CSR51 (n 1), where the *non-refoulement* duty is not absolute as it is in the other conventions but can be subject to specific conditions set out in the convention itself, see Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20(3) International Journal of Refugee Law 373.

[61] CEDAW Committee, 'General Recommendation No 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' CEDAW/C/GC/32 (14 November 2014) para 23.

[62] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC Committee, 'Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration' CMW/C/GC/3 and CRC/C/GC/22 (16 November 2017) paras 45-47.

The duty of *non-refoulement* means that any person either arriving at the borders of a state or within its jurisdiction and who claims to be a refugee or at risk of torture, ill-treatment or enforced disappearance in the country from which he or she has come cannot be arbitrarily refused admission or expelled if the consequence would be a return to such a place.[63] This means that every state which is a party to any of the conventions in which a *non-refoulement* duty is included (directly or indirectly) must carry out an assessment of the protection claim before taking action to remove the individual from its territory or jurisdiction.[64] It should be noted that an individual not having submitted a formal application for protection does not relieve states of their *non-refoulement* obligations. As the CAT Committee has noted, the 'non-refoulement obligation in article 3 of the Convention [against Torture] exists *whenever there are "substantial grounds" for believing* that the person concerned would be in danger of being subjected to torture in a State to which the person is facing deportation'.[65] As such, where states know, or ought to have known, that such a risk exists, they must not remove the individual. Where expulsion is to a third country (not the country where the risk is alleged), the procedure must consider the risk of chain-*refoulement* onwards to a country where there is such a risk. It is also the foundation of the obligation of a fair and efficient asylum procedure, as only after such procedure can a state determine the extent of its duties to the individual (see also Chapter 3).[66]

A large number of Treaty Body decisions illustrate the circumstances under which protection from *refoulement* must be granted. The CAT Committee has found that the expulsion of an asylum seeker suspected of terrorist activities to Egypt despite a high risk of torture by the Egyptian authorities amounted to a violation of Article 3 CAT.[67] In *AN v Switzerland*, the return of an Eritrean from Switzerland to Italy was held to be contrary to the CAT on account of

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[63] Vincent Chetail, 'Le Principe de Non-refoulement et le Statut de Réfugié en Droit International (The Principle of Non-Refoulement and the Refugee Status in International Law)' in Vincent Chetail and Jean-François Flauss (eds) *La Convention de Genève du 8 Juillet 1951 Relative Au Statut Des Réfugiés - 50 Ans Après: Bilan Et Perspectives* (Bruylant 2001); Vladislava Stoyanova, 'The Principle of Non-refoulement and the Right of Asylum-seekers to Enter State Territory' (2008) 3(1) Interdisciplinary Journal of Human Rights Law 1.

[64] The Refugee Convention is slightly out of step with the other conventions as it does foresee removal on grounds set out in the convention to protect national interests including of persons who are refugees, see James C Simeon, 'Terrorism, Asylum, and Exclusion from International Protection' in James C Simeon (ed), *Terrorism and Asylum* (Brill Nijhoff 2020).

[65] CAT Committee, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' CAT/C/GC/4 (4 September 2018) para 11. Emphasis added.

[66] Reinhard Marx, 'Non-refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims' (1995) 7(3) International Journal of Refugee Law 383; Mariagiulia Giuffré, 'Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in Violeta Moreno-Lax and Efthymios Papastavridis (eds) *Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Brill 2016).

[67] CAT Committee, *Agiza v Sweden*, CAT/C/34/D/233/2003 (24 May 2005) para 13.4.

uncertainty about his access to rehabilitation services as a victim of torture.[68] This is not an isolated case but indicative of the CAT standards regarding the relationship of reception conditions, torture and expulsion.

The HRC in *Israil*, concerning the expulsion of a Chinese Uigur from Kazakhstan to China, held that this constituted *refoulement* due to a risk of treatment contrary to Articles 6 (right to life), 7 (prohibition of torture) and 9 (liberty and security of the person) ICCPR in the country of origin.[69] The HRC has also found a breach of Article 7 ICCPR in cases of returns to third countries, for example in *Araya v Denmark*, which concerned a woman granted subsidiary protection in Italy, who had moved to Denmark to escape the inadequate standards of living in Italy, but who was to be returned there.[70]

The CEDAW Committee found that expulsion of a woman to a country where there was a real risk of being subject to gender-based violence, torture or ill-treatment would be contrary to the Convention.[71]

The CRC Committee has found that the Convention is applicable to situations where a child is subject to an expulsion decision to a country where there is a real risk the child would be subject to an irreversible, harmful practice.[72] For example, the CRC Committee held that the expulsion of a Chinese woman with her two children (born out of wedlock in Denmark) would be contrary to the Convention because it is almost impossible to register children in China in the local family household register (hukou) who are born outside China. The consequence of this is that these children would not have access to basic services such as medical aid, social services and education. Thus, the expulsion of the mother and her children was not consistent with the Convention principle of the best interests of the child, which seeks to ensure 'that the child will be safe and provided with proper care and enjoyment of rights,' so that their removal would amount to a breach of, *inter alia*, Article 6 CRC (right to life, survival and development) and thus to *refoulement*.[73]

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[68] CAT Committee, *AN v Switzerland*, CAT/C/64/D/742/2016 (3 August 2018).

[69] HRC, *Israil v Kazakhstan*, CCPR/C/103/D/2024/2011(1 December 2011).

[70] HRC, *Bayush Alemseged Araya v Denmark*, CCPR/C/123/D/2575 (13 July 2018) paras 9.12-12; see also HCR, *Warda Osman Jasin et al v Denmark*, CCPR/C/114/D/2360/2014 (25 September 2015) paras 8.4 and 8.10.

[71] CEDAW Committee, *RSAA et al v Denmark*, CEDAW/C/73/D/86/2015 (15 July 2019).

[72] For example: CRC Committee, *IAM (on behalf of KYM) v Denmark,* CRC/C/77/D/3/2016 (25 January 2018).

[73] CRC Committee, *WMC v Denmark*, CRC/C/85/D/31/2017 (28 September 2020) paras 8.6 and 8.8.

Meanwhile, the CED Committee found that the requisite level of risk of treatment contrary to the Convention had been established in the case of a Sri Lankan who faced expulsion to his country of origin where he feared enforced disappearance.[74]

The CPRD Committee has similarly found a *non-refoulement* duty applicable in respect of a decision by Sweden to expel an Iraqi woman suffering from various medical conditions to her country of origin,[75] as well as in respect of Sweden's decision to expel an Afghan man with mental health care needs to Afghanistan.[76]

2.2.2 The Global Compacts

The GCR confirms the centrality of the principle of *non-refoulement* as the core of the Refugee Convention, while recognising that some regions have also developed on the basis of the Refugee Convention compatible standards for refugee protection.[77] Meanwhile, the GCM in Objective 11 calls upon states to take into account the Office for the High Commissioner on Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights at International Borders when identifying best practices on border cooperation (Objective 11(g)).[78] The Guidelines are based on three principles: A. The primacy of human rights; B. Non-discrimination, and C. Assistance and protection from harm. In the context of the present discussion, the principle of assistance and protection from harm is particularly relevant since it affirms, inter alia, that all state activities in border governance must be in accordance with the principle of *non-refoulement* and the prohibition of arbitrary and collective expulsion.

2.2.3 European Human Rights Law

Like international law, the ECHR only provides a right to enter a state to that state's own nationals (who cannot be expelled therefrom).[79] Also similarly to international law, the ECHR, in Article 3, prohibits torture, inhuman or degrading treatment or punishment. In 1989 the ECtHR held that this prohibition includes expulsion or extradition to a country where there is a real risk of treatment contrary to the provision.[80] On the facts, this case related to extradition rather than expulsion, but it was rapidly followed by a second ECtHR decision confirming the applicability of it to expulsion as well.[81] In the

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74 CED Committee, *ELA v* France, CED/C/19/D/3/2019 (12 November 2020).

75 CRPD Committee, *NL v Sweden*, CRPD/C/23/D/60/2019 (28 August 2020).

76 CRPD Committee, *ZH v Sweden*, CRPD/C/25/D/58/2019 (11 October 2021).

77 GCR (n 44) para 6, 'Guiding Principles'.

78 OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (2014) www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf (accessed 19 May 2022).

79 ECHR (n 5) Art 3 of Protocol 4; see also William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015).

80 *Soering v The United Kingdom* App No 1/1989/161/217 (ECtHR, 7 July 1989).

81 *Vilvarajah and Others v The United Kingdom* App No 45/1990/236/302-306 (ECtHR, 26 September 1991).

initial judgment, the ECtHR refers specifically to the CAT and the fact that all its States Parties (at the time) were also parties to CAT as part of the explanation for the expansive interpretation of the provision. These two judgments effectively give extraterritorial effect to Article 3 ECHR, as it applies not only to acts carried out within the jurisdiction of the state but requires states to refrain from expulsion (or extradition) where there is a real risk that the receiving state may breach the prohibition.

The prohibition of *refoulement* also applies to individuals seeking to access European territory. One of the most important in this context is *Hirsi Jamaa*,[82] which has been the subject of substantial academic attention.[83] In this case the ECtHR considered whether the return of Somalian and Eritrean nationals to Libya after having been intercepted at sea by an Italian coastguard boat without any opportunity to seek asylum (or indeed to know where they were being taken) was inconsistent with Article 3 and amounted to chain-*refoulement*.[84]

A number of other cases have found a violation of Article 2 (right to life) or 3 ECHR on the grounds of return of people seeking international protection exposing them to a risk or torture or inhuman or degrading treatment.[85] The approaches of the Treaty Bodies and the ECtHR on *non-refoulement* is generally coherent in terms of the protective scope offered by the relevant instruments' respective provisions and their interpretation, though according to some analysts a more restrictive tendency can be discerned in the ECtHR caselaw.[86] As we discuss the issue of divergence below, suffice it here to state that there are three frameworks of law by which Member States are bound (international, European regional and EU). Except in the case of the EU and the ECHR there is no express hierarchy among them. Thus, divergence means that to comply with their obligations all States Parties must comply with the highest protective status as determined by the convention (to which they have chosen to be bound). Even where one framework might accept a lower standard, the state will be in breach of its obligations to another framework if the latter requires a higher standard.

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[82] *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012).

[83] Mariagiulia Giuffré, 'Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy (2012)' (2012) 61(3) International & Comparative Law Quarterly 728; Bruno Nascimbene, 'The "Push-back Policy" Struck Down Without Appeal? The European Court of Human Rights in Hirsi Jamaa and Others v. Italy' (2012) 12 Istituto Affari Internazionali 1.

[84] Chain-*refoulement* entails an individual seeking international protection being sent from one country to another, for example for the determination of their claim, with the receiving state then sending the individual to his or her country of origin despite a risk of harm in that country; see e.g. *Ilias and Ahmed v Hungary* (n 40).

[85] For example: *Chahal v The United Kingdom* App No 22414/93 (ECtHR, 15 November 1996); *Bader v Sweden* App No 13284/04 (ECtHR, 8 November 2005); *Sharifi and Others v Italy and Greece* App No 16643/09 (ECtHR, 21 October 2014); *JK and Others v Sweden* (n 40); *MA and Others v Lithuania* App No 59793/17 (ECtHR, 11 December 2018); *MK and Others v Poland* App Nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020).

[86] Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (202) 32(3) German Law Journal 355.

In addition to *refoulement*, the ECHR also prohibits collective expulsion of aliens,[87] a guarantee which does not have an equivalent in the international law discussed above.[88] As interpreted by the ECtHR in *Hirsi*, this prohibition also applies to persons rescued by States Parties' ships at sea who are disembarked or handed over to the authorities of another state without the opportunity to claim international protection.[89] 'Collective expulsion' is to be understood as 'any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[90] On the other hand, the ECtHR's decision of *ND and NT v Spain*,[91] a case regarding the pushing back of individuals who sought, as a group, to breach the fences around the Spanish enclave of Melilla from Morocco, resulted in a different outcome. In this case the ECtHR found that Article 4 Protocol 4 was not breached because there were alternative procedures available to the individuals which they should have used to seek entry to Spain. Thus, their 'push back' to Morocco was held to be the result of their own failure to use those procedures. The decision has been heavily criticised by some academic experts and runs counter to the evidence which UNHCR provided to the court.[92] The ECtHR did add however that 'it should be specified that this finding does not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders … in a manner which complies with the Convention guarantees, and in particular with the obligation of *nonrefoulement*'.[93] Since its judgement in *ND and NT*, the ECtHR has clarified in *MH and Others v Croatia* that removing applicants who enter irregularly without examining their protection claims will amount to collective expulsion where no legal procedures for entry are '*genuinely and effectively* accessible to the applicants at the time' of their irregular entry.[94]

The ECtHR has also considered whether standards of healthcare for ill protection seekers justify prohibiting the individual's expulsion on Article 3 grounds, finding that this is the case only where substantial grounds had been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving

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87 ECHR (n 5) Art 4 of Protocol 4.

88 The ICRMW (n 23), which, as explained in the Introduction, is not discussed in this report, prohibits collective expulsion in Art 22(1).

89 *Hirsi* (n 82) para 186.

90 ibid para 166; *Khlaifia and Others v Italy* App No 16483/12 (ECtHR, 15 December 2016) para 237; *ND and NT v Spain* App No 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 193.

91 *ND and NT* ibid.

92 Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v Spain' EU Migration Law Blog (1 April 2020) <https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/> (accessed 2 July 2023).

93 *ND and NT* (n 90) para 232.

94 *MH and Others v Croatia* App Nos 15670/18 and 43115/18 (ECtHR, 18 November 2021) para 301; emphasis added.

country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.[95]

2.2.4 EU Primary Law

As explained in the introduction to this report, Article 78(1) TFEU requires compliance with the principle of *non-refoulement*. Further, the EUCFR contains a number of provisions which are specifically relevant to *non-refoulement*. First, Article 4 contains the prohibition on torture, inhuman or degrading treatment or punishment. Article 18 contains a right to asylum,[96] a right contained in the UDHR, but not in the ICCPR or elsewhere in UN human rights conventions. Article 19 EUCFR prohibits collective expulsion (in the same wording as Article 4 Protocol 4 ECHR), as well as returning someone to a country where there is a serious risk that he or she would suffer the death penalty, torture, inhuman or degrading treatment or punishment.[97]

As is also explained in the introduction, the correct interpretation of the EUCFR is tied to the ECHR. Insofar as the case law of the ECtHR touches on *refoulement*, the Charter's mirroring rights must have the same or, from a fundamental rights perspective, a more generous meaning.[98]

The CJEU has been asked to interpret or is considering Article 4 and expulsion from the territory in ten judgments.[99] As regards Article 18, the CJEU has been asked to interpret or is considering its application to EU primary law in 14 cases (in one of which it found not only relevance to interpretation of obligations but

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[95] *Paposhvili v Belgium*, App No 41738/10 (ECtHR, 13 December 2016). It should be noted that in *Savran*, the Court held that the *Paposhvili* threshold could not be met by an applicant with a mental illness, see *Savran v Denmark* App No 57467/15 (ECtHR, 7 December 2021). At the same time, prior to *Paposhvili*, an even higher standard was required, with a breach of 3 ECHR only recognised in exceptional circumstances where a lack of access to adequate treatment or palliative measures on return leads to acute suffering and/or a premature death, see *D v The United Kingdom* App No 30240/96 (ECtHR, 2 May 1997); *N v The United Kingdom* App No 26565/05 (ECtHR, 27 May 2008).

[96] Art 18: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union ...'

[97] Art 19(2): 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

[98] EUCFR mirroring rights in the ECHR which are (potentially) relevant in the context of *non-refoulement*: Arts 2, 4, 5(1) and (2), 6, 7, 10(1), 11, 12(1), 14(1) and (3), 17, 19(1) and (2), 47(2), 49(1) (except the final sentence) and (2), and 50 EUCFR (n 7).

[99] C-4/11, *Puid* (CJEU, 14 November 2013); C-394/12, *Abdullahi* (CJEU, 10 December 2013); C-578/16, *CK and Others* (CJEU, 16 February 2017); C-353/16, *MP* (CJEU, 24 April 2018); C-163/17, *Jawo* (CJEU, 19 March 2019); C-540/17 and C-541/17, *Hamed and Omar* (CJEU, 13 November 2019); C-517/17, *Addis* (CJEU, 16 July 2020); C-125/22, *X and Y* (CJEU, pending); C-257/22, *CD* (CJEU, pending).

a violation).[100] The CJEU has been asked to consider Article 19(2) in nine cases.[101] The CJEU references to the Charter are supportive of a consistent interpretation of the CEAS. They start in 2011, two years after the Charter was recognised as having binding effect, and in terms of frequency of Charter references in judgments, there is a marked increase from 2019 onwards where the CJEU appears to be embedding its judgments on CEAS measures also in the Charter.

For the purposes of determining what an Article 4 compliant expulsion is, the CJEU held that where the living conditions in the country of destination fall below that of Article 4, return from one EU Member State to another cannot be effected.[102] The reception conditions standards as determined by the CJEU are that a particularly high level of severity is required by Article 4 which will be attained 'where the indifference of the authorities of a Member State would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'.[103]

2.3 Extraterritorial Applicability of Human Rights

2.3.1 International Law

Human rights responsibility arises either when an individual is present within the territory of a state, or within its jurisdiction.[104] Thus, states retain their obligation under human rights law even if they seek to externalise asylum processes and

[100] *Halaf* (n 41); C-481/13, *Qurbani* (CJEU, 17 July 2014); C-181/16, *Gnandi* (CJEU, 19 June 2018); C-585/16, *Alheto* (CJEU, 25 July 2018); C-175/17, *X* (CJEU, 26 September 2018); C-180/17, *X & Y* (CJEU, 26 September 2018); C-422/18, *FR* (CJEU, 27 September 2018); C-391/16, *M* (CJEU, 14 May 2019); C-673/19, *M* (CJEU, 24 February 2021); C-921/19, *LH* (CJEU, 10 June 2021); C-821/19, *Commission v Hungary* (CJEU, 16 November 2021); C-72/22, *MA* (CJEU, 30 June 2022) para 63: 'It must therefore be held that the application of national legislation … which provides that third-country nationals who are staying illegally are, for that reason alone, deprived, after entering Lithuania, of the opportunity of making or lodging an application for international protection, thus prevents such nationals from effectively enjoying the right enshrined in Article 18 of the Charter'; C-823/21, *Commission v Hungary* (CJEU, 22 June 2023); C-374/22, *XXX* (CJEU, pending).

[101] C-239/14, *Tall* (CJEU, 17 December 2015); C-175/17, X (n 100); C-180/17, *X & Y* (n 100); C-422/18, *FR* (n 100); C-897/19, *IN* (CJEU, 2 April 2020); C-233/19, *B* (CJEU, 30 September 2020); C-673/19, *M* (n 100); C-921/19, *LH* (n 100).

[102] *Hamed* (n 99); C-411/10, *NS and ME* (CJEU, 21 December 2011); *Abdullahi* (n 99); *Puid* (n 99).

[103] C-163/17 *Jawo* (n 99) para 92; see also C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim and Others* (CJEU, 19 March 2019); *Hamed* (n 99) para 38.

[104] See Art 2(1) ICCPR (n 9): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant' or ECHR (n 5) Art 1: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

migration control.[105] The physical territorial limb for human rights obligations to arise is fulfilled when an individual is at the border of territory which is claimed to be within the sovereign territory of the state.[106] Generally speaking, a person is within the jurisdiction of a state when he or she is under the control of the authorities of that state, even if the person is not within the territory of that state. This distinction is particularly important on the high seas, where a ship – which can be considered to be an organ of the state, for example because it has a state's agents aboard – exercises jurisdiction and incurs responsibility on behalf of the flag state.[107] States' responsibilities for human rights duties to persons under their jurisdiction but not within their territory is generally called the extraterritorial effect of human rights.

The theory of the extraterritorial effect of UN human rights conventions has been the subject of substantial academic discussion.[108] Most human rights conventions have a jurisdiction clause which sets out the scope of application.[109] This is the case for the ICCPR,[110] the CAT,[111] the CRC,[112] and the CED, which has a very developed clause.[113] CEDAW, unusually, lacks such a provision. Thus, it is not surprising that the Treaty Bodies have had to address the jurisdiction issue, convention by convention. Yet notwithstanding the differences in wording of the jurisdiction clauses, generally, agreement on the meaning and scope of extraterritorial jurisdiction can be observed.[114] As explained below, the Treaty Bodies favour a broad conceptualisation of extraterritorial jurisdiction. This notwithstanding, as parties to each convention individually, States Parties are required to comply with each convention. That the Treaty Body of one convention may have found that according to the wording of its treaty there are specific limits to extraterritorial jurisdiction this does not relieve States Parties of

[105] David Cantor, Nikolas Feith Tan, Mariana Gkliati, Elizabeth Mavropoulou, Kathryn Allinson, Sreetapa Chakrabarty, Maja Grundler, Lynn Hillary, Emilie McDonnell, Riona Moodley, Stephen Phillips, Annick Pijnenburg, Adel-Naim Reyhani, Sophia Soares and Natasha Yacoub, 'Externalisation, Access to Territorial Asylum, and International Law (2022) 34(1) International Journal of Refugee Law 120.

[106] Exceptions have recognised to states obligations to deliver human rights where they do not control part of their territory which is under occupation by another country; some states such as Australia have modified their national law so as to exclude from their jurisdiction parts of their territory but exclusively for the purposes of seeking asylum. These efforts have not been confirmed in international human rights law, see Jane McAdam, 'Australia and Asylum Seekers' (2013) 25(3) International Journal of Refugee Law 435.

[107] 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) Art 4; *Banković and Others v Belgium* App No 52207/99 (ECtHR, 12 December 2001) para 73.

[108] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

[109] Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89(1) American Journal of International Law 78.

[110] ICCPR (n 9) Art 2(1).

[111] CAT (n 12) Art 2(1).

[112] CRC (n 14) Art 2.

[113] CED (n 15) Art 9.

[114] Çalı et al (n 86).

their obligations under other treaties where Treaty Bodies have interpreted the provision of scope more widely in accordance with the difference of wording of the provision in the treaty under their supervision.

The HRC's General Comment 36 on the interpretation of the right to life states that deprivation of life 'involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an *act or omission*. It goes beyond injury to bodily or mental integrity or a threat thereto.'[115] This clarification is important to the application of the jurisdictional scope of *non-refoulement* obligations, in particular at sea, as state failure to carry out timely rescue of small boats is clearly brought within the scope of the right to life. Rescue at sea is a duty under international law of the sea as well as a human rights obligation.[116] The HRC, in Concluding Observations in respect of the USA in 2006, has taken the view that there is a broad scope to the Convention. Specifically, the HRC held that the *non-refoulement* duty in international law has extraterritorial effect, which means that where an individual is within the jurisdiction or under the control of a state, though not necessarily at its borders, the prohibition applies.[117] The HRC followed this approach in its Opinion on the application of the ICCPR to the actions of state consular authorities regarding the protection of a dual national.[118] The fact of having sought consular assistance in a foreign state was sufficient to trigger jurisdiction. In *AS and Others v Italy*, the HRC took a broad view of Italy's jurisdiction over persons on a vessel at distress at sea in the Mediterranean.[119] In this case, the Italian authorities upon receiving the vessel's distress call, attempted to pass responsibility for assisting the vessel off to the Maltese authorities (since the vessel capsized in their search and rescue area) instead of intervening promptly. By the time an Italian rescue boat reached the vessel, a number of the petitioners' relatives had drowned. The HRC considered

> that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta.[120]

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[115] HRC, 'General Comment No. 36, Article 6 (Right to Life)' CCPR/C/GC/35 (3 September 2019) para 6; emphasis added.

[116] Violeta Moreno-Lax and Efthymios Papastavridis (eds) *Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Brill 2016).

[117] HRC, 'Concluding Observations on the USA' CCPR/C/USA/CO/3/Rev 1 (18 December 2006) paras 10 and 16.

[118] HRC, *Mohammad Munaf v Romania*, CCPR/C/96/D/1539/2006 (21 August 2009).

[119] HRC, *AS and Others v Italy and Malta*, CCPR/C/130/D/3042/2017 and CCPR/C/128/D/3043/2017 (27 January 2021).

[120] ibid para 7.8.

The HRC found that Italy had violated Article 6 ICCPR (right to life).

The CAT Committee in General Comment 2 addresses the issue of jurisdiction directly. It states at paragraph 16:

> The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party [as well as commercial and private vessels under the effective control of the state], but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. … The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

The CAT Committee has also confirmed that 'obligations under the Convention concern all public officials of the State Party and other persons acting in an official capacity or under colour of law. These obligations concern the action and omissions of such persons wherever they exercise effective control over persons or territory.'[121] It is important to note that extraterritorial jurisdiction applies to all actors acting 'under colour of law', a term which confirms that state responsibility also extends, for instance, to instructions sent to private carriers by rescue coordination centres regarding the duty to rescue at sea.[122] In this way, states may exercise effective control over commercial and private vessels.

In 2007, the CAT Committee addressed the issue of jurisdiction and rescue at sea in a case where Spanish authorities had carried out a rescue operation off the southern coast of the Mediterranean but disembarked those rescued to foreign authorities which detained them immediately under conditions which did not comply with the Convention (and whose detention facilities were under the control of the Spanish authorities).[123] The responsibility of Spain for the fate of these individuals arose from its exercise of jurisdiction through control over the individuals following rescue at sea, processing, detention and subsequent expulsion.

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[121] CAT Committee, 'Concluding Observations on the Initial Report of the Holy See, CAT/C/VAT/CO/1 (17 June 2014) para 8.

[122] Tineke Strik, 'Lives lost in the Mediterranean Sea: Who is Responsible?' (29 March 2012) <https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf> (accessed 29 May 2023).

[123] CAT Committee, *JHA v Spain*, CAT/C/41/D/323/2007 (21 November 2008).

The CRC Committee issued a joint General Comment in 2017 which addresses the issue of state jurisdiction in respect of *non-refoulement* of children.[124] Paragraph 12 of the Comment states:

> The obligations of States parties under the Conventions apply to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory.

This is the clearest statement regarding the issue of jurisdiction and *non-refoulement* of all the Treaty Bodies. Here the CRC Committee is particularly firm regarding the application of the Convention to all situations where children (as defined in the convention) are attempting to enter states and rejects any state efforts to disapply their convention duties by adopting national laws which diminish their jurisdictional scope. In its Concluding Observations on Ireland in February 2023, the CRC Committee called on the State Party to '[a]ssess the impact of the visa requirement for refugees arriving from outside the European Union, with a view to lifting the requirement'.[125]

In 2019, the CRC Committee determined a case which came before it regarding the *non-refoulement* duty and jurisdiction where Spain contested its duty to apply the Convention's standards to a child who had been prevented from entering the state by irregularly crossing a fence.[126] It held that, irrespective of whether the child is considered by Spanish law to have entered Spanish territory, he was found to be under the effective control of the Spanish state. The CRC Committee went on to find that Spain had extensive obligations as regards identification of the child and his procedural rights resulting from his treatment.

2.3.2 European Human Rights Law

The ECHR applies to all persons within the jurisdiction of its States Parties.[127] Anyone within the territory of a state is also under its jurisdiction. However, like international human rights law, European human rights law applies extraterritorially (to individuals outside States Parties' territory) under certain circumstances. Thus, the ECHR has extraterritorial effects in two scenarios.

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[124] ICRMW Committee and CRC Committee, Joint General Comments No 3 and No 22 (n 62).
[125] HRC, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland' CRC/C/IRL/CO/5-6 (28 February 2023) para 40(b).
[126] CRC Committee, *DD v Spain*, CRC/C/80/D/4/2016 (1 February 2019).
[127] ECHR (n 5) Art 1.

Firstly, as explained above, the prohibition of torture, inhuman or degrading treatment or punishment has extraterritorial effects in so far as it prohibits expulsion or extradition to a country where there is a real risk of treatment contrary to the provision. In these cases, jurisdiction is easily established as the individual is located within a State Party's territory.

The second set of circumstances under which the ECHR applies extraterritorially concerns situations in which an individual is located outside the State Party's territory but may nevertheless be within that state's jurisdiction. The ECtHR in *Banković* held that this would be the exception rather than the norm.[128] The ECtHR accepts that the ECHR applies extraterritorially only where there is 'effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government',[129] as well as in 'cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State'.[130] In *Al-Skeini*, the Court clarified that 'whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation … to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual'.[131] It has been argued that this could be interpreted as meaning that states must refrain from conduct which exposes individuals to extraterritorial *refoulement* (for example by imposing visa requirements or cooperating with third countries to prevent individuals from reaching European territory).[132] Despite this, the ECtHR has rejected the argument that the refusal of visa applications constitutes an exercise of jurisdiction for the purpose of the Convention in *MN v Belgium*.[133] However, in previous judgments the ECtHR did acknowledge that the actions of consular staff bring persons affected under the embassy State's jurisdiction.[134] Nevertheless, due to the ECtHR's exceptionality approach, where states act extraterritorially, for example in order to attempt to impede protection seekers' movement towards their territory (including through cooperation with third countries), the protection of the ECHR is narrower than that offered by international law.

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[128] *Banković v Belgium* (n 107) para 61.
[129] ibid para 71.
[130] ibid para 73.
[131] *Al-Skeini and Others v The United Kingdom* App No 55721/07 (ECtHR, 7 July 2011) para 137.
[132] Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) 278.
[133] *MN v Belgium* App No 3599/18 (ECtHR, 5 May 2020).
[134] *WM v Denmark* (Admissibility) App No 17392/90 (European Commission of Human Rights, 14 October 1992); *Al-Skeini* (n 131) para 134.

2.3.3 EU Primary Law

As discussed above, the EUCFR prohibits *refoulement* both directly and indirectly in Articles 4, 18 and 19. Thus, like European human rights law, EU primary law applies extraterritorially in the sense that it prohibits returning an individual to a territory in contravention of the *non-refoulement principle*.

In addition, the EUCFR does not contain a jurisdiction clause, so that it may be argued that this limitation contained in other human rights instruments is wholly irrelevant to the application of the Charter.[135] Indeed, under Article 51(1) the EUCFR applies generally to the institutions, bodies, offices and agencies of the EU – without limiting this territorially – and to the Member States only when they are implementing Union law, with the external dimension of EU migration law being well documented.[136] The CJEU has not engaged much with the extraterritorial applicability of the Charter to those impacted by EU migration policy and its effects, with the exception of the case of *X and X v Belgium*. In this case, the referring Court asked whether Articles 4 and 18 EUCFR were engaged where individuals apply for humanitarian visas under the Visa Code at a Member State embassy outside EU territory. The CJEU declined to resolve the matter, stating that applications for humanitarian visas fall outside scope of the Code. In deciding that issuing such visas is purely a matter of national law, the CJEU circumvented the question of extraterritorial applicability of the EUCFR.

2.4 Diplomatic Assurances

Diplomatic assurances are bilateral agreements between a sending and a receiving state, specifying how an individual must (not) be treated after return. Though the use of such assurances is difficult to quantify seeing as the relevant agreements are not normally made public (among other reasons because they may involve national security considerations), it is important to discuss this practice here because states may seek to rely on diplomatic assurances to circumvent their *non-refoulement* obligations. While states sometimes rely on diplomatic assurances to effect the return of an individual to a country where, but for said assurances, he or she would be at risk of torture on inhuman or degrading treatment, diplomatic assurances are more often relied on during extradition proceedings. This section draws on opinions and case law covering both contexts since the relevant human rights standards apply to either scenario.

2.4.1 International Law

The CAT Committee defines diplomatic assurances in the context of the transfer of an individual from one state to another as 'a formal commitment by the receiving State to the effect that the person concerned will be treated

[135] Moreno-Lax, *Accessing Asylum in Europe* (n 132) 292.

[136] For example: Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019).

in accordance with conditions set by the sending State and in accordance with international human rights standards' and states that such assurances 'should not be used as a loophole to undermine the principle of non-refoulement'.[137] In *Agiza*, the CAT Committee found that where there is a foreseeable risk of torture, obtaining 'diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk'.[138] In *Kalinichenko*, the CAT Committee added that diplomatic assurances of a 'general and non-specific nature' and without 'a follow-up mechanism' did not provide sufficient protection against the risk of torture.[139] In addition, the CAT Committee has noted that where an individual has previously been tortured, diplomatic assurances must 'eliminate all reasonable doubt that the complainant would be subjected to torture upon his return' and must 'include follow-up procedures that would guarantee their effectiveness'.[140] Monitoring of the effectiveness of diplomatic assurances must be 'objective, impartial and sufficiently trustworthy'.[141]

The HRC has made similar findings regarding the standards which must be in place for diplomatic assurances to offer effective protection, stating that 'effective implementation' must be ensured, for example through monitoring.[142]

In *X and Y*, the CAT Committee found that diplomatic assurances cannot be used to return beneficiaries of refugee status to a first country of asylum where that country may subject them to chain-*refoulement*.[143] The assurances obtained did not contain a commitment on the part of the first country of asylum's government not to return the applicants to their country of origin, nor did they commit not to return the applicants if, at the pressure of the country of origin, the first country of asylum were to declare the organisation they belonged to to be a terrorist organisation.[144]

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[137] CAT Committee, 'General Comment No 4 (n 65) paras 19-20.
[138] *Agiza v Sweden* (n 67) para 13.4.
[139] CAT Committee, *Kalinichenko v Morocco*, CAT/C/47/D/428/2010 (18 January 2012) para 15.6.
[140] CAT Committee, *Boily v Canada*, CAT/C/47/D/327/2007 (13 January 2012) para 14.4.
[141] CAT Committee, *Abdussamatov and Others v Kazakhstan*, CAT/C/48/D/444/2010 (11 July 2012) para 13.10.
[142] HRC, *Alzery v Sweden*, CCPR/C/88/D/1416/2005 (10 November 2006) para 11.5.
[143] CAT Committee, *X and Y v Switzerland*, CAT/C/75/D/1081/2021 (7 February 2023).
[144] ibid para 7.9.

2.4.2 European Human Rights Law

In 1996, the ECtHR stated in *Chahal* that the UK could not remove a Sikh separatist leader to India, where he was at risk of ill-treatment, despite having obtained diplomatic assurances as to his safety from the Indian government.[145] These assurances did not provide 'an adequate guarantee of safety' due to widespread violations of human rights at the hands of the security forces, which the government did not have sufficient power to prevent.[146] While the Court in *Chahal* did not go into much detail on why the assurances in questions were inadequate, it has since developed its jurisprudence in this area. Thus, in *Saadi v Italy*, the Italian authorities sought, but did not obtain, diplomatic assurances from the Tunisian authorities in relation to a Tunisian national at risk of treatment contrary to Article 3 ECHR upon return.[147] The Tunisian authorities only provided information as to domestic laws ensuring prisoners' rights and accession to relevant international treaties. The ECtHR thus found that 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment'.[148] The Court also noted that any diplomatic assurances actually obtained would have to be examined to determine whether 'in their practical application, [they provide] a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention'.[149]

This test was applied a couple of years later in *Othman (Abu Qatada)*, which concerned the deportation of a recognised refugee on security grounds.[150] The Court stated that in rare circumstances 'the general human rights situation in the receiving State excludes accepting any assurances whatsoever'.[151] Generally, however, the Court will 'assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon'.[152] To do so, it will engage with a range of specific questions which must be

[145] *Chahal v The United Kingdom* (n 85).
[146] ibid para 105.
[147] *Saadi v Italy* App No 37201/06 (ECtHR, 28 February 2008).
[148] ibid para 147.
[149] ibid para 148.
[150] *Othman (Abu Qatada) v The United Kingdom* App No 8139/09 (ECtHR, 17 January 2012).
[151] ibid para 188.
[152] ibid para 189.

answered positively for such assurances to be sufficient.[153] In *Compaoré v France* – an extradition case – the Court confirmed that it will conduct an *ex nunc* assessment of the risk to the applicant at the time of the hearing and that a change in government in the country the individual is to be removed to requires a re-assessment of the validity of diplomatic assurances.[154]

Despite this comprehensive list of questions to consider when obtaining diplomatic assurances, the ECtHR applies a lower standard when it comes to guarantees obtained from Council of Europe Member States in the context of transfers under the Dublin Regulation. Thus, in *Tarakhel v Switzerland*, which concerned a Dublin transfer from Switzerland to Italy, the Court found that 'were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention'.[155] However, the Court did not refer to the *Othman* case, nor did it construct a similar test allowing it to assess the quality and reliability of such guarantees.

2.4.3 EU Primary Law

While the CJEU has, so far, not commented on the use of diplomatic assurances, all EU Member States are also members of the Council of Europe and as such are bound by European human rights law and its limits on the use of diplomatic assurances discussed above. It is worth noting that EU primary law does foresee use of the co-called 'safe third country' concept – essentially an iteration of diplomatic assurances – which is discussed in Chapter 3.

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[153] ibid para 189:
1) 'whether the terms of the assurances have been disclosed to the Court';
2) 'whether the assurances are specific or are general and vague';
3) 'who has given the assurances and whether that person can bind the receiving State';
4) 'if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them'
5) 'whether the assurances concerns treatment which is legal or illegal in the receiving State';
6) 'whether they have been given by a Contracting State';
7) 'the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances';
8) 'whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers';
9) 'whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible';
10) 'whether the applicant has previously been ill-treated in the receiving State'; and
11) 'whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State'.

[154] *Compaoré v France* App No 37726/21 (ECtHR, 7 September 2023) paras 123-129.

[155] *Tarakhel v Switzerland* App No 29217/12 (ECtHR, 4 November 2014) para 122.

2.5 Conclusion

It is clear from the foregoing discussion that the minimum standards that states must respect in relation to protection seekers' access to and expulsion from the territory entail the obligation not to return an individual to a place where he or she is at risk of persecution, torture, inhuman or degrading treatment or punishment, enforced disappearance or other ill-treatment or irreversible harm, including threats to life, physical integrity (including mental and physical health under certain circumstances), liberty and security of person, serious forms of discrimination, including serious forms of gender-based persecution or violence. Respecting this duty of *non-refoulement* includes assessing the risk of chain-*refoulement* and collective expulsion, which is prohibited.

The *non-refoulement* duty applies wherever states exercise jurisdiction, so that individuals in the territory, at the border, and under the effective control of a state, for example on the high seas, are protected. While international law adopts a broader view of extraterritorial jurisdiction than European human rights law, the involvement of a state's agents is key and the question of state jurisdiction has to be established on the facts of each case.

States cannot circumvent their *non-refoulement* obligations by relying on inadequate diplomatic assurances. For diplomatic assurances to guard against the risk of *refoulement*, they must be specific and contain measures taken to eliminate risk to the person being returned, be issued by a body capable of enforcing the guarantees made, include an enforcement mechanism and must be monitored by an independent body.

3 Access to the Asylum Procedure

3.1 Introduction

Like access to territory, access to the asylum procedure is an essential condition for effective refugee and human rights protection. International law does not contain any explicit references to the right to access asylum procedures. However, such a right is implied in the prohibition of *refoulement*. Although refugee status is declaratory,[156] protection from *refoulement* requires a procedure to determine whether there is a risk of persecution or other ill-treatment in the country of return. Indeed, 'properly functioning asylum systems are a prerequisite for fulfilling obligations under the 1951 Convention'.[157]

The UNHCR Handbook states that asylum applications should be 'examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs'.[158] Indeed, the asylum procedure entails a number of core guarantees and standards, which states must respect in order to ensure access to procedures and to comply with international, European and EU Primary law. This chapter focuses specifically on aspects of the asylum procedure which, if not adhered to, can have the effect of hindering, or even precluding, access to the asylum procedure. Thus, it is not within the scope of this chapter to outline all the standards that states must observe during the asylum procedure. Detention, which can create obstacles to accessing procedures, is discussed in detail in Chapter 5.

This chapter identifies the relevant procedural standards by drawing on UNHCR resources and examines them with reference to international, European and EU primary law. As explained in the Introduction to this report, documents issued by UNHCR are particularly relevant to interpreting states' obligations towards refugees and asylums seekers. The relevant aspects and standards include non-discrimination; registration, reception and documentation; interpretation, information, and representation; efficient determination of claims; appeals; applicants with specific needs; as well as accelerated procedures and inadmissibility.

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[156] Refugee status is declaratory in that a person is a refugee prior to formal recognition and as soon as he or she fulfils the criteria of the refugee definition, see UNHCR Handbook (n 36) para 28.

[157] UNHCR, 'Note on International Protection: Report of the High Commissioner' A/AC.96/1098 (28 June 2011) <www.refworld.org/docid/4ed86d612.html> (accessed 1 May 2023) para 19.

[158] UNHCR Handbook (n 36) para 190.

UNHCR refers to the asylum procedure as refugee status determination (RSD) and sets out minimum procedural standards for RSD conducted under its mandate.[159] While these standards are not binding in international law, as explained in the Introduction, documents issued by UNHCR are particularly relevant to interpreting states' obligations towards refugees and asylum seekers. Thus, while UNHCR's procedural standards for RSD primarily serve to inform its own work, they can also serve as guidelines for states who conduct their own RSD procedures. While UNHCR notes that RSD can be conducted 'on an individual or group basis,'[160] the standards, and thus the discussion in this chapter, focus on the examination of individual claims.

Nevertheless, since UNHCR normally conducts 'RSD in countries and territories that are not party to the 1951 Convention, or which have not yet established the legal and institutional framework to support an RSD process',[161] when adapting these standards to the EU context it must be kept in mind that EU Member States are expected to have the necessary legal and institutional framework for conducting RSD and are party to a range of human rights treaties which inform standards for access to the asylum procedure, so that certain standards will be higher in the EU context.

The sub-sections below are adapted from UNHCR's minimum standards and supplemented with additional sources where relevant.[162]

3.2 Non-Discrimination

3.2.1 International Law

During RSD, all applicants must be treated in a non-discriminatory manner.[163] The CSR51 prohibits discrimination on grounds of race, religion and country of origin,[164] while human rights instruments prohibit discrimination on grounds of, for example, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[165] Thus, any differential treatment of protection seekers for one of these grounds will amount

[159] UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (2020) <www.unhcr.org/media/procedural-standards-refugee-status-determination-under-unhcrs-mandate> (accessed 1 May 2023).
[160] ibid 14.
[161] ibid.
[162] The discussion in this chapter focuses on access to the asylum procedure and does not cover related issues such as procedures for exclusion from, or revocation or cessation of, refugee status.
[163] UNHCR (n 159) 15.
[164] CSR51 (n 1) Art 3.
[165] ICCPR (n 9) Art 2(1).

to discrimination, unless it pursues a legitimate aim and is proportionate.[166] This is problematic regarding the EU's temporary protection (TP) scheme for Ukrainians though UNHCR has endorsed the TP scheme. The CEDAW Committee has stated that States Parties must 'ensure that women are not discriminated against during the entire asylum process'.[167]

3.2.2 The Global Compacts

While not making specific reference to non-discrimination in the context of procedures, the principle of non-discrimination is central to both Compacts. The GCR calls on states to end 'discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status'[168] – including in the asylum procedure.

The GCM's Objective 17 calls on states to eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration, committing 'to eliminate all forms of discrimination'.[169] The Compact also calls on states to 'enact laws and take measures to ensure that service delivery does not amount to discrimination against migrants … '.[170]

3.2.3 European Human Rights Law

The ECHR's non-discrimination provision in Article 14 relates to the rights set forth in the Convention and prohibits discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. As such, Article 14 does not prohibit discrimination generally, but only in relation to the enjoyment of the Convention rights. While a violation of a Convention right does not need to be found for Article 14 to be engaged, the discrimination complained of must relate to a Convention right.

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[166] *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* App Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968) (Belgian Linguistics Case) para 10; *Willis v The United Kingdom* App No 36042/97 (ECtHR, 11 June 2002) para 48; HRC, *Oulajin and Kaiss v The Netherlands*, UN doc CCPR/C/46/D/406/1990 and 426/1990 (5 November 1992) para 7.4; HRC, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, UN doc CCPR/C/85/D/1249/2004 (21 October 2005) para 7.4; see also HRC, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/ Rev.9 (vol I) (27 May 2008) 195, para 13; For an explanation on assessing proportionality, see Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 451-52.

[167] CEDAW Committee, 'General Recommendation No 32' (n 61) para 24.

[168] GCR (n 44) para 9.

[169] GCM (n 45) para 33.

[170] ibid para 31(a).

Article 1(1) of Protocol 12 to the ECHR extends protection against discrimination by stating that the 'enjoyment of any right *set forth by law* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' (emphasis added). Here, protection against discrimination is not limited to the Convention rights. Article 1(2) Protocol 12 adds the right not to be discriminated against by public authorities.

Case law on Article 14 as related to immigration cases is relatively sparse and focuses on Article 8 ECHR (right to private and family life).[171]

3.2.4 EU Primary Law

The EUCFR's Article 21(1) states that 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'[172] – including in the asylum procedure.

3.3 Registration and Documentation

3.3.1 International Law

The first step in the asylum procedure is the registration of the protection claim. The UNHCR Handbook notes that officials receiving asylum applications must know how to deal with them, respect the principle of *non-refoulement*, and pass the case on to the relevant authority.[173] Protection seekers must be able to approach the relevant authorities to register their claim 'without an appointment'.[174] The HRC has found that Poland denied asylum seekers an effective remedy by not acknowledging their requests to claim asylum and denying them entry.[175] Similarly, the CRC Committee has found a violation of Article 37 CRC (prohibition of inhuman and degrading treatment) in a case where Spain 'did not ascertain [an unaccompanied minor's] identity, did not ask about his personal circumstances and did not conduct a prior assessment of the risk … of persecution …'.[176] In its Concluding Observations on Egypt in March 2023, the HRC expressed concern about 'the absence of an adequate legislative and institutional framework ensuring the right to asylum for all asylum seekers entering the country',[177] calling on the State Party to 'take the required measures

[171] For an overview of the relevant case law, see ECtHR, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (31 August 2022) <www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG> (accessed 27 September 2023) 51-52.

[172] EUCFR (n 7) Art 21.

[173] UNHCR Handbook (n 36) para 192(i).

[174] UNHCR (n 159) 98.

[175] HRC, *AB and BD v Poland*, CCPR/C/135/D/3017/2017 (3 February 2023).

[176] *DD v Spain*, (n 126) para 14.6.

[177] HRC, 'Concluding Observations on the Fifth Periodic Report of Egypt' CCPR/C/EGY/CO/5 (14 April 2023) para 35.

to enable all individuals seeking or in need of international protection to have rapid, unimpeded, and safe access to UNHCR, and an individualized case assessment'.[178]

Further, issuing appropriate documentation is an important part of states' duties towards protection seekers. A document confirming the status of asylum seeker (during the procedure) or beneficiary of protection (following the procedure) is essential in order ensure protection from arrest and removal and access to relevant state services, such as reception conditions, welfare benefits, and rights, for example to accessing education or the labour market. In its Concluding Observations on Botswana in November 2021, the HRC called on the State Party to '[i]ssue and renew identification documents for asylum seekers in a timely manner, in order to prevent their arbitrary detention and deportation'.[179]

3.3.2 The Global Compacts

The GCR states that '[r]egistration and identification of refugees is key for people concerned, as well as for States to know who has arrived, and facilitates access to basic assistance and protection, including for those with specific needs'.[180] The GCM also calls on States to ensure that 'migrants are issued adequate documentation'[181] and to provide 'basic humanitarian assistance and essential services in reception areas'.[182]

The GCM dedicates Objective 4 to the issue of adequate documentation, calling on states 'to ensure … that migrants are issued adequate documentation … at all stages of migration, as a means to empower migrants to effectively exercise their human rights'.[183] The GCM also asks states to 'enhance reception and assistance capacities' for migrants.[184]

3.3.3 European Human Rights Law

The ECtHR has found violations of Convention rights in a number of cases where individuals were deprived of an opportunity to register their asylum claims. For example, in *Hirsi*, the ECtHR stated that 'the applicants had no access to a procedure to identify them and to assess their personal circumstances',[185] which

[178] ibid para 36(b).

[179] HRC, 'Concluding Observations on the Second Periodic Report of Botswana' CCPR/C/BW A/CO/2 (11 November 2021) para 30(d).

[180] GCR (n 44) para 58.

[181] GCM (n 45) para 20.

[182] ibid para 54; See also UNGA, 'Resolution adopted by the General Assembly on 19 September 2016: New York Declaration for Refugees and Migrants' A/RES/71/1 (3 October 2016) Annex I 'Comprehensive Refugee Response Framework' (CRRF) para 5(a) and 5(d).

[183] GCM (n 45) para 20.

[184] ibid para 24a.

[185] *Hirsi Jamaa* (n 82) para 202; see also *MA and Others v Lithuania* (n 85) para 115; *MK and Others v Poland* (n 85) paras 185, 210

contributed to the ECtHR finding a violation of both Article 3 ECHR and Article 4 of Protocol 4 to the Convention.

In *HN and Others v France*, the Court found that severe delays in the registration of asylum claims, resulting in equally significant delays in access to reception conditions, are capable of breaching Article 3 ECHR where applicants are unable to meet their basic needs as a result, with little prospect of the situation improving.[186]

3.3.4 EU Primary Law

Access to procedures is closely linked with access to territory (see Chapter 2) and the CJEU has held that access to asylum procedures implies access to territory, since otherwise, applicants will be prevented 'from effectively enjoying the right enshrined in Article 18 of the Charter' (right to asylum).[187] This right must not be restricted by creating transit zones, which only a limited number of applicants can access each day as this would be incompatible with Articles 6, 18 and 47 (right to an effective remedy) EUCFR.[188] Further, making the possibility of applying for international protection subject to the prior lodging of a declaration of intent at an embassy located in a third country and to the granting of a travel document enabling applicants to enter the territory is not compatible with Article 18 EUCFR.[189] The CJEU has also clarified that all applications for international protection must be passed on to the competent authorities.[190]

3.4 Access to Interpretation, Information, and Legal Representation

3.4.1 International Law

The UNHCR Handbook states that applicants 'should receive the necessary guidance as to the procedure to be followed'.[191] The asylum procedure requires access to trained and qualified interpreters.[192] Both written and oral communications must be made in a language applicants understand.[193]

In addition to providing effective interpretation, RSD authorities must facilitate the applicant's access to information and legal representation. The CRC Committee considers it 'imperative that … children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, [and] the asylum process', that 'interpreters should be made

[186] *HN and Others v France* App No 28820/13 (ECtHR, 2 July 2020) para 184.
[187] C-72/22, *MA* (n 100) paras 63 and 75.
[188] C-808/18, *Commission v Hungary* (CJEU, 17 December 2020) para 128.
[189] C-823/21, *Commission v Hungary* (n 100).
[190] C-36/20 PPU, *VL* (CJEU, 25 June 2020) para 83.
[191] UNHCR Handbook (n 36) para 192(ii).
[192] ibid para 192(iv); see also UNHCR (n 159) 46.
[193] UNHCR (n 159) 46.

available at all stages of the procedure'[194] and that 'children involved in asylum procedures are 'provided with legal representation'.[195] The CEDAW Committee calls on states to ensure that 'women asylum seekers are provided with information about the status of the determination process and how to gain access to it, in addition to legal advice, in a manner and language that they understand'.[196]

The CAT Committee has found a violation of Article 3 CAT (prohibition of *refoulement*) based on, inter alia, a lack of legal representation (due to high costs) and interpretation during the asylum procedure.[197] Similarly, lack of legal advice and interpretation has contributed to the CRC Committee finding a violation of Article 37 CRC (prohibiting of inhuman and degrading treatment).[198] In its Concluding Observations on Israel in March 2022, the HRC called on the State Party to '[p]rovide asylum seekers with access to free legal aid throughout asylum procedures, including appeal proceedings'.[199]

Applicants must be provided with 'the necessary information to permit them to understand and participate in the RSD process … as well as to provide them with the appropriate support'.[200] During RSD, protection seekers and their legal representatives must be given access to their personal information and RSD file.[201]

3.4.2 The Global Compacts

The GCM commits states to provide accurate and timely information at all stages of migration (Objective 3), calling on states to provide 'comprehensive information and legal guidance on their rights and obligations, including on compliance with national and local laws, obtaining of work and resident permits, status adjustments, registration with authorities, access to justice to file complaints about rights violations, as well as on access to basic services'.[202]

The GCM further commits states to 'ensure migrants have access to public or affordable independent legal assistance and representation …'[203]

3.4.3 European Human Rights Law

In *Hirsi*, ECtHR stated that 'the lack of access to information is a major obstacle in accessing asylum procedures', highlighting 'the importance of guaranteeing

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[194] CRC Committee, 'General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin' CRC/GC/2005/6 (1 September 2005) para 25.
[195] ibid para 36.
[196] CEDAW Committee, 'General Recommendation No 32' (n 61) para 50(b).
[197] CAT Committee, *MG v Switzerland*, CAT/C/65/D/811/2017 (22 January 2019) para 7.4.
[198] *DD v Spain* (n 126) para 14.5.
[199] HRC, 'Concluding Observations on the Fifth Periodic Report of Israel' CCPR/C/ISR/CO/5 (30 March 2022) para 41(c).
[200] UNHCR (n 159) 15.
[201] ibid 24-25.
[202] GCM (n 45) para 19(d).
[203] ibid para 23(g).

anyone subject to a removal measure … the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints'.[204]

In *MSS*, the Court pointed out a number of 'shortcomings in access to the asylum procedure and in the examination of applications for asylum', including 'insufficient information for asylum-seekers about the procedures to be followed; … a shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews; [and] a lack of legal aid effectively depriving the asylum-seekers of legal counsel' which contributed to a breach of Articles 3 and 13 ECHR.[205]

3.4.4 EU Primary Law

The CJEU has stated that the right to make an application for international protection requires 'the effective observance of the applicant's rights' as a prerequisite for lodging and examining the application in line with Article 18 EUCFR.[206] This requires granting applicants access to information, representation and interpretation as without such assess, applicants cannot lodge their application.

3.5 Efficient Determination of Claims

3.5.1 International Law

The UNHCR Handbook notes that states must designate a clearly identified authority with responsibility for examining and deciding asylum claims in the first instance.[207] Efficiency of asylum procedures requires applicants having 'the opportunity to present their claims in person in an RSD Interview,'[208] accompanied by their legal representative.[209] The CEDAW Committee calls on states to ensure that 'women asylum seekers have the right to an independent claim to asylum and, in this respect, to be interviewed separately, without the presence of male family members'.[210] Interviews should 'be scheduled as soon as possible after the Applicant has been registered' their claim and the 'length of time between the date of registration and the scheduled RSD Interview … should generally not exceed six months'.[211] In its Concluding Observations on Ireland in January 2023, the HRC called on the State Party to 'take active measures to significantly reduce the processing time for international protection

[204] *Hirsi* (n 82) para 204.
[205] *MSS* (n 40) paras 301 and 321; see also *MA and Others* (n 85) para 108; *IM v France* App No 9152/09 (ECtHR, 2 February 2012) para 155; *Abdolkhani and Karimnia v Turkey* App No 30471/08 (ECtHR, 29 September 2009) paras 114-115.
[206] C-808/18, *Commission v Hungary* (n 188) para 102.
[207] UNHCR Handbook (n 36) para 192(iii).
[208] UNHCR (n 159) 145.
[209] ibid 149.
[210] CEDAW Committee, 'General Recommendation No 32' (n 61) para 50(a).
[211] UNHCR (n 159) 126.

applications with a view to meeting its proposed objective of 6 months'.[212] The CAT Committee has found that a failure to interview an applicant about the risk of being subjected to torture on return to his country of origin constituted a violation of Article 3 CAT (prohibition of *refoulement*).[213]

RSD decision-makers must have the necessary training, skills and qualifications to assess claims.[214] The HRC has found Sweden in violation of Article 7 ICCPR (prohibition of inhuman or degrading treatment) for the failure of its asylum authorities to take into consideration evidence submitted in a number of asylum claims, finding that 'the assessment of the authors' claims by the States Party was clearly arbitrary'.[215] Similarly, the CED Committee has found that France violated Article 16 of the Convention for the Protection of All Persons from Enforced Disappearance (prohibition of *refoulement*) by not sufficiently examining evidence pertaining to the applicant's risk of enforced disappearance.[216]

The UNHCR Handbook notes that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.[217] Due to the difficulties inherent in proving a claim to refugee status, applicants should be given the benefit of the doubt.[218]

3.5.2 The Global Compacts

The GCR calls for 'mechanisms for the fair and efficient determination of individual international protection claims … in accordance with [states'] applicable international and regional obligations …, in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it'.[219]

The GCM, meanwhile, calls on states to 'review and revise relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders and that all migrants are treated in accordance with international human rights law.'[220] Further, states 'commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment …'.[221]

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[212] HRC, 'Concluding Observations on the Fifth Periodic Report of Ireland' CCPR/C/IRL/CO/5 (27 July 2022) para 38(a).
[213] CAT Committee, *Ke Chun Rong v Australia*, CAT/C/49/D/416/2010 (7 February 2013) para 7.5.
[214] UNHCR (n 159) 140.
[215] HRC, *O, P, Q, R and S* v *Sweden*, CCPR/C/134/D/2632/2015 (22 September 2022) para 9.12; see also HRC, *Zabayo v The Netherlands*, CCPR/C/133/D/2796/2016 (18 February 2022) para 9.4.
[216] *ELA v France* (n 74) paras 7.5-8.
[217] UNHCR Handbook (n 36) para 196.
[218] ibid para 204.
[219] GCR (n 44) para 61.
[220] GCM (n 45) para 27(c).
[221] ibid para 28.

3.5.3 European Human Rights Law

In *Hirsi*, Judge Pinto de Albuquerque summed up the procedural guarantees necessary for RSD to be 'individual, fair and effective,' as follows. There must be:

> (1) a reasonable time-limit in which to submit the asylum application; (2) a personal interview with the asylum applicant …; (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application; (4) a fully reasoned written decision by an independent first-instance body …; (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision; (6) full and speedy judicial review of both the factual and legal grounds of the first-instance decision; and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to UNHCR or any other organisation working on behalf of UNHCR.[222]

In *Darboe and Camara v Italy*, the ECtHR held that 'the positive obligation of States under Article 8 of the Convention includes the competent authorities' duty to examine a person's asylum request promptly, in order to ensure that his or her situation of insecurity and uncertainty is as short-lived as possible'.[223]

In *FG v Sweden*, the Court has pointed out the 'shared duty between the applicant and the examiner to ascertain and evaluate all the relevant facts, and that in fulfilling this shared duty, examiners might, in some cases, need to use all the means at their disposal to produce the necessary evidence in support of the application'.[224]

3.5.4 EU Primary Law

The CJEU has clarified that Article 47 EUCFR implies that 'the right to be heard in any procedure, inherent in respect for the rights of the defence, which is a general principle of EU law, guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'.[225] The CJEU has also held that there is a shared duty of fact finding between the applicant and the determining authority.[226]

Further, the CJEU has held that, even if a national emergency is declared, legislation depriving applicants from accessing the asylum procedure is not compatible with Article 18 EUCFR.[227]

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[222] *Hirsi* (n 82) Concurring Opinion of Judge Pinto de Albuquerque.
[223] *Darboe and Camara v Italy* App No 5797/17 (ECtHR, 21 July 2022) para 122.
[224] *FG v Sweden* App No 43611/11 (ECtHR, 23 March 2016) para 122.
[225] C-348/16, *Moussa Sacko* (CJEU, 26 July 2017) para 34.
[226] C-277/11, *M* (CJEU, 22 November 2012) paras 65-66; C-756/21, *X* (CJEU, 29 June 2023) para 61.
[227] C-72/22, *MA* (n 100) para 75.

3.6 Notification and Appeals

3.6.1 International Law

The UNHCR Handbook requires states to notify protection seekers of the outcome of their asylum application and to allow them to appeal negative decisions.[228] The CEDAW Committee, too, calls on states to ensure that 'the claimant should be able to appeal against [a negative decision] to a competent body'.[229] UNHCR notes that the 'appeal encompasses both findings of fact and the application of the refugee criteria' and 'should also take into consideration any new information relevant to the claim'.[230] The CAT Committee has emphasised that in order to constitute an effective remedy, an appeal must entail an examination of the merits of a claim.[231]

Deadlines for submitting an appeal 'should not be less than 30 days after the date on which the Applicant has been notified of the RSD decision and appeal procedures, unless the claims were rejected in accelerated procedures for manifestly unfounded claims, in which case, the time limit should not be less than 15 days'.[232] Until the outcome of the appeal has been determined, applicants 'should continue to enjoy the rights and protection accorded to them as registered asylum-seekers'.[233] In its Concluding Observations on Japan in November 2022, the HRC called on the State Party to ensure 'that all persons applying for international protection are given access to an independent judicial appeal mechanism with suspensive effect against negative decisions'.[234]

3.6.2 European Human Rights Law

The ECHR contains the right to an effective remedy (Article 13), which requires an alleged violation of a Convention article and exhaustion of domestic remedies before a claim can be brought before the ECtHR. This encompasses appeals against negative decisions on an asylum application, usually under Articles 2 or 3 ECHR. A court hearing such appeals (both domestic courts and the ECtHR) must assess the risk on return to the applicant 'in the light of the material before it at the time of its consideration of the case',[235] i.e. it must conduct an *ex nunc* examination of the facts.[236] Appeals must have suspensive effect and applicants must be granted reasonable time-limits to prepare and submit their appeals.[237]

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[228] UNHCR Handbook (n 36) para 192(v) and (vi).

[229] CEDAW Committee, 'General Recommendation No 32' (n 61) para 50(k).

[230] UNHCR (n 159) 270.

[231] CAT Committee, *Nirmal Singh v Canada*, CAT/C/46/D/319/2007 (30 May 2011).

[232] UNHCR (n 159) 272.

[233] ibid.

[234] HRC, 'Concluding Observations on the Seventh Periodic Report of Japan' CCPR/C/JPN/CO/7 (3 November 2022) para 33(d).

[235] *D v The United Kingdom* (n 95) para 50; see also *Saadi v Italy* (n 147) para 133.

[236] See, for example, *Salah Sheekh v The Netherlands* (n 40) para 136; *NA v The United Kingdom* App No 25904/07 (ECtHR, 17 July 2008) para 112; *SHH v The United Kingdom* App No 60367/10 (ECtHR 29 January 2013) para 72; For an explanation of the ex *nunc* approach, see *FG v Sweden* (n 224) para 115.

[237] *IM v France* (n 205) para 156; see also *AM v The Netherlands* App No 29094/09 (ECtHR, 5 July 2016) para 66.

3.6.3 EU Primary Law

Applicants have the right to an effective remedy before a court or tribunal in line with Article 47 EUCFR, which must entail 'full and *ex nunc* examination of the facts and points of law' of an admissibility decision or a decision on the merits of a claim.[238] However, it is not necessary 'to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure'.[239]

The CJEU has clarified that appeals must be heard within a reasonable time,[240] and that they must have suspensive effect unless the appeal concerns a decision not to further examine a subsequent application for asylum in order to comply with Articles 19(2) (prohibition of *refoulement*) and 47 EUCFR.[241] However, states need not provide for appeals against first-instance judicial decisions and a second appeal need not have suspensive effect.[242]

3.7 Applicants with Specific Needs

3.7.1 International Law

Persons with specific needs have a number of additional rights during the RSD process. Such persons include (but are not limited to) 'persons manifestly in need of a protection intervention; survivors of torture and persons suffering from trauma; women with specific needs; LGBTIQA+ persons; certain child applicants, in particular unaccompanied and separated children; older asylum-seekers; asylum-seekers with mental health conditions, or intellectual or physical disabilities; and asylum-seekers who require medical or psycho-social support and assistance.'[243]

Firstly, 'registration procedures should include measures to facilitate the identification of asylum-seekers who may have vulnerabilities or specific needs, as early as possible in the RSD process'.[244] In addition, determining authorities must 'ensure that persons … with disabilities and other specific needs have adequate access' to RSD facilities.[245]

States should also keep in mind that despite their vulnerability, these applicants must still be allowed to claim and realise their rights. Thus, the CRC Committee considers that '[a]sylum-seeking children … shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age'.[246] The CRC Committee has decided that

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[238] *Alheto* (n 100) para 130.
[239] C-69/10, *Samba Diouf* (CJEU, 28 July 2011) para 45.
[240] C-756/21, X (n 226) para 77.
[241] *Tall* (n 101) paras 58-59.
[242] C-175/17, *X* (n 100) para 48; C-180/17, *X & Y* (n 100) para 44.
[243] UNHCR (n 159) 119.
[244] ibid.
[245] ibid 39.
[246] CRC Committee, 'General Comment No. 6' (n 194) para 66.

failing to assign an unaccompanied minor a guardian and thus enable him to claim asylum 'led to him being deprived of the special protection that is to be afforded to unaccompanied asylum-seeking minors'.[247]

At the same time, states must be mindful of the fact that vulnerabilities may affect an individual's ability to participate in the RSD process. This is especially the case for persons with 'mental health conditions and intellectual disabilities', so that these individuals should 'receive all necessary assistance and support in making their claim'.[248] The CRC Committee requires States Parties to interpret the CSR51's refugee definition 'in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children'.[249] The CEDAW Committee calls on states to ensure that women asylum seekers are able to present their claims by adopting measures such as granting competent and free leal assistance, ensuring that 'interviewers use techniques and procedures that are sensitive to gender, age and other intersectional grounds of discrimination and disadvantage', establishing a supportive interview environment and providing childcare, assisting with fact- and evidence-finding, taking account of the effects of trauma and offering 'referral to psychosocial counselling and other support services'.[250]

3.7.2 The Global Compacts

The GCR explains that 'persons with specific needs include: children, including those who are unaccompanied or separated; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices; those with medical needs; persons with disabilities; those who are illiterate; adolescents and youth; and older persons'.[251] States must provide 'accessible processes and procedures' for these individuals.[252]

The GCM also emphasises the need for 'gender-responsive and child-sensitive referral mechanisms, including improved screening measures and individual assessments at borders and places of first arrival'.[253] It commits states to 'provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance'.[254]

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[247] CRC Committee, *RK v Spain*, CRC/C/82/D/27/2017 (18 September 2019) para 9.12; see also CRC Committee, *RYS v Spain*, CRC/C/86/D/76/2019 (4 February 2021).
[248] UNHCR (n 159) 85.
[249] CRC Committee, General Comment No. 6 (n 194) para 74.
[250] CEDAW Committee, General Recommendation No 32 (n 61) para 50(c)-(j).
[251] GCM (n 45) para 5; see also CRRF (n 182) para 5(e).
[252] ibid para 60.
[253] ibid para 28(c).
[254] ibid para 23(b).

3.7.3 European Human Rights Law

In *Darboe and Camara v Italy*, a case concerning an unaccompanied minor who was accommodated in an adult reception facility, the ECtHR found a violation of Articles 3 and 8 ECHR based on, inter alia, 'the failure to promptly appoint a legal guardian or representative in the applicant's case [which] prevented him from duly and effectively submitting an asylum request'.[255]

3.7.4 EU Primary Law

Where applicants with specific needs undergo accelerated procedures, and are detained for this purpose, the CJEU has clarified that to comply with Articles 6, 18 and 47 EUCFR, 'national authorities are required to ensure, at the end of a case-by-case examination, that detention … of an applicant for international protection in need of special procedural guarantees does not deprive him or her of the "adequate support" to which he or she is entitled in the context of the examination of his or her application.'[256]

3.8 Accelerated Procedures and Inadmissibility

3.8.1 International Law

Not all applicants will necessarily go through regular asylum procedures. Indeed, some may not be admitted to the procedure in the first place. Determining authorities frequently make use of accelerated procedures (for example based on the 'safe country of origin' concept) and/or conduct an admissibility assessment (based on the 'safe third country' or 'first country of asylum' concept) before allowing access to the asylum procedure. Both of these practices are controversial as they can impede access to the asylum procedure and therefore entail a risk of *refoulement*.

According to UNHCR, accelerated procedures should generally only be used 'when there are compelling protection reasons to process the claim on a priority basis and/or within shorter timeframes', but may also be appropriate 'for Applicants whose claims are likely to be manifestly well-founded or manifestly

[255] *Darboe and Camara* (n 223) para 144.
[256] C-808/18, *Commission v Hungary* (n 188) para 192.

unfounded'.[257] Compelling protection reasons for accelerated procedures include the age, state of health, and other vulnerabilities of protection seekers.[258] While states, in practice, often conduct accelerated procedures where an applicant is from a co-called 'safe country of origin',[259] UNHCR clarifies that 'a manifestly unfounded claim should be distinguished from asylum claims that are likely to be unsuccessful but that are genuinely made'.[260] Thus, applicants should not be channelled into accelerated procedures based on the fact that their country of origin is considered to be 'safe'.

Accelerated processing of claims entails 'an acceleration or shortening of all or some timelines in the RSD process' but 'not … beyond what is reasonable to allow the Applicant to adequately prepare and present information in support of his/her claim'.[261] Further, accelerated processing 'does not involve a simplification of any aspect of the substantive determination of the refugee status claim, nor a merging of case processing steps'.[262] Simplified procedures and the merging of procedural steps may only be used in the context of prima facie recognition or where there is a 'high presumption of inclusion',[263] not where there is a high presumption

[257] UNHCR (n 159) 186. UNHCR defines these concepts as follows: 'Manifestly well-founded claims are refugee status claims which, on their face, clearly indicate that the Applicant meets the refugee definition under the 1951 Convention or under UNHCR's broader refugee criteria. This may be because the Applicant falls into the category of individuals for whom a presumption of inclusion or a prima facie approach applies, or because of particular facts arising in the individual's RSD application'; '"Manifestly unfounded" claims are claims for refugee status (i) clearly not related to the criteria for refugee status, or which are (ii) clearly fraudulent or abusive. A claim can be considered "clearly fraudulent" only if the Applicant makes what appear to be false allegations of a material or substantive nature relevant for the determination of his/her status and the claim clearly does not contain other elements which warrant further examination. False statements do not in themselves make the claim "clearly fraudulent", nor does it mean that the criteria for refugee status may not be met. A manifestly unfounded claim should be distinguished from asylum claims that are likely to be unsuccessful but that are genuinely made. Claims submitted by applicants from a particular country or profile may have, in the past or at present, very low recognition rates. This does not, however necessarily imply that such claims are "clearly" not related to the criteria for refugee status or that applicants from that country or profile are not acting in good faith. The terms "manifestly unfounded" and "manifestly well-founded" do not refer to a procedure but rather to concepts which inform the channelling of claims based on certain well defined criteria, into accelerated or simplified RSD procedures'.

[258] ibid 187.

[259] Under EU law, 'a country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU [Qualification Directive], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict', see Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180 (Asylum Procedures Directive) Annex I. Art 31(8)(b) Asylum Procedures Directive provides for accelerated procedures for applicants from safe countries of origin.

[260] UNHCR (n 159) 186, n 28.

[261] ibid 186.

[262] ibid.

[263] ibid 191 and 196.

of the claim being unsuccessful. In its Concluding Observations on Portugal in April 2020, the HRC expressed concerns about '[e]xcessive use of accelerated procedures, which might compromise the quality of the assessment of applications and increase the risk of refoulement,'[264] calling on the State Party to 'maintain and strengthen the quality of its refugee status determination procedures, in order to fairly and efficiently identify and recognize those in need of international protection and to afford sufficient guarantees of respect for the principle of non-refoulement'.[265] In its Concluding Observations on Germany in 2019, the CAT Committee expressed concerns that 'accelerated asylum procedures … may not allow a thorough assessment of whether asylum seekers and refugees are victims of torture or ill-treatment, or are at risk of torture or ill-treatment upon deportation or transfer,'[266] calling on the State Party to '[a]llow sufficient time for asylum seekers to indicate fully the reasons for their applications, obtain and present crucial evidence in order to guarantee fair and efficient asylum procedures and ensure sufficient time to appeal, with suspensive effect'.[267]

As opposed to accelerated procedures, which, as explained above, must still grant full access to the asylum procedures by respecting procedural guarantees, admissibility procedures may lead to an outcome where an applicant cannot access the asylum procedure at all. In practice, the question of admissibility is assessed based on the question whether an individual can be sent to a 'safe third country' or 'first country of asylum'. Before transferring an individual to a third country, states must ensure that the country in question is indeed safe for the individual applicant. In the context of the 'first countries of asylum', this means conducting

> an individual assessment of whether the refugee will be readmitted to the 'first country of asylum', granted lawful stay there, and be accorded standards of treatment commensurate with the 1951 Convention and its 1967 Protocol and international human rights standards, including – but not limited to – protection from *refoulement*.[268]

In the context of 'safe third countries', the sending state must, in addition, assess whether the third country will 'grant the person access to a fair and efficient [RSD] procedure …, permit the person to remain while a determination is made, and [w]here she or he is determined to be a refugee, s/he should be

[264] HRC, 'Concluding Observations on the Fifth Periodic Report of Portugal' CCPR/C/PRT/CO/5 (28 April 2020) para 34(b).
[265] ibid para 35(b).
[266] CAT Committee, 'Concluding Observations on the Sixth Periodic Report of Germany' CAT/C/DEU/CO/6 (11 July 2019) para 25(a).
[267] ibid para 26(a).
[268] UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (2018) <www.refworld.org/docid/5acb33ad4.html> (accessed 29 September 2023) para 3.

recognized as such and be granted lawful stay'.[269] In its Concluding Observations on Germany in 2019, the CAT Committee also called on the State Party to '[e]nsure that all asylum seekers, including those from "safe countries of origin" and "Dublin cases", have access to fair asylum procedures, including an interview to evaluate their risk of being subjected to torture and ill-treatment in their countries of origin'.[270]

3.8.2 The Global Compacts

While there is little in the Compacts on accelerated procedures or inadmissibility, they caution against the unjustified use of accelerated procedures in the provisions on avoiding protection gaps (GCR, para 61) and certainty and predictability of migration procedures (GCM, para 28).

With regard to states' use of the safe third country concept, it should be noted that although the Compacts do not address this explicitly, the GCR calls for effective responsibility-sharing in refugee situations, which entails the transfer of resources, rather than people.[271] The GCM, too, emphasises the importance of responsibility sharing.[272]

3.8.3 European Human Rights Law

The ECtHR has held that accelerated procedures must not affect the applicant's ability to put forward the merits of her claim.[273] In addition, the Court has clarified that in the context of border procedures, applicants must still have 'access to a remedy with automatic suspensive effect'.[274] Further, if a state seeks to return applicants to a third country, an assessment of whether that country is safe for the applicants must be conducted.[275]

3.8.4 Primary Law

With regard to accelerated procedures, the CJEU has held that 'the nationality of the applicant for asylum is an element which may be taken into consideration to justify the prioritised or accelerated processing of an asylum application'.[276] Thus, EU primary law provides lesser protection than international law, which, as explained above, condones accelerated processing only where there is a high chance of the application being successful.

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[269] ibid para 4.

[270] CAT Committee, 'Concluding Observations on the Sixth Periodic Report of Germany' (n 266) para 26(b).

[271] GCR (n 44) para 32.

[272] GCM (n 45) para 11.

[273] *IM v France* (n 205) para 148.

[274] *Gebremedhin v France* App No 25389/05 (ECtHR, 26 April 2007) para 66.

[275] *MA and Others* (n 85) para 113; *Ilias and Ahmed v Hungary* (n 40); *OM and DS v Ukraine* App No 18603/12 (ECtHR, 15 September 2022); *WA and Others v Poland* App No 64050/16 (ECtHR, 15 December 2022).

[276] C-175/11, *HID and BA* (CJEU, 31 January 2013) para 73.

In relation to admissibility procedures, the CJEU has clarified that an application by applicants who have been granted refugee status in another Member State cannot be rejected as inadmissible where living conditions in the Member State in question expose the applicant to inhuman or degrading treatment in accordance with Article 4 EUCFR.[277] Similarly, applicants cannot be transferred to another EU Member State where living conditions in the receiving state amount to inhuman or degrading treatment for the purpose of Article 4 EUCFR.[278] The CJEU has also held that to comply with Article 24 EUCFR, asylum applications cannot be found to be inadmissible where criteria for determining whether a third country is safe have not been met or not sufficiently considered.[279] The same applies in relation to the notion of safe country of origin.[280]

3.9 Conclusion

It is clear from the foregoing discussion that the minimum standards that states must respect in relation to protection seekers' access to the asylum procedure entail the obligation not to discriminate between protection seekers when conducting asylum procedures on grounds of race, colour, religion, national or social origin, association with a national minority, ethnicity, birth, language, sex, gender, sexual orientation, disability, age, political or other opinion, property or other status.

States have the obligation to register asylum claims in a timely manner by recording at least applicants' identity and reasons for their claim. States must also provide individuals with documentation verifying their status as asylum seekers (during the procedure) or beneficiaries of protection (following the procedure). Protection seekers must be given access to interpretation, information, and legal representation in order to effectively participate in the asylum procedure.

States have the obligation to determine asylum claims in a timely manner by interviewing each individual applicant and collecting other evidence which must then be assessed by trained staff. Once a decision has been taken, this must be communicated to the applicant along with details on how to lodge an appeal. Appeals must allow for reasonable time-limits to prepare and submit the necessary documents, have suspensive effect and take into account all relevant facts of the claim at the time of the hearing.

In guaranteeing the above standards in the asylum procedure, states must take account of applicants with specific needs. Vulnerabilities must be identified as early as possible and adjustments to procedures made to accommodate these and support applicants.

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[277] *Hamed* (n 99) para 43.
[278] C-411-10 and C-493-10, *NS and ME* (n 102); *Jawo* (n 99) para 98.
[279] C-564/18, *LH* (n 100); C-821/19, *Commission v Hungary* (n 100) para 42.
[280] C-404/17, *A* (CJEU, 25 July 2018).

Finally, where states rely on accelerated procedures and inadmissibility procedures, they must be careful to ensure that this does not lead to *refoulement*. Accelerated procedures must still enable the applicant to effectively present his or her claim, including in the context of an appeals procedure, and international law requires that different steps of the procedure must not be merged. States should re-think the grounds for channelling particular groups of protection seekers into these procedures. In particular, international law does not condone subjecting protection seekers to accelerated procedures based on their nationality, but requires an individual assessment of whether the claim is unsubstantiated.

In inadmissibility procedures, states must carefully assess whether a first country of asylum or a 'safe third country' enables the protection seeker to exercise his or her rights in accordance with refugee and human rights law and whether effective asylum procedures are available.

4 Reception Conditions, including Family Reunification

4.1 Introduction

In international law, the duty to provide reception conditions to protection seekers has multiple sources. As a specific duty to refugees (bearing in mind the declaratory nature of a recognition of refugee status), reception conditions are found in Articles 12-24 CSR51. On the basis of the UNHCR Handbook definition of a refugee as someone who fulfils the conditions of the refugee definition irrespective of whether state authorities have carried out an RSD (see Chapter 3), everyone who claims asylum may be a refugee, so that reception conditions provisions of the Convention apply immediately to them.

This chapter examines all of the relevant human rights conventions, international and European regional law and EU primary law, as regards the following elements of reception conditions identified in them: general conditions, housing, health, employment, education, and family reunification. In most conventions, general conditions cover food, clothing, access to water and sanitation and the basic elements of dignity. There is convergence but not complete overlap in the wording used to describe these general conditions. Housing, health, employment, education and family reunification are frequently dealt with by separate articles in the conventions though not always.[281] Among the general issues relating to reception conditions is the durability of residence of protection seekers: how long they will be on the territory or within the jurisdiction of the state and to what extent that question of time is relevant to reception conditions. This comes up for instance in the question of access to employment or education, or the extent of health care which states must provide.[282]

International law does not distinguish between persons who have been recognised as refugees, persons who are seeking recognition as refugees or international protection on other grounds of international law. As regards refugee status, state recognition that a person is a refugee is declaratory not constitutive. This means that the person is and always has been a refugee from the time he or she fulfilled the definition of the Refugee Convention, irrespective of how long it has taken the state to assess the application. For those who come within other categories of international protection (see introduction) on the basis of international

[281] This is the consequence of the material scope of civil and political rights conventions as opposed to economic, social and cultural rights ones or subject-specific conventions.

[282] For instance, does emergency health care satisfy the requirement if the protection seeker is only temporarily present or should the person be entitled to full health care?

obligations reception conditions relevant to them are those established by international law as relevant for everyone within the jurisdiction of the state.

The standard of reception conditions in the CSR51 is based on the principle of non-discrimination. But the category in respect of which discrimination is prohibited varies, i.e. the group of the host country's population with reference to which refugees' rights are to be provided on the basis of non-discrimination. For instance, it varies from nationals of the state as regards primary education (refugees are entitled to the same conditions of access to education as citizens), to foreign nationals in the same circumstances as regards employment or other economic rights (refugees are entitled to access to employment under the same conditions as foreign nationals similarly placed).[283]

From the perspective of international human rights law, the right to reception conditions has a number of sources. The first source is found in civil and political rights conventions, the right to dignity[284] and the prohibition of torture, cruel, inhuman or degrading treatment or punishment (ICCPR and others). The Committee on Economic, Social and Cultural Rights has also highlighted the relationship between adequate reception conditions and protection from chain-*refoulement*.[285]

The second source is found in economic, social and cultural rights (ICESCR and others). This second source sets out the minimum standards of economic, social and cultural rights which states must provide to everyone within their jurisdiction. Economic and social rights are absolute and must be provided to everyone, such as the right to education, but the ICESCR recognises that for some states which are economically disadvantaged achieving these rights may require additional assistance and time.[286] EU states are all high-income countries according to the World Bank,[287] so the programmatic element for

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[283] This standard is discussed in the literature, see e.g. James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005); Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007).

[284] ICCPR (n 9) Preamble: 'Recognizing that these rights derive from the inherent dignity of the human person'. The extent to which this is a right as such rather than a foundation for rights is much disputed in international law, but clear in EU primary law where the CJEU has found the EUCFR right to dignity legally binding, see Catherine Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19(2) European Public Law; Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281.

[285] ICESCR Committee, 'CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (13 December 1991).

[286] ICESCR (n 10) Art 13(2)(a): 'The States Parties to the present Covenant recognize the right of everyone to education'. But Art 13(2) qualifies this: 'with a view to achieving the full realization of this right'.

[287] Nada Hamadeh, Catherine Van Rompaey, Eric Metreau and Shwetha Grace Eapen, 'New World Bank Country Classifications by Income Level: 2022-2023' (1 July 2022) <https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2022-2023> (accessed 13 June 2023).

the achievement of social and economic rights is not relevant. Thereafter, the standard of provision of the rights (such as the quality of primary education, etc) is based on non-discrimination. Here, the discrimination comparator is not on the basis of citizenship, but prohibited grounds. This is because these rights are designed first and foremost for all persons (not just citizens but including them), so equality among everyone is a key objective.[288] Civil and political rights and social and economic rights are not hermetically sealed in their dedicated conventions. There are many areas of overlap as will become apparent below.

The third source of the right to reception conditions is from subject-specific international human rights conventions which bring together civil and political rights with their economic, social and cultural counterparts with specific reference to identified groups. The most important for our purposes are the CEDAW, CRC and CRPD. Here, specific categories of persons, such as women, children or persons living with disabilities, are the object of the relevant rights (similar to the CSR51). The civil and political rights mirror those in the ICCPR, while social, economic and cultural rights follow the ICESCR.

Reception conditions are also covered in the GCR and GCM. As discussed in Chapter 1, these two Compacts are based on refugee and human rights convention obligations. Where they cover reception conditions, we will discuss them in this chapter. European human rights law and EU primary law, meanwhile, clarify the reception conditions standards applicable regionally, primarily through the jurisprudence of the ECtHR and the CJEU, respectively.

Family reunification is a somewhat different right from the others as it is a civil and political right in the ICCPR, as well as an economic and social right in the ICESCR. Family reunification is a component of reception but refusal of states to permit the admission of family members does not necessarily constitute a breach of the prohibition on torture, inhuman and degrading treatment but rather of the right to respect for family life.[289] Unlike the prohibition on torture and other treatment, which is absolute, the right to respect for family life is qualified. States may interfere with it where this is permitted in law, but any interference must not be arbitrary (or in the language of the ECHR, it must be proportionate and necessary in a democratic society). Where an individual is a refugee (as we have set out earlier, this term including those seeking recognition as refugees as well as those seeking international protection under other obligations), and acknowledged in the host state as such, there is no possibility of family reunification in the country of origin. So where there is no alternative

[288] ICESCR (n 10) Art 1(2) lists the following as the prohibited grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The general argument is that if a state can provide a standard of social economic rights to some people it must be able to apply it to all people.

[289] ICCPR (n 9) Art 17; ICESCR (n 10) Art 10; CRC (n 14) Art 9; CPRD (n 16) Art 22; ECHR (n 5) Art 8; EUCFR (n 7) Art 7.

country where the family could enjoy the right, it must be delivered in the host country.[290] Among the issues which arise in respect of family reunification for protection seekers are the definition of the family and qualifying conditions for family unity.

4.2 The Content of Reception Conditions

4.2.1 International Law

The CSR51 sets out what reception conditions must be provided to refugees.[291] There are three levels of rights, firstly where there is no qualification, and only Article 22, the right to education, is in this category. Secondly, where there is a lawfully staying criterion which covers all the other rights, except for two provisions which are in the third category and require habitual residence; the right to industrial property (Article 14) and access to the courts (Article 16(2)). As refugee status is declaratory, not constitutive, a person claiming to be a refugee and whose claim is under consideration cannot be considered to be unlawfully staying as her right to be on the territory is a necessary corollary of the non-refoulement obligation of states.

Articles 17-18 provide for the right to employment (with a possible waiting period of three years) and self-employment on the basis of the best conditions available to foreign nationals in the same circumstances.[292] Article 21 states that housing must be made available which is not less favourable than that accorded to aliens generally in the same circumstances. Article 22 requires that access to elementary education is made available on the same conditions as applicable to nationals, and access to higher education on conditions not less favourable than those accorded to aliens generally in the same circumstances. Article 23 obliges states to make available to lawfully residing refugees welfare on the basis of the same treatment with respect to public relief and assistance as is accorded to their nationals. Thus, according to the CSR51, the essential elements of reception are access to the labour market, housing, education and welfare. The standard for these elements varies from providing them on par with the host state's own nationals (rationing, elementary education and public relief) to aliens generally in the same circumstances, a phrase tying certain rights to length of sojourn or residence of non-nationals in the host state.[293]

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[290] HRC, *Farag El Dernawi v Libya*, CCPR/C/90/D/1143/2002 (31 August 2007).

[291] Note, the position of UNHCR that a refugee is such as soon as the conditions of Art 1A(2) CSR51 (n 1) is fulfilled and when a state completes a determination procedure confirming that the individual is a refugee this is confirmatory only of the status which the individual holds.

[292] CSR51 (n 1) Art 24 provides for the application of employment protection and access to social security.

[293] ibid Art 6 states that: 'For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling'.

Article 26 requires states to provide refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances. Further, Article 31(2) provides that states shall not apply to the movements of such refugees restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission to another country.

The ICESCR sets out more generally the economic and social rights which states are required to accord to all persons within their jurisdiction. Article 2(2) requires that the rights are delivered without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[294] Articles 6-7 provide a right to work and equality in working conditions for all workers. Article 10 requires family assistance, in particular regarding maternity and childbirth. Article 11 creates a duty on states to provide adequate living standards which include food, clothing and housing, and 'the continuous improvement of living conditions.' Physical and mental health are covered by Article 12(d) which requires the creation of conditions which assure all medical services and medical attention in the event of sickness. Articles 13-14 set out the obligations regarding education, free primary education for all, secondary education available to everyone and higher education on the basis of equal access.[295] Article 15 provides the right to take part in cultural life. It does not cover freedom of movement.

In its General Comment 20, the ICESCR Committee states: '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.'[296] Thus, the delivery of economic rights under the ICESCR applies to protection seekers. At the time of writing, the ICESCR Committee has not considered the issue of access to reception conditions for protection seekers.[297]

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[294] The general welfare provision in Art 4 CSR51 (n 1) allows states to place limitations on rights where justified.

[295] See Claude Cahn, 'The Economic, Social and Cultural Rights of Migrants' in Elspeth Guild, Stefanie Grant, and Cornelis A Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2017).

[296] ICESCR Committee, '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)' E/C.12/GC/20 (2 July 2009) para 30.

[297] The ICESCR Committee was presented with a Communication regarding refusal of access to housing by a protection seeker in *Sergei Ziablitsev v France*, E/C.12/71/D/176/2020 (5 May 2022), where the CJEU judgment in C-233/18, *Haqbin* (CJEU, 12 November 2019) and the ECtHR judgment in *NH and Others v France*, App Nos 28820/13, 75547/13 and 13114/15 (ECtHR, 2 July 2020) were cited, but the Committee found the complaint inadmissible for failure to exhaust domestic remedies.

The ICCPR, as discussed in Chapter 2, includes a prohibition on torture, cruel, inhuman or degrading treatment or punishment. As the ICCPR creates civil and political rights, there is little definition of minimum standards of reception conditions which generally fall within the scope of economic and social rights. However, in extreme circumstances, where reception conditions are so dire that they come within the prohibition on torture, cruel, inhuman or degrading treatment or punishment the ICCPR is engaged. The matter does come up in reviews of states' delivery of rights to people within their jurisdiction. For instance, in the HCR's Concluding Observations on Ireland in January 2023, it expressed concerns regarding 'the reception conditions for asylum seekers, and the increased use of emergency accommodation … overcrowding, difficulty in accessing medical services and social protection payments, feelings of lack of safety due to sharing of communal areas, at times, of bedrooms with non-family members, as well as harassment and threats experienced by LGBTI asylum seekers'.[298] It called on the State Party to '[t]ake concrete measures to improve reception conditions for asylum-seekers by, inter alia, establishing a robust system of vulnerability assessments for international protection applicants, phasing out the use of emergency accommodation for asylum-seekers and developing a contingency planning framework for their accommodation'.[299] Article 12 requires states to ensure that everyone has the right to liberty of movement and freedom to choose his residence. ICCPR General Comment 27 clarifies that permissible limitations, which may be imposed on the rights protected under article 12, must not nullify the principle of liberty of movement, and are governed by the requirement of necessity. Where aliens are treated differently from the state's nationals in this regard, the state must justify this difference in treatment. The permissibility of limitations means that states may restrict the right only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the ICCPR.

The CERD specifically excludes from its scope differences of treatment between citizens and non-citizens.[300] However, the CERD Committee clarified in General Comment 30 that notwithstanding the limitation of scope, the Convention does apply to those seeking international protection and requires states to 'ensure that conditions in centres for refugees and asylum-seekers meet international standards' (para 19).[301] The CERD requires that all persons enjoy

[298] HRC, 'Concluding Observations on the Fifth Periodic Report of Ireland' (n 212) para 37.
[299] ibid para 38(b).
[300] Art 1(2): 'This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'.
[301] CERD Committee, 'CERD General Recommendation XXX [30] on Discrimination Against Non Citizens' (5 August 2004).

equality before the law irrespective of race (as defined in the Convention).[302] Article 5(e) specifically requires that states must prohibit and 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 in particular in the following fields: access to the labour market and conditions of work; housing; public health, and medical care and education. Article 5 CERD applies equally to those seeking international protection. Accordingly, in CERD Committee's Concluding Observations on Austria it welcomes an amendment to legislation granting individuals 'unrestricted access to the labour market if they have enjoyed the status of a person with a subsidiary title to protection for one year'.[303] Further in considering the report by Greece, the CERD Committee expressed concerns 'about reported cases of ill-treatment of asylum-seekers and illegal immigrants, including unaccompanied children,' recommending that 'the State party take more effective measures necessary to treat asylum-seekers humanely…'.[304] This convention does not deal with freedom of movement.

The CEDAW covers education, health and economic rights from the perspective of discrimination against women. Article 10 provides for equal rights with men in the field of education including continuing education and vocational training; Article 11 covers employment, access to employment, working conditions and social security; Article 12 provides for equality in access to health care and treatment; Article 13 provides for non-discrimination in access to family benefits, bank loans, credit and social activities; and Article 14(c) requires non-discriminatory access to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

The CEDAW Committee's General Comment 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women provides guidance on reception calling on receiving states to acknowledge their responsibility towards women granted asylum status when it comes to helping them to, among other things, find proper accommodation, training and/or job opportunities, providing legal, medical, psychosocial support for victims of trauma and offering language classes and other measures facilitating their integration. As regards reception before recognition or grant of status, the Comment states that gender sensitivity should be reflected in reception

[302] CERD (n 11) Art 1(1) 'the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

[303] CERD Committee, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Austria', CERD/C/AUT/CO/17 (22 September 2008).

[304] CERD Committee, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Greece', CERD/C/GRC/CO/16-19 (14 September 2009).

arrangements, taking into account the specific needs of victims of sexual abuse and exploitation, of trauma and torture or ill-treatment and of other particularly vulnerable groups of women. CEDAW does not deal with freedom of movement.

In its Concluding Observations on Belgium in 2022, the CEDAW Committee called on the state to strengthen access to education for girls and women from disadvantaged groups, including Roma, migrant, refugee and asylum-seeking girls and girls with disabilities.[305]

The CRC recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.[306] While it is the primary duty of parents to ensure this, states must assist them in case of need and provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. Children are also entitled to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States must strive to ensure that no child is deprived of his or her right of access to such health care services.[307] Two General Comments from the CRC Committee are of particular relevance, General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin,[308] and Joint General Comment 22 (with the Committee on the Rights of Migrant Workers) on the general principles regarding the human rights of children in the context of international migration.[309] Regarding unaccompanied or separated children, General Comment 6 restates the obligation of states in Article 27 CRC to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. It also addresses the issue of health care, noting that states must assess and address the particular plight and vulnerabilities of such unaccompanied or separated children.

As regards the correct interpretation of Article 27, Joint General Comment 22, too, requires states to assist with providing nutrition, clothing and housing.[310] It recommends that states develop detailed guidelines on standards of reception facilities, assuring adequate space and privacy for children and their families. States should take measures to ensure an adequate standard of living in temporary locations, such as reception facilities and formal and informal camps, ensuring that these are accessible to children and their parents, including persons with disabilities, pregnant women and breastfeeding mothers.[311] Regarding access to

[305] CEDAW Committee, 'Concluding Observations on the Eighth Periodic Report of Belgium', CEDAW/C/BEL/CO/8 (1 November 2022) para 41(d).
[306] CRC (n 14) Art 27.
[307] ibid Art 24.
[308] CRC Committee, 'General Comment No. 6' (n 194).
[309] ICRMW Committee and CRC Committee, Joint General Comments 3 and 22 (n 62).
[310] ibid para 49.
[311] ibid para 50.

health care, the Comment states that every migrant child should have access to health care equal to that of nationals, regardless of their migration status in order to fulfil state obligations under Articles 23, 24 and 39 CRC.[312]

In fulfilment of state obligations under Articles 28-31 CRC (education), the Comment notes 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. It further clarifies that 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.[313]

In its Concluding Observations on Sweden in September 2022, the CRC Committee called for Sweden to define budgetary lines for asylum-seeking, refugee and migrant children, among others, and ensure that those budgetary lines are protected even in situations of economic crisis or other emergencies.[314] As regards access to health care, the CRC Committee stated that Sweden needs to 'strengthen measures … to ensure prompt and efficient access to high-quality health services for children in disadvantaged or marginalized situations, including … asylum-seeking and refugee children…'.[315]

Article 37 requires states to ensure that children are not deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child must be in conformity with the law and used only as a measure of last resort and for the shortest appropriate period of time. General Comment 24, dealing with children in the juvenile justice system, also discusses the right to freedom of movement. However, as it is directed a children accused of crimes, the interpretation is of limited application to refugee children.

Three provisions of the CRPD are relevant to reception conditions. First, Article 24 provides that for all persons within the scope of the Convention, states shall ensure an inclusive education system at all levels and life-long learning. States agree to deliver health case under Article 25 where they recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States must take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. Finally, by virtue of Article 28 states recognise the right of persons with disabilities

[312] ibid para 55.
[313] ibid para 62.
[314] CRC Committee, 'Combined Sixth and Seventh Periodic Reports Submitted by Sweden under Article 44 of the Convention, due in 2021' CRC/C/SWE/6-7 (5 September 2022) para 9(b).
[315] ibid para 32(a).

to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and must take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. Article 18 CPRD requires states to guarantee that the rights of persons with disabilities, to liberty of movement, to freedom to choose their residence and to a nationality, are exercised on an equal basis with others.

4.2.2 The Global Compacts

The GCR specifically defines minimum reception as requiring states to provide for adequate, safe and dignified reception conditions, with a particular emphasis on persons with specific needs (including for those with vulnerabilities). In the context of preparedness of states for large movements of refugees, states must assess and meet the essential needs of refugees, including by providing access to adequate safe drinking water, sanitation, food, nutrition, shelter, psychosocial support and health care, including sexual and reproductive health, and providing assistance to host countries and communities in this regard, as required.[316] The Compact commits states to deliver assistance, to the extent possible, through appropriate national and local service providers, such as public authorities for health, education, social services and child protection to refugees.[317] Access to health care is also covered by a call for the facilitated access by refugees and host communities to national health systems.[318]

The GCM in Objective 15 provides for access to basic services for all migrants, irrespective of their status. However, it does not define what basic services include. It does, however, specifically refer to the incorporation of health needs of migrants into national and local healthcare policies and plans and the provision of inclusive and equitable quality education to migrant children and youth, as well as facilitate access to lifelong learning opportunities.[319]

4.2.3 European Human Rights Law

Just as international law has separate conventions for civil and political rights and economic, social and cultural rights, the Council of Europe has two conventions dividing rights along the same lines. The ECHR covers civil and political rights and the ESC the counterpart. However, just as in the case of international human rights law, these two categories overlap.

The ECHR, devoted to civil and political rights like the ICCPR, has no specific provision relating to reception conditions. As in international human rights law, reception conditions are mainly dealt with under the prohibition of torture,

[316] GCR (n 44) para 5(c).
[317] ibid para 7(b) and (c).
[318] ibid para 72.
[319] GCM (n 45) para 31(f).

inhuman or degrading treatment or punishment or private and family life. These provisions are particularly important as regards how protection seekers are treated in host countries and as a bar on expulsion to a country where reception conditions not meet the minimum threshold (see Chapter 2). These standards have been set primarily by the ECtHR in cases on specific facts.

Housing has been one of the key reception conditions where the failure to provide them to protection seekers has resulted in decisions finding a violation of Article 3 ECHR. There have been a series of orders for interim measures (to provide housing) against Belgium in 2022 where protection seekers had successfully petitioned national courts, but the state authorities had still failed to provide accommodation for them.[320] These have been followed by a judgment against Belgium for failure to provide housing to a claimant[321] and a judgment against Italy regarding the inadequacy of the housing provided.[322] Overcrowding and lack of access to facilities and healthcare in an asylum reception centre was found to constitute treatment contrary to Article 3.[323] The lack of healthcare, including care for mental health in closed reception centres, has resulted in findings of Article 3 breaches.[324] As regards the living conditions in transit zones in terms of accommodation, hygiene and access to food and medical care, the ECtHR has considered their sufficiency on the facts and found that they were generally acceptable for holding adult asylum-seekers for a limited period of time but not necessarily for children and not for long durations.[325] Where detention exceeded seven months and the conditions were poor, the ECtHR found an Article 3 violation.[326] For a family of protection seekers who were forced out of a reception centre and not provided with material support, which resulted in them spending nine days on a public square in Brussels, two nights in a transit centre, and a further three weeks in a Brussels train station until their return to Serbia was arranged by a charity, the ECtHR found that Article 3 had been breached because of the failure to provide reception.[327]

The right to free movement is guaranteed by Article 2(1) Protocol 4 which states that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

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[320] *Al Shujaa and Others v Belgium* App No 52208/22 (ECtHR, 16 December 2022); *Camara v Belgium* App No 49255/22 (ECtHR, 18 July 2023); *Msallem v Belgium* (App No 48987/22 (ECtHR, 15 November 2022).

[321] *Camara v Belgium* ibid.

[322] *MA v Italy* App No 70583/17 (ECtHR 31 August 2023).

[323] *Camara* (n 320).

[324] *HM and Others v Hungary* App No 38967/17 (ECtHR, 2 June 2022).

[325] *MBK and Others v Hungary* App No 73860/17 (ECtHR, 24 February 2022).

[326] *WO and Others v Hungary* App No 36896/18 (ECtHR, 25 August 2022).

[327] *VM and Others v Belgium* App No 6 0125/11 (ECtHR, 7 July 2015); see also *NH and Others v France* (n 297).

The ESC, the Council of Europe equivalent to the ICESCR, sets out social rights to which States Parties must accord to those within their jurisdiction. While Article 19 ESC limits these social rights on the basis of reciprocity to nationals of other States Parties, the Committee on Social Rights, which has jurisdiction to receive complaints regarding state compliance with the Charter, found that migrants (including protection seekers of any nationality), even where they are in an irregular situation, are entitled to social and medical assistance and housing under Articles 13(4) and 31(2) ESC, where the individual is without adequate resources and unable to secure such resources either by his own efforts or from other sources.[328]

4.2.4 EU Primary Law

The EUCFR, unlike international and Council of Europe conventions, covers both civil and political rights, as well as economic, social and cultural ones. On a number of occasions, the CJEU has been asked to interpret the application of EUCFR provisions as regards reception conditions. Perhaps the most important is *Haqbin*,[329] where the CJEU held that Article 1 EUCFR prohibits Member States from applying sanctions for serious breaches of the rules of accommodation centres (and seriously violent behaviour) which include the withdrawal, even temporary, of material reception conditions relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other (lesser) sanctions must comply with the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must comply with the Article 24 EUCFR duty to take particular account of the best interests of the child. As regards free movement, Article 45 EUCFR provides a right to free movement but limited to EU citizens. For others it only states that free movement may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State. While the CJEU considered the legality of limitations on free movement of refugees seeking recognition, it did so only on the basis of EU secondary law,[330] and this judgement is therefore outside the scope of this study. The CJEU did make reference to Article 26 CSR51 but not in its consideration or finding.

4.3 Family Reunification

Family reunification has been included as part of reception conditions rather than as a separate section as it is inherent to the conditions of living of a refugee (including those seeking recognition and those who are seeking international protection on the grounds of international law).

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[328] Committee of Social Rights, *Conference of European Churches (CEC) v The Netherlands (decisions on the merits)*, Complaint No 90/2013 (10 November 2014).

[329] C-233/18, *Haqbin* (n 297).

[330] C-443/14 and C-444/14, *Alo* (CJEU, 6 October 2015).

4.3.1 International Law

The human right to family life in international law is composed of two main elements: the right to marry and found a family and the prohibition on arbitrary or unlawful interference with privacy, family or home (alternatively formulated as a right to respect for family and private life). Both are relevant to protection seekers who may be seeking to form a family with someone they knew from their country of origin or to reunification[331] with family members who were not able to travel with them in their flight. One of the questions which arises as regards protection seekers' family formation and reunification is that of time. If the protection seeker will only be very temporarily in the host state (a very difficult term to define however, in the case law of the CJEU, 90 days out of every 180 days is considered too short to establish family reunification rights),[332] this raises the question whether that state's duty to facilitate family life is the same as when the protection seeker's claims has been recognised or granted and his or her future will be, at least until circumstances change, in the host state.

The CSR51 does not contain any specific provision on family unity or reunification. Instead, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons – the conference at which the Refugee Convention was adopted – calls on states to provide for family reunification of refugees where the head of the family fulfils the conditions or where the refugee is an unaccompanied minor. The UNHCR Handbook provides guidance on how to achieve family unity, making reference to Article 16(3) UDHR.[333] As regards the definition of family members, the Handbook recommends that 'the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household'.[334] There should be no requirement that the family became refugees together as flight may have disrupted family unity (para 186). In 2018, UNHCR commissioned a detailed report on the Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied which examines the issue in depth but does not express the views of UNHCR.[335] This report was preceded by Summary Conclusions in 2001,[336] as well as numerous

[331] For our purposes we do not differentiate as regards meaning between reunion and reunification. In EU primary law, generally reunion is used to describe the reuniting of EU nationals with family members and reunification for third country nationals seeking to reunite with their family members.

[332] C-456/12, *O & B* (CJEU, 12 March 2014).

[333] UNHCR Handbook (n 36): 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

[334] ibid paras 181-188.

[335] UNHCR, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' (2018) <https://www.refworld.org/docid/5a9029f04.html> (accessed 14 June 2023).

[336] Cambridge University Press, 'Summary Conclusions: Article 31 of the 1951 Convention' (June 2003) <www.refworld.org/docid/470a33b20.html> (accessed 4 July 2023).

conclusions of UNHCR's Executive Committee.[337] UNHCR has also issued Guidelines on Determining the Best Interests of the Child.[338]

The ICCPR has two provisions, one on family formation,[339] the other prohibiting unlawful interference with family life.[340] In General Comment 19 the HRC confirmed that the right to found a family means also the right of family members to live together.[341] It recognises that the definition of which relationships give rise to family life entitled to protection varies from country to country,[342] a matter of substantial concern for protection seekers who may come from societies with a wide definition of family for whom a principal is responsible but may be seeking protection in a host state where the definition is much narrower. The HRC states that where a group of persons is regarded as a family under the legislation and practice of a state, it must be given the protection referred to in Article 23.[343] This raises the question for EU states regarding the relevant comparator legislation. For instance, family is often defined in national law much more widely regarding social security or tax benefits or obligations than for immigration purposes. The legal problem with exclusively comparing the definition of family for refugees with that of immigration law is that the latter is designed for aliens (or citizens with alien family members) where anti-immigrant politics have frequently successfully pared down the definition of family to the bare minimum of spouse and minor unmarried children. In terms of EU law on free movement of EU citizens (based on the principle of reciprocity) this was unacceptable and a much wider definition of family applies including all dependent relatives in ascending and descending lines, children up to the age of 21 with no dependency requirement, unmarried partners, same sex relationships etc.[344] In this regard, in General Comment 15 the HRC clarified that in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise (para 5).

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[337] International protection is included as a priority theme on the agenda of each session of the Executive Committee. The consensus reached by the Committee in the course of its discussions is expressed in the form of Conclusions on International Protection (ExCom Conclusions). Although not formally binding, they are relevant to the interpretation of the international protection regime. ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community.

[338] UNHCR, '2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child' (2021) <www.refworld.org/docid/5c18d7254.html> (accessed 16 June 2023).

[339] ICCPR (n 9) Art 23 ICCPR complemented by Art 10(1) requiring protection and assistance to the family.

[340] ibid Art 17.

[341] HRC, 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) para 5.

[342] ibid para 2.

[343] ibid.

[344] Kees Groenendijk, 'Developing a right to family reunification, immigrant integration and equality in Europe' 9 September 2021, University of Ghent, Keynote lecture (forthcoming).

As regards the definition of family, the HRC dealt with a complaint against Australia in 2022,[345] considering whether protection seekers who form part of one family should be entitled to Article 17 ICCPR protection. A Sri Lankan national arrived in Australia in June 2012, while his wife arrived in September 2012 after a change in law prevented family reunification of protection seekers in different categories. They married under Australian law in September 2016 (following which a child was born to them). Only the husband was subject to an expulsion order on account of the rejection of his asylum claim. The HRC found a breach of Article 17, recalling that

> in cases in which one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, in light of the degree of hardship that the family and its members would encounter as a consequence of such removal.

The ICESCR requires states to provide the widest possible protection and assistance to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children (Article 10(1)).

The CEDAW contains an obligation on states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women in eight specific areas, all of which assume family unity but none specifically address it (Article 16). However, General Comment 26 on women migrant workers addresses discrimination in family reunification directly. It notes that women migrants are often excluded from family reunification on the basis of the sector in which they work or migration status which they hold (para 19) and recommends that 'States parties should ensure that family reunification schemes for migrant workers are not directly or indirectly discriminatory on the basis of sex' (para 26(e)). It further recommends that states ensure non-discriminatory residency regulations: 'when residency permits of women migrant workers are premised on the sponsorship of an employer or spouse, States Parties should enact provisions relating to independent residency status' (para 26(f)). The Comment addresses specifically the situation of women migrant workers but is also relevant to women protection seekers.

[345] HRC, *Gnaneswaran v Australia*, CCPR/C/133/D/3212/2018 (8 February 2022).

The CRC explicitly deals with the issue of family reunification in the context of the overarching duty to protect the best interests of the child. In Article 10(1) it states that applications by a child or his or her parents to enter or leave a state for the purpose of family reunification shall be dealt with by states in a positive, humane and expeditious manner. Article 22 requires states to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights and to assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. Joint General Comment 22 states that considerations such as those relating to general migration control cannot override best interests considerations. The CRC Committee stresses that return is only one of various sustainable solutions for unaccompanied and separated children and children with their families. Other solutions include integration in countries of residence — either temporarily or permanently — according to each child's circumstances, resettlement in a third country, e.g. based on family reunification grounds.

Article 23 CRPD contains the right to marry and found a family and the right to respect to family life. However, to date the issue of family reunification for protection seekers has not been addressed either in a General Comment or by the CRPD Committee.

4.3.2 The Global Compacts

The GCR deals with family reunification only briefly and in the context of complementary pathways, noting that states are expected to 'to facilitate effective procedures and clear referral pathways for family reunification' (para 95).

The GCM, too, contains a number a reference to family unity in the context of regular migration pathways, calling on states to '[f]acilitate access to procedures for family reunification for migrants at all skills levels' (paras 21(i)). In addition, the Compact highlights the role of family reunification as a tool to protect children (paras 23(f) and 28(d)) and for migrant inclusion (para 32 (c)).

4.3.3 European Human Rights Law

Article 8 ECHR contains the right to respect for private and family life and Article 12 the right to marry and found a family. Neither refer to protection seekers or refugees. There is a very long caselaw of the ECtHR on family life, mainly in the form of protection from expulsion of family members from states.[346] This caselaw has been developed by the ECtHR to include migration

[346] In particular the standard setting judgment *Boultif v Switzerland* App No 54273/00 (ECtHR, 2 August 2001).

including in cases of a right to admission of children.[347] It also extends in exceptional cases to family members who are irregularly on the territory.[348] The ECtHR held in 2014 that 'the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life'.[349] But the conditions which could be placed on that family reunification were not developed. As regards the interconnection between the right to family life and the general non-discrimination obligation (Article 14), the ECtHR held in 2012 that a different treatment of refugees in comparison with others in temporary categories, such as students or workers, regarding family reunification was not justified.[350]

In a 2021 decision the ECtHR for the first time considered whether, and to what extent, the imposition of a statutory waiting period for granting family reunification on persons who benefit from subsidiary or temporary protection status is compatible with Article 8 ECHR.[351] It found that regarding family life, as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the fair balance that has to be struck between the competing interests involved. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the state, whether there are insurmountable obstacles to the family living in the country of origin of the alien and whether there are factors of immigration control (para 132). The key for protection seekers is the issue of insurmountable obstacles, as refugees cannot return to – and exercise their family life in – their countries of origin. However, on account of the precariousness of the status of asylum seeker, the strength of claims to family reunification is likely to be less strong than for those with a protection status (as was the case on the facts).

Here, time is also an important factor, as the longer a protection seeker's claim has been outstanding (for instance in some European countries this can be a matter of years) the strength of the argument that even the status of protection seeker must be assimilated to that of temporary protection status becomes greater. Yet, the ECtHR held that the granting of family reunification does not, in itself, change the nature and legal basis of the stay for beneficiaries of temporary protection, which still remains temporary. This indicates that family reunification for persons with temporary status in a state is indeed covered by Article 8 (para 165). The crux of the issue according to the ECtHR is between the

[347] *Sen v The Netherlands* App No 31465/96, (ECtHR 21 December 2001); *Rodriques da Silva & Hooghamer v The Netherlands* App No 50435/99 (ECtHR 31 January 2006); *Butt v Norway* App No 47017/09 (ECtHR 4 October 2013) among others.
[348] *Jeunesse v The Netherlands* App No 12738/10 (ECtHR 3 October 2014).
[349] *Tanda Muzinga* App No 2260/10 (ECtHR 10 October 2014) para 75.
[350] *Hode and Abdi v UK* App No 22341/09 (ECtHR 6 November 2012).
[351] *MA v Denmark* App No 6697/18 (ECtHR, 9 July 2021).

applicant's interest in being reunited with a spouse as soon as possible, whereas the state's interest in controlling immigration as a means of serving the general interests of the economic wellbeing of the country and of ensuring the effective integration of those granted protection with a view to preserving social cohesion. On these grounds the ECtHR found in *MA v Denmark* that for persons with a protection status, a waiting period of three years was too long.

A 2023 ECtHR decision[352] indicates that in some cases the application of a self sufficiency requirement may be lawful. It held that states enjoy a certain margin of appreciation in relation to requiring non-reliance on social assistance before granting family reunification in the case of refugees who have left their countries of origin without being forced to flee persecution and whose grounds for refugee status have arisen following their departure and as a result of their own actions. On the other hand, this margin is considerably more narrow than the margin afforded to states in relation to the introduction of waiting periods for family reunification when that is requested by persons who have not been granted refugee status, but rather subsidiary or temporary protection status (para 104).

4.3.4 EU Primary Law

Article 7 EUCFR protects the right to respect for family life, while Article 24 provides that as regards all decisions taken by authorities the child's best interests must be a primary consideration. Article 47 protects the right to an effective remedy. These provisions are applicable to everyone within the scope of EU primary law, though there is no specific mention of protection seekers as such. For protection seekers within the EU who have a family member legally resident on a the basis of a protection decision in another Member State, EU secondary rules allow for them to be reunited and to have the outstanding applications dealt with there (Article 9).[353] Where a protection seeker in the EU has family members who are also protection seekers, but in another Member State(s), they are entitled to be reunited (Article 10). As regards family reunification with persons outside the EU, EU secondary rules only take effect once the principal family member has been recognised as entitled to protection.[354] The CJEU has held that, to comply with Articles 7, 24 and 47 EUCFR, Member States cannot separate family members seeking asylum (para 83). [355] Further, the CJEU has held that the date relevant to the family reunification application of an unaccompanied minor protection seeker is that of the minor's arrival in the

[352] *BF and Others v Switzerland* App No 13258/18 (ECtHR 4 July 2023).

[353] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180.

[354] Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L 251 (Family Reunification Directive) Art 10.

[355] C-582/17 and C-583/17, *H & R* (CJEU, 2 April 2019); C-19/21, *I and S* (CJEU, 1 August 2022).

state or the date of her application for protection, so that, in accordance with Article 24(2) EUCFR which protects the best interests of the child principle, family reunification is still possible where the minor turns 18 while his or her claim is being assessed.[356] Further, unaccompanied minor refugees who are married are nonetheless entitled to family reunification with their third country national parent from outside the EU in order to give effect to Articles 7 and 24(2) EUCFR.[357]

4.4 Conclusion

It is clear from the foregoing discussion that the minimum international and European standards require states to respect reception conditions and family reunification for refugees including persons entitled to international protection on other grounds of international law. The content of reception conditions includes access to employment, housing, welfare, education and health care. The minimum standard in respect of reception conditions is established by the duty to ensure that no one is subject to inhuman or degrading treatment or punishment and in the EU context by the entitlement of all persons to dignity. Reception conditions also include the right to free movement which can only be subject to limited restrictions set out in law. Family reunification is also a condition of reception in that it is essential element to the wellbeing of refugees. While some waiting periods may be lawful and some conditions may be placed on family reunification as regards self-sufficiency, these must meet the requirements of proportionality and necessity, striking a fair balance between the interest of the state and that of the refugee.

[356] C-550/16, *A and S* (CJEU, 12 April 2018); C-133/19, C-136/19 and C-137/19, *BMM and Others* (CJEU, 16 July 2020).

[357] C-230/21, *X v Belgium* (CJEU, 17 November 2022).

5 Detention

5.1 Introduction

Applicants for international protection may be detained at different stages of their journey through the asylum system. Protection seekers may be detained as part of the asylum procedure, including in the context of border- or accelerated procedures, for the purpose of a transfer to a first country of asylum or a safe third country, or for the purpose of expulsion. Yet, since detention may infringe the right to liberty, the use and conditions of detention are carefully regulated in international, European and EU primary law and the human rights standards on detention apply to all types of immigration detention, irrespective of the point in the procedure at which an individual is detained. The HRC defines 'liberty of person' broadly, as 'freedom from confinement of the body'.[358] This chapter adopts this broad definition, which has the capacity to encompass the detention of asylum-seekers during asylum procedures (see also Chapter 3), as well as the detention of rejected asylum seekers confined to removal facilities for the purpose of expulsion (see also Chapter 2). This chapter only covers so-called administrative detention, including *de facto* detention, but not imprisonment for criminal offences.

A wide range of international human rights instruments contain provisions on detention, and/or provisions relevant to treatment in detention, including the CSR51,[359] the CAT,[360] the CERD,[361] the ICCPR,[362] the CED,[363] the CRC,[364] and the CRPD.[365] In addition, UNHCR has issued Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention (Detention Guidelines).[366] As explained in the Introduction to this report, documents issued by UNHCR are particularly relevant to interpreting states' obligations towards refugees and asylum seekers.

The Global Compacts draw on the international law provisions referred to above and contain a strong presumption against detention. The GCM is particularly relevant since it dedicates an entire Objective to using immigration detention

[358] HRC, 'General Comment No. 35: Article 9 (Liberty and security of person)' CCPR/C/GC/35 (16 December 2014) para 3.
[359] CSR51 (n 1) Art 26.
[360] CAT (n 12) Arts 3 and 11.
[361] CERD (n 11) Art 5(d)(i).
[362] ICCPR (n 9) Arts 9, 10, 12 and 24.
[363] CED (n 15) Art 17.
[364] CRC (n 14) Art 37.
[365] CRPD (n 16) Arts 14 and 18(1).
[366] UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) <www.refworld.org/docid/503489533b8.html> (accessed 29 May 2023) (UNHCR Detention Guidelines).

only as a measure of last resort and working towards alternatives (Objective 13). Drawing on binding international law provisions, the GCM thus lays out best-practice standards on how to realise the rights to liberty and freedom of movement codified in international law (see Section 5.2.1 below). The commitment to the use of detention as a measure of last resort is articulated explicitly, together with the commitment to prioritise non-custodial alternatives that are in line with international law. States further commit to taking a human rights-based approach to any detention of migrants. Meanwhile, the GCR calls for support in developing of noncustodial and community-based alternatives to detention, particularly for children (paragraph 60). With regard to reception arrangements, the GCR also calls for 'alternatives to camps' (paragraph 54). This is relevant in the context of discussing detention since 'closed refugee camps, or even camps operating under informal confinement policies, may operate as *de facto* places of detention'.[367]

Like the international human rights instruments mentioned above, the ECHR too contains provisions relevant to the detention context,[368] in particular Article 5 which protects the right to liberty and security. The ECtHR has developed extensive jurisprudence on detention generally, as well as in the immigration context in particular.[369] The focus in this chapter will be on a number of cases which illustrate how the Court approaches the prohibition of arbitrary detention and the guarantee of appropriate detention conditions in the immigration context.

Since detention affects applicants for international protection at different stages of the asylum procedure (applicants may be detained on arrival (e.g. for the purpose of establishing their identity), for the purpose of a transfer to another EU Member State, during the asylum procedure and/or the return procedure), different EU legal instruments govern under what circumstances applicants for international protection can be detained. These secondary law instruments must be interpreted in line with international obligations and EU primary law, in particular with EUCFR, which contains a number of provisions relevant to the detention context, including Article 6 (right to liberty and security), Article 1 (right to dignity), Article 3 (right to the integrity of the person), Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), and Article 47 (right to an effective remedy). The CJEU has clarified how secondary legislation pertaining to detention must be interpreted (in light of Charter provisions).

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[367] Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (Brill 2013) 117.

[368] ECHR (n 5) Arts 3, 5 and Art 2(1) of Protocol 4.

[369] For a general overview, see ECtHR, 'Guide on Article 5 of the European Convention on Human Rights' (31 August 2022) <www.echr.coe.int/documents/guide_art_5_eng.pdf> (accessed 24 May 2023).

This chapter examines the international standards applicable to all detention of aliens, beginning by outlining how international, European and EU primary law prohibit arbitrary detention. This is followed by considering the applicable standards for detention conditions.

5.2 Prohibition of Arbitrary Detention

5.2.1 International Law

In guaranteeing the rights to liberty and freedom of movement, international law contains a general presumption against detention. The right to liberty is guaranteed in Article 9(1) of the ICCPR; Article 37(b) CRC; and Article 14(1)(a) CRPD. The rights as guaranteed in the ICCPR explicitly apply to refugees and asylum seekers.[370] Freedom of movement is guaranteed in the ICCPR's Article 12; the CSR51's Article 26; the CERD's Article 5(d)(i); and the CRPD's Article 18(1). The CED contains a prohibition of secret detention.[371] In its Concluding Observations on Egypt in March 2023, the HRC called on the State Party to '[p]ut an end to the detention of asylum seekers'.[372]

It follows from the general presumption against detention in international law that detention may only be used in strictly defined circumstances. Importantly, international law explicitly prohibits arbitrary detention in Article 9(1) ICCPR; Article 37(b) CRC; and Article 14(1)(b) CRPD. In order for detention to not be arbitrary, it must be authorised by law,[373] pursue a legitimate aim and be necessary, reasonable and proportionate.[374]

Detention must be authorised by national law, in line with the principle of legal certainty, which requires defining (exhaustive) grounds for detention.[375] These grounds for detention must pursue a legitimate aim. According to the ICCPR, permissible restrictions of the right to liberty, i.e. legitimate grounds for detention, are limited to those which are 'are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.[376] With regard to asylum seekers, the HRC lists permissible grounds of detention as 'document[ing] [protection seekers'] entry, record[ing]

[370] HRC, General Comment No. 35 (n 358) para 3.
[371] CED (n 15) Art 17(1).
[372] HRC, 'Concluding Observations on the Fifth Periodic Report of Egypt' (n 177) para 36(c).
[373] ICCPR (n 9) Art 9(1); CRC (n 14) Art 37(b); CRPD (n 16) Art 14(1)(b). In addition, the Convention on Enforced Disappearances clarifies that state-sanctioned detention outside the law is a form of enforced disappearance where it is followed by an acknowledgement of the deprivation of liberty, see CED (n 15) Art 2.
[374] HRC, General Comment No. 35 (n 358) para 12; see also UNHCR Detention Guidelines (n 366) para 18.
[375] ibid para 22; see also UNHCR Detention Guidelines (n 366) para 16.
[376] ICCPR (n 9) Art 12(3).

their claims and determin[ing] their identity if it is in doubt', as well as 'an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security'.[377]

Reasons for detention which are not permissible include seeking asylum and entering irregularly,[378] in order to determine the asylum claim,[379] for reasons of expulsion where the asylum claim has not been finally determined,[380] and the 'existence of a disability'.[381] Detention must also be non-discriminatory and not be imposed on the basis of protected grounds such as race, religion or nationality.[382] The CRC Committee has found that detaining children based on their or their parents' migration status is 'arbitrary within the meaning of article 37 (b) of the Convention' and therefore unlawful.[383]

5.2.2 The Global Compacts

The GCM in Objective 13 includes a commitment to ensuring that detention 'follows due process, is non-arbitrary, is based on law, necessity, proportionality and individual assessments'.[384] The Compact calls on states to '[r]eview and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based on law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a deterrent'.[385]

The GCM also requires states to 'promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children'.[386]

5.2.3 European Human Rights Law

The ECHR protects the right to liberty in Article 5(1) and the right to liberty of movement under Article 2(1) of Protocol 4 to the ECHR (for persons lawfully within the territory of a state, a group which includes asylum seekers). The right to liberty of movement can only be restricted in accordance with law and where restrictions 'are necessary in a democratic society in the interests of national

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[377] HRC, General Comment No. 35 (n 358) para 18.
[378] CSR51 (n 1) Art 31; UNHCR Detention Guidelines (n 366) para 32.
[379] HRC, General Comment No. 35 (n 358) para 18.
[380] UNHCR Detention Guidelines (n 366) para 33.
[381] CRPD (n 16) Art 14(1)(b).
[382] HRC, General Comment No. 35 (n 358) para 17; UNHCR Detention Guidelines (n 366) para 43.
[383] CRC Committee, *AMK and SK v Belgium*, CRC/C/89/D/73/2019 (22 March 2022); para 10.11; CRC Committee, *EH and Others v Belgium*, CRC/C/89/D/55/2018 (3 February 2022) para 13.12.
[384] GCM (n 45) para 29.
[385] ibid para 29(c).
[386] ibid para 29(a).

security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'[387] The right to liberty, on the other hand, can be restricted 'in accordance with a procedure prescribed by law' on a number of grounds. In the immigration context, deprivation of liberty is permissible, according to Article 5(1)(f) ECHR, in case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.[388] In addition, as the ECtHR has clarified, Article 5(1)(f) ECHR 'does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is generally necessary to ensure the asylum seekers' presence pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily'.[389]

Generally, however, the ECHR's protection against arbitrary detention in the removal context is considerably less extensive than that provided for in international law. This is because the ECtHR found in *Saadi v The United Kingdom* that an assessment of the proportionality of detention is not generally required,[390] despite the Court insisting on such an assessment in relation to detention for purposes other than immigration control.[391] The Court has held that 'Article 5 § 1 (f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. However, any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only as long as deportation or extradition proceedings are in progress'.[392] For example, in *SK v Russia*, the ECtHR found a violation of Article 5(1) based on the applicant's removal being unlikely due to the ongoing conflict in Syria.[393] The ECtHR also considers that '[i]n principle it is … immaterial whether the underlying decision to expel can be justified under

[387] ECHR (n 5) Protocol 4, Art 2(3).

[388] ibid Art 5(1)(f).

[389] *ZA and Others v Russia* App Nos 61411/15, 61420/15, 61427/15 and 3028/16 (ECtHR, 21 November 2019) para 163; see also *Ilias and Ahmed v Hungary* (n 40); *Amuur v France* App No 19776/92) (ECtHR, 25 June 1996).

[390] *Saadi v The United Kingdom* App No 13229/03 (ECtHR, 29 January 2008) para 74 where the Court states that all that is required for detention not to be arbitrary is that 'such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate…; and the length of the detention should not exceed that reasonably required for the purpose pursued'. Although the Court does conduct a proportionality assessment in relation to certain applicants, see Section 5.3.4.3 below.

[391] *Enhorn v Sweden* App No 56529/00 (ECtHR, 25 January 2005) para 36.

[392] *Khlaifia* (n 90) para 90; cf. *Saadi v The United Kingdom* (n 390) para 72; *Chahal* (n 85) para 112. It should be noted that a substantial length of detention is nevertheless possible. According to the Court in *Chahal*, detaining an applicant for 17 months with a view to deporting him did not breach Art 5(1) ECHR, see *Chahal* (n 85) para 123.

[393] *SK v Russia,* App No 52722/15 (ECtHR, 14 February 2017) para 115-117.

national or Convention law, or whether the detention was reasonably considered necessary, for example to prevent the person concerned from absconding or from committing an offence'.[394] The Court has, however, found a violation of Article 5(1) ECHR due to an insufficient legal basis in national law for detaining migrants who had entered Italy irregularly.[395] Their detention was unlawful and therefore arbitrary. It has also found a violation of Article 5(1) due to delays and lack of diligence in administrative procedures which formed the basis for detention.[396]

While the ECHR does not contain a provision explicitly prohibiting arbitrary detention, the ECtHR has clarified that 'no detention which is arbitrary can be compatible with Article 5 § 1'.[397] In order for detention not to be arbitrary, it 'must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate …; and the length of the detention should not exceed that reasonably required for the purpose pursued'.[398]

5.2.4 EU Primary Law

Although neither EU primary nor secondary (asylum and migration) law contains a provision explicitly prohibiting arbitrary detention, EU primary law contains guarantees to safeguard against this. The EUCFR in Article 6 protects the right to liberty and in Article 52(1) states that any limitations to Charter rights must be authorised by law, proportionate and necessary. Further, the CJEU has highlighted the importance of the right to liberty, as well as, 'the gravity of the interference with that right which detention represents', stating that any 'limitations on the exercise of the right must apply only in so far as is strictly necessary'.[399] Thus, like international law, EU primary law requires detention to be proportionate and necessary. This requires conducting an individual assessment and considering alternatives to detention to ensure that detention is a measure of last resort.[400] Detained persons must be released immediately if detention is not (or no longer) lawful.[401]

The CJEU has clarified that detaining an individual solely because he or she is 'unable to provide for his or her needs,'[402] or is residing irregularly while an emergency has been declared in response to a mass influx of protection seekers,[403]

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[394] ibid.
[395] *Khlaifia* (n 90) paras 106-108.
[396] *MH and Others v Croatia* (n 94) paras 249-259.
[397] *Saadi v The United Kingdom* (n 390) para 67.
[398] ibid para 74.
[399] C-36/20 PPU, *VL* (n 190) para 105.
[400] C-18/16, *K* (CJEU, 14 September 2017) para 48; C-36/20 PPU, *VL* (n 190) para 102; C-924/19 PPU, *FMS* (CJEU, 14 May 2020).
[401] C-924/19 PPU, *FMS* ibid para 301.
[402] ibid para 256.
[403] C-72/22, *MA* (CJEU, 30 June 2022) para 93.

is not permissible. Neither can an applicant be detained because the authorities are unable to 'find him a place in a humanitarian reception centre'.[404] Further, Member States cannot impose detention as a criminal law sanction for failing to comply with an order to leave the national territory,[405] or 'based on the risk that the effective enforcement of the removal would be compromised, without satisfying one of the specific grounds for detention'.[406] In addition, confinement to a transit zone in the context of border procedures amounts to detention and is therefore subject to the safeguards provided by EU primary law and discussed in this section.[407]

5.3 Detention Conditions

5.3.1 Humane Treatment

5.3.1.1 International Law

Detained persons must be treated humanely and with dignity, a requirement laid down in Article 10(1) ICCPR; and Article 37(c) CRC. As noted in Article 14(2) CRPD and in the HRC's General Comment 21,[408] other human rights provisions play into this requirement, in particular the prohibition of torture, inhuman or degrading treatment. The CAT, for example, stipulates that any officials involved in detaining individuals must be trained on the prohibition of torture.[409] The Optional Protocol to the CAT foresees a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment [410]

Under the CED, states must guarantee that 'any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty'[411] and must keep information registers about detained persons.[412] In its Concluding Observations on Zambia in March 2023, the HRC expressed concern regarding 'reports of migrants being placed in detention facilities for prolonged periods of time, alongside persons convicted for a crime'.[413]

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[404] C-36/20 PPU, *VL* (n 190) para 106.

[405] C-61/11 PPU, *El Dridi* (CJEU, 28 April 2011) para 59; C-329/11, *Achughbabian* (CJEU, 6 December 2011) para 39.

[406] C-241/21, *IL* (CJEU, 6 October 2022) para 55.

[407] C-924/19 PPU, *FMS* (n 400) para 231; C-808/18, *Commission v Hungary* (n 188) para 162.

[408] HRC, General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (10 April 1992) para 3.

[409] CAT (n 12) Art 10(1).

[410] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT) Art 1.

[411] CED (n 15) Art 17(2)(c).

[412] ibid Art 17(3).

[413] HRC, 'Concluding Observations on the Fourth Periodic Report of Zambia' CCPR/C/ZMB/CO/4 (24 March 2023) para 35.

Detained protection seekers are also entitled to standards of detention which maintain their physical and mental wellbeing. The HRC considers that immigration detention 'should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons'.[414] In addition to appropriate accommodation, immigration detainees should also have access to medical treatment, including psychological counselling, as well as nutritional food and basic necessities, contact with family, friends, religious and non-governmental organisations, physical exercise, reading materials, education and vocational training, and the right to practice their religion.[415]

In its Concluding Observations on Egypt in March 2023, the HRC stated that it was 'concerned by reports that conditions of immigration detention do not meet international standards, including overcrowding, the detention of children with adults and lack of access to adequate medical care (arts. 2 [non-discrimination], 6 [right to life], 7 [prohibition on torture and other treatment], 9 [right to liberty], 10 [dignity and the right to liberty], 13 [effective remedies] and 26 [equality before the law]).'[416] In its Concluding Observations on Japan in November 2022, the HRC expressed concerns regarding 'reports of suffering due to poor health conditions in immigration detention facilities',[417] calling on the State Party to 'guarantee that immigrants are not subject to ill-treatment, including through the development of an improvement plan, in line with international standards, on treatment in detention facilities, including access to adequate medical assistance'.[418]

5.3.1.2 The Global Compacts

The GCM requires states to ensure that immigration detention is not 'used as a form of cruel, inhumane or degrading treatment to migrants'.[419] The Compact acknowledges that detention affects individual levels of health status and is likely to lead to long-term implications. As such, states are to reduce (rather than eliminate) the negative and potentially lasting effects of detention by guaranteeing due process and proportionality. They are to guarantee that detention must be for the shortest period of time and that it safeguards physical and mental integrity. At a minimum, states are to guarantee access to food, basic healthcare, legal orientation and assistance, information and communication as well as adequate accommodation, in line with international human rights law.[420]

[414] HRC, General Comment No. 35 (n 358) para 18.
[415] UNHCR Detention Guidelines (n 366) para 48.
[416] HRC, 'Concluding Observations on the Fifth Periodic Report of Egypt' (n 177) para 35.
[417] HRC, 'Concluding Observations on the Seventh Periodic Report of Japan' (n 234) para 32.
[418] ibid para 33(b).
[419] GCM (n 45) para 29(c).
[420] ibid para 29(f).

5.3.1.3 European Human Rights Law

Like other human rights instruments, the ECHR prohibits torture, inhuman and degrading treatment (Article 3), which also applies to detained individuals and therefore informs what constitutes humane treatment in detention. The ECtHR has clarified that states

> must ensure that a person is detained in conditions that are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured.[421]

Thus, firstly, detained persons must be protected from ill-treatment at the hands of detention officials. In *Zontul*, the ECtHR held that rape and physical violence against an immigration detainee at the hand of Greek Coast Guard officials constituted a violation of Article 3 ECHR.[422] A violation of Article 3 can also result from a combination of ill-treatment and other factors. Thus, the ECtHR has found a violation of Article 3 ECHR with regard to an asylum seeker who experienced (a combination of) 'brutality and insults by the police', overcrowding, lack of access to fresh water and sanitary facilities and outdoor exercise.[423] A violation of Article 3 ECHR has been found for similar reasons in relation to migrants detained for the purpose of expulsion.[424]

Secondly, living conditions in detention alone can amount to a breach of Article 3 ECHR. Thus, severe overcrowding in a detention facility can, in itself, constitute a violation of Article 3 ECHR.[425] Other factors which must be taken into account in the assessment include 'the possibility of using toilets with respect for privacy, ventilation, access to natural air and light, quality of heating and compliance with basic hygiene requirements'.[426] Thus, in *JA and Others*, the Court found a violation of Article 3 ECHR with regard to applicants who had stayed in an overcrowded and inadequate detention facility in the Lampedusa hotspot for ten days.[427]

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[421] *Haghilo v Cyprus* App No 47920/12 (ECtHR, 26 March 2019) para 99.
[422] *Zontul v Greece* App No 12294/07 (ECtHR, 17 January 2012).
[423] *MSS* (n 40) 227-234.
[424] See eg *FH v Greece* App No 78456/11 (ECtHR, 31 July 2014) paras 98-103.
[425] *Khlaifia* (n 90) para 165.
[426] ibid para 167.
[427] *JA and Others v Italy* App No 21329/18 (ECtHR, 30 March 2023) paras 58-67.

In *AL (XW) v Russia*, the ECtHR found a violation of Article 3 based on the applicant being kept in solitary confinement in a detention centre for aliens over the course of four months 'without any objective assessment as to whether or not the measure in question was necessary and appropriate and with no procedural safeguards guaranteeing his welfare and the proportionality of the measure'.[428]

The threshold for a violation of Article 3 ECHR may be lower in relation to applicants with specific needs (see Section 5.3.4 below).

5.3.1.4 EU Primary Law

Article 4 EUCFR, which corresponds to Article 3 ECHR, prohibits any inhuman or degrading treatment of applicants in detention. The CJEU has clarified that detention must take place in specialised detention facilities,[429] and detained persons must be separated from ordinary prisoners.[430]

5.3.2 Access to Information, Procedures and Compensation

5.3.2.1 International Law

Detained persons have the right to access information, courts and compensation. Under the ICCPR, detainees 'shall be entitled to take proceedings before a court'[431] and '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.[432] Indeed, lack of access to an effective remedy against detention renders it arbitrary.[433]

The CRC, too, guarantees detained children 'prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action'.[434]

The CED obliges states to allow detained persons to 'communicate with and be visited by his or her family, counsel or any other person of his or her choice,' as well as consular authorities.[435] Generally, detained protection seekers must benefit from a range of procedural guarantees, such as being informed about the reasons for their detention and their rights, including review procedures, access to legal representation, as well as asylum procedures (see also Chapter 3).[436]

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[428] *AL (XW) v Russia* App No 44095/14 (ECtHR, 29 October 2015) paras 81-82.
[429] C-473/13 and C-514/13, *Bero and Bouzalmate* (CJEU, 17 July 2014).
[430] C-474/13, *Pham* (CJEU, 17 July 2014).
[431] ICCPR (n 9) Art 9(4).
[432] ICCPR (n 9) Art 9(5).
[433] UNHCR Detention Guidelines (n 366) para 17.
[434] CRC (n 14) Art 37(d).
[435] CED (n 15) Art 17(2)(d).
[436] UNHCR Detention Guidelines (n 366) paras 11 and 47.

5.3.2.2 The Global Compacts

The GCM calls on states to '[e]nsure that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, legal representatives and family members, in accordance with international law and due process guarantees'.[437] The GCM acknowledges the role of legal assistance in migrants' effective access to justice. As such, states are to facilitate access to free or affordable legal advice and assistance of a qualified and independent lawyer, together with access to information.[438] Further, authorities administering detention must be 'held accountable for violations or abuses of human rights'.[439]

5.3.2.3 European Human Rights Law

Article 5(2) ECHR protects the right to be informed about the reason for detention, while Article 5(4) provides for a right to challenge the lawfulness of detention before a court and Article 5(5) gives detained persons a right to compensation for unlawful detention. In *Khlaifia*, the ECtHR found a violation of Article 5(2) ECHR since the Italian authorities had not 'informed the applicants of the legal reasons for their deprivation of liberty or thus [had not] provided them with sufficient information to enable them to challenge the grounds for the measure before a court'.[440] The Court also found a violation of Article 5(4) ECHR due to the lack of a remedy against the detention.[441] Similarly, in *Akkad v Turkey*, the Court found a violation of Article 5(2) ECHR based on the Turkish authorities informing the applicant that he was being detained in order to transfer him to a refugee camp when in reality, he was being detained for the purpose of removal to Syria.[442] Based on the resulting inability to challenge the legality of detention and to access compensation, the Court also found a violation of Articles 5(4) and 5(5) ECHR.[443]

5.3.2.4 EU Primary Law

The CJEU has clarified that legal representatives and UNHCR must have access to applicants in detention, a right which cannot be limited by criminalising certain forms of assistance, as this would be incompatible with Article 18 EUCFR.[444]

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[437] GCM (n 45) para 29(e).
[438] ibid 29(d).
[439] ibid para 29(g).
[440] *Khlaifia* (n 90) paras 117-122.
[441] ibid para 135.
[442] *Akkad v Turkey* App No 1557/19 (ECtHR, 21 June 2022) paras 104-105.
[443] ibid paras 106-109.
[444] C-821/19, *Commission v Hungary* (n 100) paras 95-99.

5.3.3 Time limits, review and monitoring of detention

5.3.3.1 International Law

The CRC states that detention 'shall be used only as a measure of last resort and for the shortest appropriate period of time'.[445] The HRC agrees that children should be detained only 'as a measure of last resort and for the shortest appropriate period of time'.[446] In its Concluding Observations on Japan in November 2022, the HRC called on the State Party to 'take steps to introduce a maximum period of immigration detention, and take measures to ensure that detention is resorted to for the shortest appropriate period and only if the existing alternatives to administrative detention have been duly considered'.[447]

Meanwhile, the CAT states that detention arrangements must be subject to systematic review.[448] The HRC considers that 'the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention'.[449] In its Concluding Observations on Japan in November 2022, the HRC also called on the State Party to ensure 'that immigrants are able to effectively bring proceedings before a court that will decide on the lawfulness of their detention'.[450]

Under the CED, states must guarantee 'access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty'.[451] Indeed, detention facilities should be subject to regular independent monitoring to ensure that they comply with international principles.[452] In its Concluding Observations on Germany in 2019, the CAT Committee called on the State Party to ensure that '[i]ndependent national and international monitoring bodies and non-governmental organizations regularly monitor all places in which asylum seekers and migrants are deprived of their liberty or their liberty is restricted.'[453]

5.3.3.2 The Global Compacts

The GCM states that detention must for the shortest possible period of time.[454] Objective 13 specifies that states are to ensure that all actors engaged in administering immigration detention can be held accountable for violations of abuses of rights.[455]

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[445] CRC (n 14) Art 37(b).
[446] HRC, General Comment No. 35 (n 358) para 18.
[447] HRC, 'Concluding Observations on the Seventh Periodic Report of Japan' (n 234) para 33(e).
[448] CAT (n 12) Art 11; see also CAT Committee, General Comment No 4 (n 65) para 12.
[449] HRC, General Comment No. 35 (n 358) para 12.
[450] HRC, 'Concluding Observations on the Seventh Periodic Report of Japan' (n 234) para 33(e).
[451] CED (n 15) Art 17(2)e).
[452] UNHCR Detention Guidelines (n 366) para 66.
[453] CAT Committee, 'Concluding Observations on the Sixth Periodic Report of Germany' (n 266) para 31(d).
[454] GCM (n 45) para 29(f).
[455] ibid para 29(g).

The Compact also calls on states to '[u]se existing relevant human rights mechanisms to improve independent monitoring of migrant detention, ensuring that it is a measure of last resort, that human rights violations do not occur'.[456] Detention orders must be reviewed regularly.[457]

5.3.3.3 European Human Rights Law

Generally, Article 5(1)(f) ECHR 'does not lay down maximum time-limits for detention pending deportation' and does not require 'automatic judicial review of detention pending deportation.'[458] Nevertheless, an effective remedy must be available, which must allow the detained person 'to obtain speedy review of [their detention's] lawfulness', and which 'must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question', while being 'capable of leading, where appropriate, to release'.[459]

The ECtHR has found a violation of Article 5 ECHR based on a lack of an effective remedy. For example, in *AM and Others v France*, the ECtHR found a violation of Article 5(4) ECHR due to a lack of a review of the legality of detaining minors (with their mother) for the purpose of a Dublin transfer.[460] In *Chahal*, the Court found a violation of Article 5(4) based on the applicant's access to the courts in order to challenge the legality of detention and noted that national security concerns do not absolve states from providing an effective remedy.[461] In *Gayratbek Saliyev v Russia*, the Court found that the amount of time it took a court to examine the applicant's appeals against first-instance detention orders (47 and 51 days) breached Article 5(4) ECHR.[462]

5.3.3.4 EU Primary Law

The CJEU has clarified that detention in the context of border procedures and in transit zones must last no longer than four weeks.[463] It has also clarified the exact time limits applicable to detention for the purpose of transfer to another Member State, in line with Article 6 EUCFR,[464] as well as in the context of detention pending expulsion.[465] The Court has also clarified that 'the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention' in the expulsion context.[466]

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[456] GCM (n 45) para 29(a).
[457] ibid para 29(d).
[458] *JN v The United Kingdom* App No 37289/12 (ECtHR, 19 May 2016) paras 83 and 87.
[459] ibid para 88.
[460] *AM and Others v France* App No 7534/20 (ECtHR, 4 May 2023) paras 28-29.
[461] *Chahal* (n 85) paras 132-133.
[462] *Gayratbek Saliyev v Russia* App No 39093/13 (ECtHR, 17 April 2014) para 79-80.
[463] C-924/19 PPU, *FMS* (n 400) para 246.
[464] C-60/16, *Khir Amayry* (CJEU, 13 September 2017).
[465] C-357/09 PPU, *Said Shamilovich Kadzoev* (30 November 2009).
[466] C-146/14 PPU, *Mahdi* (CJEU, 5 June 2014) para 73.

5.3.4 Detainees with Specific Needs

5.3.4.1 International Law

Detention may be wholly inappropriate for certain persons with specific needs. This includes victims of trauma and torture, pregnant women and nursing mothers, trafficked persons, persons with 'with long-term physical, mental, intellectual and sensory impairments', older asylum seekers, LGBTQIA+ individuals, and (unaccompanied and separated) children.[467] With regard to the latter, the CRC notes that detention of children 'shall be used only as a measure of last resort'.[468] Detention 'cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof'.[469] In its Concluding Observations on Belgium in December 2019, the HRC expressed concerns regarding 'return to the practice of deprivation of liberty of families, pregnant women and migrant children,'[470] calling on the State Party to '[p]rohibit the detention of migrants, especially families, pregnant women and children, and develop alternatives to detention, in conformity with its obligations under the Covenant and the principles of the best interests of the child and family unity'.[471] In its Concluding Observations on Denmark in 2016, the CAT Committee called on the State Party to 'ensure that victims of torture are not held in places of deprivation of liberty and have prompt access to rehabilitation services'.[472]

Where persons with specific needs are nevertheless detained, detention conditions must be adapted to their needs. Thus, the CRC states that children in detention 'shall be treated … in a manner which takes into account the needs of persons of his or her age' and shall be 'separated from adults'.[473] Detained children must have access to visits, e.g. from friends, family and legal counsel, to basic necessities, appropriate medical treatment and psychological counselling, education, recreation and play.[474]

The HRC has found a violation of Article 24 ICCPR (protection of children) in relation to a minor detained with his family in a Norwegian immigration removal centre for 76 days.[475] The detention conditions in the centre were unsuitable for children, inter alia due to the centre being prison-like, with no

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[467] UNHCR Detention Guidelines (n 366) paras 49-65; see also CEDAW Committee 'General Recommendation No 32' (n 61) para 49.

[468] CRC (n 14) Art 37(b).

[469] CRC Committee, 'General Comment No. 6' (n 194) para 61.

[470] HRC, 'Concluding Observations on the Sixth Periodic Report of Belgium' CCPR/C/BEL/CO/6 (6 December 2019) para 29.

[471] ibid para 30(a).

[472] CAT Committee, 'Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Denmark' CAT/C/DNK/CO/6-7 (4 February 2016) para 23.

[473] CRC (n 14) Art 37(c).

[474] CRC Committee, 'General Comment No. 6' (n 194) para 63; see also UNHCR Detention Guidelines (n 366) para 56.

[475] HRC, *Wahaj Ali and Others v Norway*, CCPR/C/135/D/2926/2017 (14 July 2022).

dedicated area for families, 'limited access by psychologists or psychiatrists', and lack of recreation and play.[476]

Meanwhile, detained women must be safeguarded against violence and therefore be accommodated separately from men, except in the family context.[477] Their 'specific hygiene needs' and other specific needs must be met.[478] Similarly, older asylum seekers must be provided with care and assistance in detention.[479] LGBTQIA+ individuals, too, must have access to appropriate medical care and must be protected from violence and abuse.[480] Persons with disabilities must be provided with 'reasonable accommodation' while in detention,[481] as well as 'changes to detention policy and practices to match their specific requirements and needs'.[482]

5.3.4.2 The Global Compacts

With regard to children, the GCM draws on the best interests of the child principle and calls on states to ensure alternatives to detention and to work to end the practice of child detention in the context of international migration.[483]

Generally, the Compact also requires states to '[a]ddress and reduce vulnerabilities in migration' (Objective 7), in particular with regard to

> women at risk, children, especially those unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, including sexual and gender-based violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, workers facing exploitation and abuse, domestic workers, victims of trafficking in persons, and migrants subject to exploitation and abuse in the context of smuggling of migrants.[484]

5.3.4.3 European Human Rights Law

The ECtHR has considered the specific needs of a number of applicants in the detention context. Children are such a group, with the ECtHR finding that 'children, whether accompanied or not, are extremely vulnerable and have specific needs' and that their 'extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant'.[485]

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[476] ibid para 10.8.
[477] CEDAW Committee, 'General Recommendation No. 32' (n 61) para 34.
[478] ibid.
[479] UNHCR Detention Guidelines (n 366) para 64.
[480] ibid para 65.
[481] CRPD (n 16) Art 14(2).
[482] UNHCR Detention Guidelines (n 366) para 63.
[483] GCM (n 45) para 29(h).
[484] ibid para 23(b).
[485] *SF and Others v Bulgaria* App No 8138/16 (ECtHR, 7 December 2017) para 79.

Although, as mentioned above, the Court does not normally conduct a proportionality assessment in the context of detention for the purpose of removal, it has found that 'when a child is involved … the deprivation of liberty must be necessary to fulfil the aim pursued, namely to secure the family's removal'.[486] Thus, 'the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1 (f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be implemented'.[487]

Where minors are detained (with their parents), detention conditions must be appropriate for children. In *AM and Others v France*, the ECtHR found a violation of Article 3 of the Convention with regard to minor children held in detention for the purpose of a Dublin transfer due to the combined effects of the children's age, the detention conditions (noise pollution, a family space insufficiently separated from the rest of the detention centre, and a lack of recreation activities for the children) and the length of detention (10 days).[488] Even a relatively brief period of detention (of 32-41 hours) can breach Article 3 ECHR where conditions are particularly inappropriate for children, for example where the detention facility is 'extremely run-down, with paint peeling off the walls and ceiling, dirty and worn out bunk beds, mattresses and bed linen, and litter and damp cardboard on the floor', has limited access to sanitary facilities and fails 'to provide the applicants with food and drink for more than twenty-four hours'.[489] In *MH and Others v Croatia*, the ECtHR held that where the conditions in which children are detained are satisfactory, but for insufficient leisure activities, Article 3 will nevertheless be breached if detention exceeds the permissible maximum period.[490]

Other individual characteristics must also be considered when assessing whether detention is compatible with the guarantees of the ECHR. Thus, in *Abdi Mahamud v Malta*, the ECtHR found that due to the applicant's 'vulnerability as a result of her health,' the conditions of her detention cumulatively amounted to a breach of Article 3 ECHR.[491]

5.3.4.4 EU Primary Law

Where applicants with specific needs are detained in the context of accelerated procedures, the CJEU has clarified that to comply with Articles 6, 18 and 47 EUCFR, 'national authorities are required to ensure, at the end of a case-by-case examination, that detention … of an applicant for international protection in

[486] *AB and Others v France* App No 11593/12 (ECtHR, 12 July 2016) para 120.
[487] ibid 123; see also *AM and Others v France* (n 460) paras 22-23.
[488] *AM and Others v France* ibid paras 7-17; see also *AB and Others v France* (n 486) paras 110-115.
[489] *SF and Others v Bulgaria* (n 485) paras 84-93.
[490] *MH and Others v Croatia* (n 94) paras 191-204.
[491] *Abdi Mahamud v Malta* App No 56796/13 (ECtHR, 3 May 2016) para 89; see also *Aden Ahmed v Malta* App No 55352/12 (ECtHR, 23 July 2013).

need of special procedural guarantees does not deprive him or her of the "adequate support" to which he or she is entitled in the context of the examination of his or her application.'[492]

5.4 Conclusion

It is clear from the foregoing discussion that the minimum standards states must respect in relation to protection seekers' detention entail the obligation to ensure that detention is not arbitrary. Thus, detention must be authorised by law (through an exhaustive list of detention grounds) and pursue a legitimate aim. International law and EU primary law require, further, that detention must be necessary and proportionate, a requirement not contained in European human rights law, which sees detention as non-arbitrary where it is ordered in good faith, connected to the purpose of preventing unauthorised entry or facilitating removal, and ensures appropriate length and conditions of detention.

Conditions of detention must ensure that protection seekers are treated in accordance with human rights law. More specifically, they must not be subjected to torture, inhuman or degrading treatment and are entitled to standards of detention which maintain their physical and mental wellbeing. Detainees must also be informed about the reasons for their detention and their rights, and must have access to procedures to challenge the lawfulness of their detention.

Detention must be time-limited and for the shortest appropriate period. The lawfulness of detention must be re-evaluated at regular intervals and detention facilities must be subject to regular independent monitoring. Finally, detention may be wholly inappropriate for certain persons with specific needs. Where such individuals are nevertheless detained, detention conditions must be adapted to their needs.

[492] C-808/18, *Commission v Hungary* (n 188) para 192.

6 Overall Conclusion

This report has as its objective to establish the international legal standards applicable to the treatment of refugees and those in need of international protection. It is based on the binding commitments of EU Member States according to three fields of law:

(1) international human rights and refugee conventions (including by reference to Treaty Body Opinions and Conclusions adopted in accordance with their jurisdiction to receive individual complaints and UNHCR legal opinions)
(2) the European Convention on Human Rights (as interpreted by the ECtHR) and
(3) EU primary law in the form of the Charter.

In respect of all these sources of law, the Member States have consented to be bound in accordance with the Vienna Convention on the Law of Treaties,[493] adopted in 1969. The report also makes reference to the Global Compacts which are founded on international human rights law and provide clarification of rights contained therein. The standards applicable to the four areas under investigation in this report – access to territory and expulsion; access to asylum procedures; reception conditions, including family reunification; and detention – are summarized in full in the executive summary.

Briefly, this report has shown that states have binding obligations towards protection seekers at all stages of their journey through the asylum system. With regard to access to and expulsion from the territory, states must, first and foremost, uphold the principle of *non-refoulement* and the prohibition of collective expulsion wherever they exercise jurisdiction. They must also ensure protection seekers' access to the asylum procedure, including for applicants with specific needs, by upholding the principle of non-discrimination and guaranteeing procedural standards in the following areas: registration and documentation; interpretation, information, and legal representation; determination of claims and remedies, as well as in relation to accelerated procedures and inadmissibility procedures. States further have to provide adequate reception conditions, including access to employment, housing, welfare, education, health care and free movement, as well as family reunification. Finally, states must ensure that immigration detention is not arbitrary, that its lawfulness can be challenged, and that detention conditions do not amount to torture, inhuman or degrading treatment and maintain detainees' physical and mental wellbeing.

[493] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

In summary, the international and European standards investigated in this report provide robust protection against rights abuses and reductions. These standards are the result of three different legal frameworks – international law, ECHR law and EU law. Member States are required to fulfil their commitments under all three frameworks. Where one legal regime might provide a lower standard of rights protection than another, the highest standard established by each of the legal regimes must be respect and applied. The doctrine of consent to be bound means that unless a state has denounced or withdrawn from a treaty, it is bound to respect it (recent examples of withdrawal or denunciation are Russia withdrawing from the ECHR and the UK from the EU). As regards EU law, the Charter constitutes primary EU law and can only be changed by way of re-negotiation of the EU Treaties. This is possible but rare.

This report is not based on EU secondary law which is subject to frequent change by the EU legislator. In the field of asylum and international protection, there has already been one major revision of this secondary law. While the secondary legislation that makes up the CEAS was only adopted fully in 2005, by 2013 it had all been revised in the so-called 2nd phase. A third phase was opened by the Commission with its proposals contained in the Pact in 2020. At the time of writing, it has not been completed and it is unclear whether it will be completed before the European Parliament elections take place in June 2024 and a new Commission is announced. Thus, at this time, it is premature to examine each of the Pact proposals as regards international standards (in addition to the fact that this would require a much longer and more detailed study). Suffice it to state that EU secondary law must be in full compliance in order of immediacy: (1) the Charter; (2) the ECHR; and (3) the international human rights and refugee conventions to which the Member States are bound.

This is a study in the discipline of law and thus this report does not venture to comment on the politics of the proposals on the CEAS. Instead, this report provides a basis to assess, criticise and challenge both existing and any future secondary legislation in the area of asylum. In international, European regional and EU law, where individuals have rights, they must have a legal remedy against any claimed infringement of those rights. The right to redress is express in all the international human rights conventions which have been considered here as well as in the ECHR and the Charter. Any limitation of access to a remedy must fulfil the exacting requirements of international law, European regional law and the Charter.

Remedies must be both accessible and effective. The CJEU has provided such remedies with regard to CEAS provisions (and their fundamental rights implications) where Member States have infringed these, in particular Hungary[494]

[494] C-808/18, *Commission v Hungary* (n 188).

and Lithuania.[495] It will be for the EU institutions to ensure that these states, and all Member States, comply with their obligations in EU law (and also European human rights law and international conventions in so far as part of EU law). The principle of rule of law is at the centre of the EU[496] and ensuring that it is fully respected, including as regards refugees and those in need of international protection, is required of all EU states. Where relevant human rights standards are not respected and enforced by the institutions, individuals whose rights are violated can challenge this in national courts and where domestic remedies have been exhausted, rights violations can be challenged directly before the ECtHR or relevant Treaty Bodies.

[495] C-72/22 PPU, *MA* (n 100).

[496] See European Commission, 'Rule of Law Mechanism' <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en> (accessed 3 October 2023).

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Sammanfattning på svenska

Stater har en suverän rätt att skydda människor som flyr för att de riskerar att utsättas för förföljelse, tortyr, godtyckliga försvinnanden och annan grym, omänsklig eller förnedrande behandling eller bestraffning. Rätten att ge skydd garanteras av internationell konventionsrätt och får inte betraktas som en fientlig handling av den stat där den skyddssökande personen är medborgare.[497] I denna rapport avser ”skyddssökande” alla de som ansöker om internationellt skydd enligt internationella flykting- och människorättsliga instrument, oavsett om ansökan har beviljats eller inte.

Staters suveräna rätt att ge internationellt skydd är inskriven i lag i alla europeiska liberala demokratier. De har alla lagar och regler om hur skyddssökande personer ska ges tillträde till territoriet och få tillgång till en asylprövning, hur de ska behandlas så länge de befinner sig inom statens jurisdiktion samt så länge de är tagna i förvar, vilket kan vara motiverat i ett fåtal fall. Detta följer av att europeiska stater har ställt sig bakom rättsstatsprincipen.

Europeiska stater har utövat denna suveräna rätt när de har valt att underteckna och ratificera internationella och europeiska konventioner om mänskliga rättigheter. Europa är den kontinent där staterna i störst utsträckning ratificerar konventioner om mänskliga rättigheter (efter Sydamerika).[498] Valet att göra det är ett uttryck för att staten utövar sin suveränitet. När en stat väl har undertecknat och ratificerat en konvention är det statens plikt att fullgöra de skyldigheter som den frivilligt har åtagit sig. En stat kan alltid dra sig ur en konvention, men det är mycket ovanligt.[499]

Europas stater har undertecknat och ratificerat de flesta av FN:s människorättskonventioner, som alla bygger på den allmänna förklaringen om de mänskliga rättigheterna.[500] Många stater har också erkänt de organ som inrättats för att ta emot och fälla avgöranden i enskildas klagomål om överträdelser av konventionerna. Viktiga konventioner i Europa är den europeiska konventionen om skydd för de mänskliga rättigheterna och

[497] Konventionen om flyktingars rättsliga ställning (antagen 28 juli 1951, trädde i kraft 22 april 1954) 189 UNTS 137 (CSR51) Ur inledningen: ”[…] att alla stater under erkännande av flyktingproblemets sociala och humanitära beskaffenhet måtte göra allt som står i deras makt för att förhindra detta problem att bliva en orsak till spänning mellan stater”.

[498] Se OHCHR, ”Dashboard” <https://indicators.ohchr.org/> (läst 28 september 2023).

[499] Ryska federationens val att dra sig ur den europeiska konventionen om de mänskliga rättigheterna och de grundläggande friheterna (ECHR) och att träda ur Europarådet fullbordades den 31 december 2022. Ryssland hade redan fått sin rösträtt indragen till följd av invasionen av Ukraina den 24 februari 2022.

[500] Allmän förklaring om de mänskliga rättigheterna (antogs 10 december 1948) UNGA Res 217 A(III) (UDHR).

de grundläggande friheterna (Europakonventionen)[501] och den europeiska sociala stadgan.[502] Dessa konventioner fastställer normer, tillsammans med domstolar och tvistlösningsorgan som inrättats för att behandla klagomål som rör konventionerna. På EU-nivå antogs stadgan om de grundläggande rättigheterna[503] år 2000, och år 2009 införlivades den med EU-fördragen.

Många konventioner om mänskliga rättigheter anger statens skyldigheter gentemot skyddssökande, antingen direkt eller indirekt. 1951 års konvention om flyktingars rättsliga ställning (CSR51)[504] är den främsta referensen, men när det gäller att fastställa normer är ytterligare åtta internationella konventioner relevanta: konventionen om medborgerliga och politiska rättigheter (ICCPR),[505] konventionen om ekonomiska, sociala och kulturella rättigheter (ICESCR),[506] konventionen om avskaffande av alla former av rasdiskriminering (CERD),[507] konventionen mot tortyr och annan grym, omänsklig eller förnedrande behandling eller bestraffning (CAT),[508] konventionen om avskaffande av all form av diskriminering av kvinnor (CEDAW),[509] konventionen om barnets rättigheter (CRC),[510] konventionen om skydd för alla människor mot påtvingade försvinnanden (CED)[511] och konventionen om rättigheter för personer med funktionsnedsättning (CRPD).[512]

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[501] Den europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, i dess ändrade lydelse (antogs 10 november 1950, trädde i kraft 3 september 1953) CETS No 005 (ECHR).

[502] Europeisk social stadga (antogs 18 oktober 1961, trädde i kraft 1 juli 1999) CETS No 163 (ESC).

[503] Europeiska unionens stadga om de grundläggande rättigheterna [2012] EUT C 326 (EUCFR).

[504] CSR51 (n 1). Bland forskare saknas en gemensam syn på huruvida flyktingkonventionen är en människorättskonvention eller ingår i den separata kategorin flyktingkonventioner, se Tom Clark och François Crépeau, ”Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law” (1999) 17(4) Netherlands Quarterly of Human Rights 389.

[505] Internationell konvention om medborgerliga och politiska rättigheter (antogs 16 december 1966, trädde i kraft 23 mars 1976) 999 UNTS 171 (ICCPR).

[506] Internationell konvention om ekonomiska, sociala och kulturella rättigheter (antogs 16 december 1966, trädde i kraft 3 januari 1976) 993 UNTS 3 (ICESCR).

[507] Konvention om avskaffande av alla former av rasdiskriminering (antogs 7 mars 1966, trädde i kraft 4 januari 1969) 660 UNTS 195 (CERD).

[508] Konvention mot tortyr och annan grym, omänsklig eller förnedrande behandling eller bestraffning (antogs 10 december 1984, trädde i kraft 26 juni 1987) 1465 UNTS 85 (CAT).

[509] Konvention om avskaffande av all form av diskriminering av kvinnor (antogs 18 december 1979, trädde i kraft 3 september 1981) 1249 UNTS 13 (CEDAW).

[510] Konvention om barnets rättigheter (antogs 20 november 1989, trädde i kraft 2 september 1990) 1577 UNTS 3 (CRC).

[511] Konvention om skydd för alla människor mot påtvingade försvinnanden (antogs 20 december 2006, trädde i kraft 23 december 2010) 2716 UNTS 3 (CED).

[512] Konvention om rättigheter för personer med funktionsnedsättning (antogs 13 december 2006, trädde i kraft 3 maj 2008) 2515 UNTS 3 (CRPD).

De organ som övervakar genomförandet av dessa konventioner har varit mycket aktiva när det gäller att fastställa normer för skyddssökande. Många av de fall som gäller asylområdet har riktats mot europeiska länder. Inom Europa har tillämpliga miniminormer också slagits fast av Europadomstolen för de mänskliga rättigheterna, kommittén för sociala rättigheter och EU-domstolen. Det finns en hög grad av samstämmighet mellan europeisk och internationell nivå när det gäller miniminormer för skyddssökande personers mänskliga rättigheter. När skillnader uppstår, vilket de ibland gör, brukar de minska eller försvinna med tiden, allteftersom olika organ och domstolar kommer med klargöranden.

När EU:s medlemsstater är parter till internationella konventioner om mänskliga rättigheter (alla utom Ungern när det gäller konventionen om påtvingade försvinnanden) har de åtagit sig att följa de normer som fastställs där. Med andra ord har de samtyckt till att vara bundna (*consent to be bound*). Som medlemmar i Europarådet är de på samma sätt skyldiga att följa Europakonventionen och Europadomstolens domar. Stadgan om de grundläggande rättigheterna ingår i EU:s primärrätt och är därmed tillämplig i alla medlemsstater som en del av EU-rätten (och såsom den tolkas av EU-domstolen).

Om normerna skiljer sig åt måste stater rätta sig efter den norm som bäst skyddar individens rättigheter, eftersom staterna är bundna av alla dessa rättsområden. De kan inte välja bland normerna i ett försök att tillämpa lägre rättighetsnivåer. Det skulle innebära att staten bryter mot sina åtaganden enligt internationell rätt, Europakonventionen eller EU:s primärrätt samt vara ett brott mot staternas skyldigheter inom ett eller flera av rättsområdena. EU-rätten tar hänsyn till att det kan uppstå skiftande normer: artikel 52.3 i stadgan erkänner särskilt risken för att EU-rätten och Europakonventionen kan skilja sig åt och föreskriver att EU:s normer måste motsvara Europakonventionens normer. Det innebär att EU kan tillförsäkra ett mer långtgående skydd än Europakonventionen, men aldrig mindre.[513] Därför skiljer vi i denna rapport mellan europeisk människorättslagstiftning (särskilt enligt Europakonventionen) och EU:s primärrätt (enligt stadgan). År 2018 upprepade de flesta europeiska stater att de står bakom internationella normer genom att rösta för FN:s två globala ramverk för flyktingar och migranter (*Global Compact on Refugees* och *Global Compact for Safe, Orderly and Regular Migration*).

[513] EUCFR (n 7) artikel 52.3: ”I den mån som denna stadga omfattar rättigheter som motsvarar sådana som garanteras av europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna ska de ha samma innebörd och räckvidd som i konventionen. Denna bestämmelse hindrar inte unionsrätten från att tillförsäkra ett mer långtgående skydd.”

I denna rapport fastställer vi de internationella miniminormer för skyddssökande som är tillämpliga på EU. Vi fokuserar på fyra grundläggande aspekter av skyddssökandes rättigheter: tillträde till territoriet och skydd mot avvisning och utvisning; tillgång till asylförfaranden; mottagningsvillkor, inklusive familjeåterförening, samt begränsningar när det gäller frihetsberövande (förvar). Vi är noga med att skilja mellan önskvärd bästa praxis och obligatoriska miniminormer som fastställts som rättsligt bindande av aktuella internationella fördragsorgan och europeiska domstolar. Vårt fokus ligger på det sistnämnda: vad kräver internationell och europeisk rätt (särskilt Europakonventionen och EU:s primärrätt) att stater ska tillförsäkra skyddssökande? Svaret på den frågan sammanfattar vi här nedan, medan rapporten innehåller källor och förklaringar.

Normerna

1. **Tillträde till territoriet och skydd mot utvisning: principen om *non-refoulement***
    - Stater måste respektera förbudet mot avvisning och utvisning av skyddssökande (principen om *non-refoulement*). Detta innebär att en person som antingen anländer till en stats gränser eller som vistas inom dess jurisdiktion och som uppger sig vara flykting inte godtyckligt kan vägras inresa eller avvisas eller utvisas om följden är att återvändande sker till en plats där risken att utsättas för förföljelse, tortyr, godtyckliga försvinnanden och annan grym, omänsklig eller förnedrande behandling eller bestraffning, förekommer. Europarådets och EU:s lagstiftning om mänskliga rättigheter förbjuder dessutom kollektiv avvisning och utvisning. Skyldigheten att inte avvisa och utvisa är absolut, vilket innebär att medlemsstaterna exempelvis inte kan ange nationell säkerhet som skäl för avvisning eller utvisning.
    - Om avvisning eller utvisning sker till ett tredjeland som inte är det land som den sökande söker skydd från måste den avvisande eller utvisande staten beakta risken för att det mottagande landet utvisar den skyddssökande till ett land där sådan risk föreligger.
    - Staternas skyldigheter i fråga om mänskliga rättigheter, inklusive principen om *non-refoulement*, gäller inte bara inom staternas territorium utan överallt där de utövar jurisdiktion. Jurisdiktionen gäller med andra ord där stater eller deras ombud har rätt till myndighetsutövning gentemot eller faktiskt kontrollerar personer som vistas utomlands.
    - Endast under mycket begränsade omständigheter kan stater förlita sig på andra länders diplomatiska försäkringar om att en persons återvändande inte innebär att denne kommer att utsättas för tortyr, omänsklig eller förnedrande behandling eller andra liknande brott mot den internationella rätten. Det finns specifika krav på hur sådana diplomatiska försäkringar ska vara utformade. Den avvisande eller utvisande staten ska bland annat kunna följa upp att de faktiskt

efterlevs. Efterlevnaden ska också övervakas av ett objektivt och opartiskt organ. Den avvisande eller utvisande staten måste bedöma om det går att lita på det mottagande landets försäkringar, bland annat mot bakgrund av hur landet förhåller sig till de mänskliga rättigheterna och huruvida det har upprätthållit förbudet mot tortyr.

2. Tillgång till asylförfarandet

- Var och en som uppger behov av internationellt skydd till myndigheterna i en stat har rätt att få sin ansökan prövad fullt ut och rättvist.
- För att garantera tillgång till asylförfarandet måste stater behandla alla sökande på ett icke-diskriminerande sätt.
- Stater måste skyndsamt registrera asylansökningar som ett första steg i förfarandet samt tillhandahålla dokument som skyddar dem mot att gripas och avlägsnas.
- Skyddssökande måste få tillgång till tolkning, information och ett ombud som kan hjälpa dem att förstå och delta i asylförfarandet.
- Stater måste säkerställa att asylprocessen leder till effektiva beslut om asylansökningar. Detta inbegriper personliga intervjuer med skyddssökande och kvalificerade beslutsfattare som fattar beslut i god tid.
- Sökandena ska underrättas om beslut och ha en faktisk rätt att överklaga. Om ett beslut överklagas måste skyddsbehovet prövas utifrån de faktiska omständigheter som då föreligger, och ett tidigare beslut om avvisning eller utvisning får inte verkställas förrän ett nytt beslut har fattats.
- Stater måste vidta åtgärder för att se till att sökande med särskilda behov har tillgång till asylförfarandet och får hjälp med att lämna in sin ansökan.
- Stater får endast påskynda asylförfarandet under vissa omständigheter och under förutsättning att nödvändiga skyddsåtgärder har vidtagits. Detta gäller även förfaranden för att avgöra huruvida en ansökan är grundad eller inte. Om ett påskyndat förfarande används får det inte ske på bekostnad av ett kvalitativt och rättvist förfarande. Vid beslut om ogrundade ansökningar (beslut om att en ansökan inte kommer att behandlas i sak på grund av exempelvis bristande ansvar hos den stat till vilken ansökan har lämnats) måste det övervägas om ett annat land kommer att återta en sökande och behandla honom eller henne i enlighet med flyktingkonventionens normer. Det innebär att det andra landet bland annat måste respektera principen om *non-refoulement*, ge den sökande tillgång till ett rättvist och effektivt asylförfarande, tillåta henne eller honom att stanna kvar medan ansökan prövas och, om personen bedöms vara flykting, erkänna denne som sådan och bevilja laglig vistelse. Staterna måste också ta hänsyn till sökandens levnadsvillkor i det mottagande landet.

3. Mottagandevillkor, inklusive familjeåterförening

- Varje skyddssökande är i beroendeställning i förhållande till den stat där han eller hon söker skydd. Denna stat är således ansvarig för skyddssökandes grundläggande behov.
- Stater måste tillhandahålla boende, mat, vatten och sanitet, kläder samt uppehälle som motsvarar gällande existensminimum.
- Alla som söker skydd måste få tillgång till grundläggande hälso- och sjukvård, både fysisk och psykisk.
- Alla minderåriga skyddssökande ska ha tillgång till grundskoleutbildning på samma villkor som statens egna medborgare, gymnasieutbildning på grundval av icke-diskriminering samt vidareutbildning på grundval av meriter.
- Skyddssökande måste ges tillgång till arbetsmarknaden, i form av anställning eller egen verksamhet. Det finns dock möjligheter att skjuta på detta en begränsad tid.
- Den som söker skydd har rätt till familjeåterförening. Tillfälliga uppskov är tillåtna.[514]

4. Förvar

- Skyddssökande får inte godtyckligt frihetsberövas. Ett frihetsberövande får med andra ord endast ske med stöd i lag, ha ett legitimt syfte och vara nödvändigt och proportionerligt.
- Som utgångspunkt får stater ta personer i förvar i syfte att dokumentera inresor, registrera ansökningar, fastställa identiteter, hindra personer från att avvika, verkställa avvisningar eller utvisningar samt skydda mot brott och hot mot den nationella säkerheten. I samtliga fall krävs dock individuella proportionalitetsbedömningar och att alternativ till förvar övervägs.
- Förvar i avvaktan på utvisning är endast motiverat så länge ett avvisnings- eller utvisningsförfarande pågår och så länge det finns rimliga utsikter att genomföra avvisningen eller utvisningen.
- Skyddssökande som frihetsberövats måste behandlas med respekt för de mänskliga rättigheterna. I synnerhet måste de skyddas mot tortyr och annan omänsklig eller förnedrande behandling samt ha rätt till en standard som upprätthåller deras fysiska och psykiska hälsa.
- Skyddssökande som frihetsberövats måste ha tillgång till information om skälen till beslutet om frihetsberövande, inklusive deras rättigheter. Detta inbegriper tillgång till förfaranden som gör det möjligt att bestrida beslutets laglighet och att få kompensation för olagligt frihetsberövande. Den enskilde måste således ha tillgång till effektiva rättsmedel (rättslig prövning eller överklagande).

[514] Vi inkluderar familjeåterförening i kapitlet om mottagningsvillkor eftersom de inte kan skiljas åt: det finns ingen rätt till familjeåterförening om en person inte befinner sig på statens territorium eller inom dess jurisdiktion. Familjeåterförening är en del av de rättigheter som gäller på territoriet, såsom tillgång till sociala förmåner.

- Förvar ska vara tidsbegränsat och omfatta kortast möjliga lämpliga period. Frihetsberövandets laglighet måste omprövas med jämna mellanrum och förvarsanläggningarna måste vara föremål för regelbunden oberoende övervakning.
- Förvar kan vara helt olämpligt för vissa personer med särskilda behov. Om dessa personer ändå hålls i förvar måste förhållandena under förvarstiden vara anpassade efter deras behov.

'This report functions as a summary of binding human rights standards against which the outcome of the EU's asylum reform can be assessed, criticised and challenged.'

Elspeth Guild and Maja Grundler

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